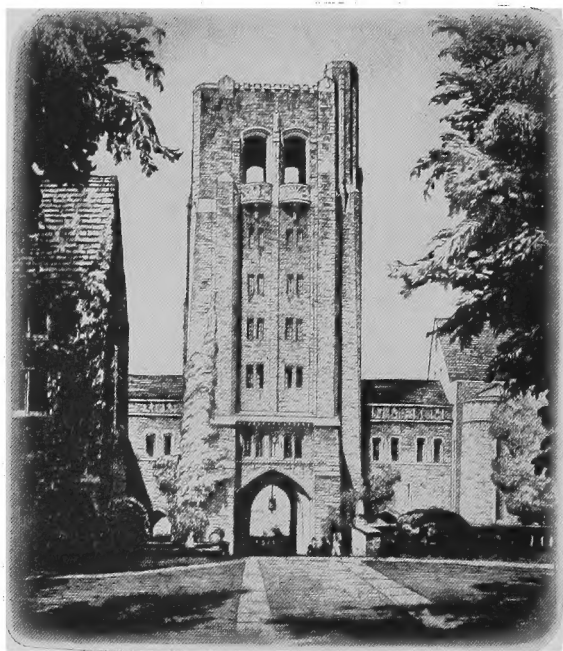


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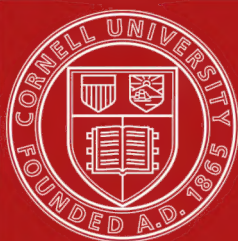
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THE
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EDITED BY
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VOL. XII

LOS ANGELES, CAL.
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1908

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TIMES-MIRROR PRINTING AND BINDING HOUSE
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I. NATURE OF THE STATUTE.

The statute of frauds is generally considered to have introduced a new rule of evidence and not to have established a rule of substantive law, since it deals with the competency of parol evidence to establish the existence of agreements and contracts in certain specified cases.¹

1. **Rule of Evidence.**—"It is very true that the statute itself as construed by the courts does not denounce the contract as void, but on the contrary only goes to the remedy, and as such is a rule of evidence; and it is likewise true that parol evidence in such cases has probative force sufficient and is competent to establish the contract in law provided the statute is not invoked against it. . . . We do not understand from the principles thus stated, however, that the mere failure to interpose the objection of the statute against the

reception of parol evidence until it is adduced, operates to preclude the party from properly and distinctly invoking the statute at the conclusion of the plaintiff's whole case, for under the exceptions of the statute it is not until then that the defendant can determine for himself whether or not the plaintiff will bring his case within or without the provisions of the statute." *Schmidt v. Rozier*, 121 Mo. App. 306, 98 S. W. 791.

This statute created a rule of evidence. It renders oral evidence incompetent to prove in whole or in

II. PRESUMPTIONS.

The general rule is that where an action is brought on a contract required by the statute of frauds to be in writing, the court will presume that such agreement is in writing, although it is not so alleged in the complaint, unless it appears otherwise on the face of the pleadings or is denied by the defendant.² However, in Indiana the op-

part a contract which must be proved by a writing, and the objection to such evidence for incompetency was good." *Warth v. Kastriner*, 104 N. Y. Supp. 1056. See *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; 1 *Mechem on Sales*, § 291.

Rule of Substantive Law.—The court in the case of *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110, 61 C. C. A. 657, said: "According to the modern and better view, the rule which prohibits the modification of a written contract by parol, is not a rule of evidence but of substantive law. Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown. Where by statute a writing is required, either to create an obligation or to effect a result, as in the case of deeds and wills, or of contracts within the statute of frauds, it is readily understood that it is the writing alone that is to speak." But see *Ballantine v. Yung Wing*, 146 Fed. 621.

And see article "PAROL EVIDENCE," Vol. IX, p. 326.

2. *United States.*—*Barnsdall v. Waltemeyer*, 142 Fed. 415, 73 C. C. A. 515; *Wilhite v. Skelton*, 149 Fed. 67, 78 C. C. A. 635; *Rogers v. Penobscot Min. Co.*, 154 Fed. 606; *Sanborn v. Rodgers*, 33 Fed. 851.

Alabama.—*Piedmont Land Imp. Co. v. Piedmont Foundry & Mach. Co.*, 96 Ala. 389, 11 So. 332.

Arkansas.—*McDermott v. Cable*, 23 Ark. 200; *Hurlburt v. Wheeler & W. Mfg. Co.*, 38 Ark. 594; *Gale v. Harp*, 64 Ark. 462, 43 S. W. 144.

California.—*Barnard v. Lloyd*, 85 Cal. 131, 24 Pac. 658, 11 L. R. A. 125; *Brennan v. Ford*, 46 Cal. 7; *Wakefield v. Greenhood*, 29 Cal. 597; *Vassault v. Edwards*, 43 Cal. 458; *Rea-*

gan v. Justice's Court, 75 Cal. 253, 17 Pac. 195; *Emerson v. Bergin*, 76 Cal. 197, 18 Pac. 264; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513.

Colorado.—*Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233.

Florida.—*Maloy v. Boyett*, 43 So. 243.

Georgia.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330; *Eaton v. Barnes*, 121 Ga. 548, 49 S. E. 593; *Bluthenthal v. Moore*, 106 Ga. 424, 32 S. E. 344; *Draper v. Macon Dry Goods Co.*, 103 Ga. 661, 30 S. E. 566 (full discussion of this question); *Piercy v. Adams*, 22 Ga. 109; *Printup v. Johnson*, 19 Ga. 73; *Long v. Lewis*, 16 Ga. 154; *Taliaferro v. Smiley*, 112 Ga. 62, 37 S. E. 106; *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800; *Anslay v. Hightower*, 120 Ga. 719, 48 S. E. 197; *Allen & Holmes v. Powell*, 125 Ga. 438, 54 S. E. 137; *Anderson v. Hilton & Dodge Lumb. Co.*, 121 Ga. 688, 49 S. E. 725; *Mobley v. Lott*, 127 Ga. 572, 56 S. E. 637. But see *Logan v. Bond*, 13 Ga. 192.

Idaho.—*Bowman v. Ainslie*, 1 Idaho 644.

Massachusetts.—*De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938.

Michigan.—*Stearns v. Lake Shore & M. S. R. Co.*, 112 Mich. 651, 71 N. W. 148; *Harris Photo Supply Co. v. Fisher*, 81 Mich. 136, 45 N. W. 661.

Minnesota.—*Laybourn v. Zinns*, 92 Minn. 208, 99 N. W. 798; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Collom v. Bixby*, 33 Minn. 50, 21 N. W. 855; *Benton v. Schulte*, 31 Minn. 212, 17 N. W. 621.

Missouri.—*Van Idour & Co. v. Nelson*, 60 Mo. App. 523; *Wildbahn v. Robidoux*, 11 Mo. 659; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Reed v. Crane*, 89 Mo. App. 670; *Stillwell v. Harm*, 97 Mo. 579, 11 S. W. 252; *Springer v. Kleinsorge*, 83 Mo. 152; *Cape Girard-*

posite doctrine prevails and, unless the complaint alleges that the contract is in writing, it will be presumed to be oral.³

eau & C. R. Co. v. Wingerter, 124 Mo. App. 426, 101 S. W. 1113; *Chambers v. Lecompte*, 9 Mo. 575.

New Mexico.—*Alexander v. Cleland*, 86 Pac. 425.

New York.—*Livingston v. Smith*, 14 How. Pr. 490; *Cozine v. Graham*, 2 Paige 177; *Coles v. Bowne*, 10 Paige 526; *Gibbs v. Nash*, 4 Barb. 449; *Marston v. Swett*, 66 N. Y. 206, 23 Am. Rep. 43; *Lupean v. Brainard*, 20 App. Div. 212, 46 N. Y. Supp. 1044.

Pennsylvania.—*American Mfg. Co. v. Morgan, Smith Co.*, 25 Pa. Super. Ct. 176.

Texas.—*International Harvester Co. v. Campbell* (Tex. Civ. App.), 96 S. W. 93; *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Lewis v. Alexander*, 51 Tex. 578; *Horn v. Shamblin*, 57 Tex. 243; *Gonzales v. Chartier*, 63 Tex. 36; *Robb v. San Antonio St. R. Co.*, 82 Tex. 392, 18 S. W. 707; *Tinsley v. Miles* (Tex. Civ. App.), 26 S. W. 999; *Booher v. Anderson* (Tex. Civ. App.), 86 S. W. 956; *McKinley v. Wilson* (Tex. Civ. App.), 96 S. W. 112; *Wallis v. Turner* (Tex. Civ. App.), 95 S. W. 61.

Utah.—*Kilpatrick-Koch Co. v. Box*, 13 Utah 494, 45 Pac. 629.

Wisconsin.—*Robbins v. Deverill*, 20 Wis. 142.

As was said in the case of *Printup v. Johnson*, 19 Ga. 73: "If the agreement was such a one that was required to be in writing by the statute of frauds then it is to be presumed that the agreement was in writing; for it is, in general, to be presumed, until something to the contrary be shown, that no man does what the law forbids, or what the law declares shall be invalid." And in the case of *Stillwell v. Hanna*, 97 Mo. 579, 11 S. W. 252, the court said: "Where the law requires a contract to be made in a particular manner, an allegation that it was made will be held to imply that it was made in lawful form."

Rule in Equity.— "While in England, prior to recent changes by acts of parliament, the presumption that prevails in actions at law, that the statute of frauds has been complied with, did not obtain in suits in equity,

and the complainants in such suits were bound, either to aver compliance with its provisions, or allege facts which took the case out of the statute, yet in this country the doctrine is, both at law and in equity, that compliance with the statute is presumed, and the party plaintiff is not required to set out compliance in his declaration or bill. *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473. See *Belt v. Lazebny*, 126 Ga. 767, 56 S. E. 81.

Contract Set Up in the Answer. The presumption arises where the agreement relied upon is set up in the answer, as well as when it is alleged in the complaint. *Bradford Inv. Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083; *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753 (cross-complaint); *McDermott v. Cable*, 23 Ark. 200.

Contra.—*Reinheimer v. Carter*, 31 Ohio St. 579; *Headington v. Neff*, 7 Ohio 229.

Complaint Showing Form of Contract.—Where it appears from the face of the complaint that the agreement is within the statute of frauds and is oral, the presumption of the existence of a writing does not arise and a demurrer to the complaint will be sustained. *Merritt v. Coffin* (Ala.), 44 So. 622; *Thompson v. New South Coal Co.*, 135 Ala. 630, 34 So. 31, 93 Am. St. Rep. 49, 62 L. R. A. 551; *Bolling v. Munchus*, 65 Ala. 558; *Phillips v. Adams*, 70 Ala. 373; *Chambers v. Lecompte*, 9 Mo. 575; *Closson v. Thompson Pulp & Paper Co.*, 112 App. Div. 273, 97 N. Y. Supp. 1113; *Kilpatrick-Koch Co. v. Box*, 13 Utah 494, 45 Pac. 629.

Rebuttal of the Presumption. But see *Bringinghurst v. Texas Co.* (Tex. Civ. App.), 87 S. W. 893.

3. *Horner v. McConnell*, 158 Ind. 280, 63 N. E. 472; *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325; *Goodrich v. Johnson*, 66 Ind. 258; *McCoy v. McCoy*, 32 Ind. App. 38, 69 N. E. 193, 102 Am. St. Rep. 223; *Langford v. Freeman*, 60 Ind. 46; *Berkshire v. Young*, 45 Ind. 461; *Crafton v. Carmichael*, 29 Ind. App. 320, 64 N. E.

III. BURDEN OF PROOF.

Where the defense of the statute of frauds has been properly raised in an action upon an agreement or contract which upon its face appears to be within the statute, the burden is upon the party relying upon the agreement to prove that it is evidenced by a sufficient writing; that it is such an agreement as is not covered by the statute, or that such facts exist as to bring it within some exception provided for in the statute.⁴

627; *Boos v. Hinkle*, 18 Ind. App. 509, 48 N. E. 383; *Bucklen v. Cushman*, 145 Ind. 51, 44 N. E. 6; *Jarboe v. Severin*, 85 Ind. 496; *Budd v. Kraus*, 79 Ind. 137.

In an action for the specific performance of a contract for the sale of land, it was held that "the complaint being founded on a contract and there being no allegation that it was in writing, the presumption is that it was in parol." *Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523.

And in another case the court said: "We call the alleged agreement, stated in the cross-complaint, a parol agreement, because it was not alleged in the cross-complaint that such agreement was in writing, nor was any copy thereof filed with the pleading. In such case, a conclusive presumption arises that the agreement or contract was not in writing." *Carlisle v. Brennan*, 67 Ind. 12.

4. *Holland v. Atkinson*, 112 Ga. 346, 37 S. E. 380; *Brophy v. Idaho Produce & Provision Co.*, 31 Mont. 279, 78 Pac. 493; *Jones v. Hagler*, 95 Ala. 529, 10 So. 345. *Williamson v. Williamson*, 58 Ala. 279; *Baltzen v. Nicolay*, 53 N. Y. 467; *Solomon v. Walpole*, 27 Ind. 464.

Promise To Answer for the Debt of Another.—Where plaintiff had contracted with two defendants to sell them lumber, and a third defendant undertook to pay for it, the burden was held to be upon the plaintiff to prove that the agreement was an original undertaking on the part of the third defendant, and not a contract of suretyship. *Guthrie v. Mann* (Tex. Civ. App.), 35 S. W. 710.

Sale of Goods To Be Manufactured.—In an action for a breach of contract where the plaintiff ordered goods of defendants' salesman and the order was never received and no

written acceptance of the order given, the court said: "The plaintiffs in this case claim that they did not know but that the defendants were to manufacture the goods. If the contract is affirmatively within the statute of frauds, as it clearly is upon its face, then it was the duty of the plaintiffs to show those facts by which they desired to take it out of that statute, or in other words, they were bound to show that the defendants were to manufacture the goods." *Millar v. Fitzgibbons*, 9 Daly (N. Y.) 505.

Interest in Land.—In an action by the plaintiff to recover the possession of a tract of land where the defendant pleaded the statute of frauds, the court said: "He put himself in the attitude of affirming that at the time of the sale to him, a note or memorandum thereof was made expressing the consideration in writing and subscribed by the party to be charged therewith or some person thereunto by him lawfully authorized in writing; or that the purchase money or some part thereof was paid and that the purchaser was put in possession of the land by the seller." *Jones v. Hagler*, 95 Ala. 529, 10 So. 345.

"The perpetual right of way which the defendant claims he acquired from plaintiff constitutes an easement or interest in land. The oral agreement upon which he relies is within the statute of frauds, and under the well settled rule, in order to take such agreement out of the statute of frauds, it is incumbent upon him to support the same by clear, definite, and conclusive proof." *Laesch v. Morton* (Colo.), 87 Pac. 1081.

Contract To Be Performed Within a Year.—In an action for the breach

IV. ORDER OF PROOF.

The general rules as to the order of producing proof apply to cases arising under the statute of frauds. Thus the order of proof is largely within the control of the court, which has a large discretion in the matter.⁵ Proof of the oral contract may be made before evidence is introduced to show that the statute does not apply.⁶

of a contract of employment for one year from and including the day on which it was made, the statute of frauds being pleaded, the burden of showing either that the contract was to commence on the day on which it was made, or that it was in writing; that the contract was not within the provisions of the statute, or that the requirements of the statute were complied with, was held to be upon the plaintiff. *Jonas v. Field*, 83 Ala. 445, 3 So. 893. See *Jacobson v. Schiffer*, 51 Misc. 54, 99 N. Y. Supp. 864.

Acceptance of Goods.—"That there has been an acceptance of this character, or that the buyer has conducted himself, in regard to the goods, as owner (as by a resale, which would deprive him of the option to take or decline them, and which is of itself an acceptance), is to be proved by the party setting up the contract. It cannot be inferred as matter of law merely from the circumstance that the goods have come into the possession of the buyer." *Remick v. Sandford*, 120 Mass. 309.

Sale.—Memorandum of Auctioneer.—"The fact that the law imposes upon auctioneers the duty to make memoranda of sales made by them did not relieve the plaintiff from the necessity of proving a valid contract; and the presumption which in many cases is indulged in favor of the performance of official duty can not stand for proof that there was a written contract of sale as against the defendant who denies the fact and against whom the contract is directly or indirectly sought to be enforced." *Balzen v. Nicolay*, 53 N. Y. 467.

Proof Must Be Clear and Definite. Where a contract or agreement is claimed to come within some exception to the statute of frauds, the facts relied upon to establish the exception must be shown to exist by clear and definite proof. *Whitsett v. Kershow*,

4 Colo. 419; *Vandevier v. Fetta*, 3 Colo. App. 420, *affirmed*, 20 Colo. 368, 38 Pac. 466.

"Legal title is in respondent. Complainant seeks to divest it by proof of a parol gift upon conditions which he says have been complied with by him. To sustain these averments when denied by the answer, the burden of proof is peculiarly upon him. If a party would take a case out of the statute of frauds, upon the ground of part performance, it is indispensable that the parol contract, agreement, or gift, should be established by clear, unequivocal, and definite testimony; and the acts claimed to be done thereunder should be equally clear and definite and referable exclusively to the said contract or gift." *Williamson v. Williamson*, 4 Iowa 279.

Demonstrative Proof.—In cases in equity, where part performance has been relied upon to take a case out of the operation of the statute of frauds, proof has sometimes been required to the point of demonstration. *Lawrence v. Springer*, 49 N. J. Eq. 297, 24 Atl. 933, 31 Am. St. Rep. 702; *Barbour v. Barbour*, 51 N. J. Eq. 267, 29 Atl. 148.

5. Discretionary Power of the Court.—The order of proof is largely within the discretion of the trial court, and it is not error to receive evidence of a parol agreement concerning land before any evidence is given of the acts of performance relied upon to meet the objection that under the statute of frauds the agreement must be in writing. *Russell v. Berkstresser*, 77 Mo. 417.

6. Preliminary Proof of Oral Contract.—"It was discretionary with the plaintiff as to the order in which he would introduce his evidence. He could introduce proof of his contract first, and thereafter proof to take the contract out of the statute. Nor could the defendant have

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

1. In General. — The terms of an oral contract which it is alleged is a contract not to be performed within a year, may be established by any competent evidence.⁷ A previous and similar contract made between the same parties is inadmissible upon the issue of whether a contract is one which is to be performed within a year.⁸

2. Parol Evidence. — Parol evidence is inadmissible to complete or vary an insufficient writing.⁹ But the surrounding circumstances may be shown by parol,¹⁰ and facts established from which the relation of several writings may be inferred.¹¹

3. Question for the Court. — Whether the contract alleged is one which by its terms is not to be performed within a year is a question for the court to determine, unless there is a dispute as to the terms of the contract.¹²

successfully objected to the proof of the contract until it appeared that the plaintiff had failed to establish the exceptions he had pleaded. *Benedict v. Bird*, 103 Iowa 612, 72 N. W. 768.

Objection to Evidence. — Oral evidence should be objected to conditionally, that is, subject to the subsequent proof by the party that the contract comes within some exception to the statute of frauds. *Scharff v. Klein*, 29 Mo. App. 549.

7. Where the issue was as to the terms of a parol contract, the question being whether it was such a contract as might be performed within one year, a written memorandum of the agreement prepared by the plaintiff and submitted to the defendant for his signature, but never signed, was held admissible. *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. 752.

8. General Electric Insp. Co. v. Ebling Brew. Co., 52 Misc. 145, 101 N. Y. Supp. 648.

9. *Ballantine v. Yung Wing*, 146 Fed. 621; *Morris v. Peckham*, 51 Conn. 128; *First Presbyterian Church v. Swanson*, 100 Ill. App. 39; *Miller v. Goodrich Bros. Bkg. Co.*, 53 Mo. App. 430; *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339, 70 N. E. 863; *Warth v. Kastriner*, 104 N. Y. Supp. 1056.

10. See *Hagan v. Domestic Sew. Mach. Co.*, 9 Hun (N. Y.) 73.

11. Parol Evidence To Identify an Agreement. — In *Beckwith v. Talbot*, 95 U. S. 289, an agreement not to be performed within one year was reduced to writing but not signed

by the defendant, who, however, in several letters to the plaintiff referred to an agreement made with him. It was held that parol evidence was admissible to show that the agreement referred to was the agreement alleged in the complaint. "It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. . . . There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid instead of discouraging fraud."

12. Question for Court. — Where a contract relied upon is set out *in haec verba*, whether or not it is obnoxious to the statute of frauds upon the ground that it is not to be performed within one year, must be determined by the court without regard to the construction placed upon it by the plaintiff as manifested by the allegations of his petition, and where it appears that it may possibly be performed within the year it is not within the statute although the probability is that it will not be so performed and although the parties do not expect it to be so completed.

VI. PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MIS-CARRIAGE OF ANOTHER.

1. The Promise. — A promise to answer for the debt of another need not be made in express terms, but may be implied from the existing circumstances.¹³ It is often established by the correspondence of the parties.¹⁴

2. Original or Collateral Undertaking. — A. METHOD OF PROOF. Proof that the promise to answer for the debt of another was a collateral promise and within the statute of frauds may be made by showing that the original debtor still remains liable.¹⁵

United States. — *McPherson v. Cox*, 96 U. S. 404; *Walker v. Johnson*, 96 U. S. 424; *Warner v. Texas & Pac. R. Co.*, 164 U. S. 418.

Indiana. — *Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 474.

Massachusetts. — *Roberts v. Rock-bottom*, 7 Metc. 46.

Missouri. — *Foster v. Mc. O'Brien*, 18 Mo. 88; *Suggett's Admr. v. Cason's Admr.*, 26 Mo. 221; *Biest v. Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081.

Texas. — *Lennard v. Texarkana Lumb. Co.* (Tex. Civ. App.), 94 S. W. 383; *Weatherford, M. W. & N. W. R. Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526.

Question for Jury. — But where the terms of the parol contract are in dispute and hence uncertain, it is a question for the jury. "Until the terms of such contract are determined as a matter of fact, it is impossible to say, as a matter of law, that the case did not come within the statute. In holding as a matter of law that the case did not come within the statute, the court necessarily held that there was not sufficient evidence to take the case to the jury." *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. 752.

13. *Yawger v. Backs*, 119 Ill. App. 61.

14. Letters To Establish Guaranty. — Where it is undertaken to establish a contract of guaranty by means of two letters written by defendant, such letters "which are relied upon as the written agreement cannot be added to or varied by parol testimony. Nor can they be so far explained by parol testimony as to affect their import with regard to the supposed undertaking." *Clarke v.*

Russell, 3 Dall. (U. S.) 415; *Yawger v. Backs*, 119 Ill. App. 61.

Construction of the Writing.

"The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume." In this case, the letter relied upon was held to be a mere letter of introduction and not a promise to answer for the debt of another. *Russell v. Clark's Exrs.*, 7 Cranch (U. S.) 69, 89.

15. *Connecticut.* — *Packer v. Benton*, 35 Conn. 343.

Illinois. — *Geary v. O'Neil*, 73 Ill. 593; *Hartley Bros. v. Varner*, 88 Ill. 561.

Massachusetts. — *Fears v. Story*, 131 Mass. 47.

New York. — *Leonard v. Vredenburg*, 8 Johns. 29.

North Carolina. — *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143; *Mason v. Wilson*, 84 N. C. 51; *Whitehurst v. Hyman*, 90 N. C. 487; *Haun v. Burrell*, 119 N. C. 544, 26 S. E. 111; *White v. Tripp*, 125 N. C. 523, 34 S. E. 686.

Existing Debt. — If it appears that the debt has not been created at the time the promise to pay was made, the promise is an original undertaking and may be proved by parol evidence. *Lusk v. Throop*, 189 Ill. 127,

B. TEST. — The test of whether a promise to answer for the debt of another was original or collateral is whether credit is given the promisor or the third person.

a. *Direct Testimony.* — The plaintiff may testify directly as to whom he gave credit.¹⁶

b. *Books of Account.* — Entries in the plaintiff's books of account are admissible to show to whom the credit was given.¹⁷

59 N. E. 529; *Williams v. Corbet*, 28 Ill. 262.

A Promise To Assume the debt of another who is thereby discharged, may be enforced though oral, since the statute of frauds referring to promises to answer for the debt, default or miscarriage of another, applies only to invalidate verbal agreements to be surety for the debt, etc., of another. *Jenkins v. Holley*, 140 N. C. 379; 53 S. E. 237.

Agency. — Under an allegation in a complaint that goods were furnished the defendant under a contract made by another as defendant's agent, such contract need not be established by a writing, since it is an original undertaking and the statute of frauds has no application. *Southern Pine & Cypress Co. v. Bruce Lumb Co.* (Tex. Civ. App.), 95 S. W. 28.

Liberal Construction. — In *Lusk v. Throop*, 189 Ill. 127, 141, 59 N. E. 529, the court says: "Where the original promisors, in such a case as this, receive a benefit from the supplying of the goods to the third person for whom they make the promise, a less rigid application will be given to the statute of frauds than in a case where the original promisor has no interest in the contract or receives no benefit growing out of it." See the following cases:

United States. — *Emerson v. Slater*, 22 How. 28.

Iowa. — *Pratt v. Fishwild*, 121 Iowa 642, 96 N. W. 1089.

Kentucky. — *Simpson v. Carr*, 25 Ky. L. Rep. 849, 76 S. W. 346.

Maryland. — *Small v. Schaefer*, 24 Md. 143, 161.

Michigan. — *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593.

Montana. — *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500.

New York. — *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318.

Ohio. — *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80.

Tennessee. — *Lookout Mt. R. Co. v. Houston*, 85 Tenn. 224, 2 S. W. 36.

Texas. — *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934.

16. Testimony by Plaintiff as to Whom He Credited. — *Rossman v. Bock*, 97 Mich. 430, 56 N. W. 777.

17. The test of whether a promise was original or collateral, being whether credit is given the promisor or the third person, evidence showing that the promisor was charged upon the plaintiff's books is admissible.

England. — *Simpson v. Penton*, 2 Crompt. & M. 430, 4 Tyr. 315, 3 L. J. Ex. 126.

Alabama. — *Boykin v. Dohlonde*, 37 Ala. 577; *Sanford v. Howard*, 29 Ala. 684.

California. — *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856.

Colorado. — *Wagner v. Hallack*, 3 Colo. 176, 184.

Georgia. — *Sext v. Geise*, 80 Ga. 698, 6 S. E. 174.

Illinois. — *Heggie v. Smith*, 87 Ill. App. 141; *Clark v. Smith*, 87 Ill. App. 409; *Schotte v. Puscheck*, 79 Ill. App. 31; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529; *Hardman v. Bradley*, 85 Ill. 162; *Ruggles v. Gatton*, 50 Ill. 412.

Indiana. — *Lance v. Pearce*, 101 Ind. 595.

Iowa. — *Benbow v. Soothsmith*, 76 Iowa 151, 40 N. W. 693; *Langdon v. Richardson*, 58 Iowa 610, 12 N. W. 622; *Beerkle v. Edwards*, 55 Iowa 750, 8 N. W. 341.

Maryland. — *Cropper v. Pittman*, 13 Md. 190; *Myer v. Grafflin*, 31 Md. 350, 100 Am. Dec. 66.

Massachusetts. — *Swift v. Pierce*, 13 Allen 136; *Kendall v. Jennison*, 119 Mass. 251; *Banfield v. Whipple*, 10 Allen 27; *Cahill v. Bigelow*, 18

C. THE CONSIDERATION. — Unless the local statute expressly requires the consideration for the promise to answer for the debt of

Pick. 369; *Dean v. Tallman*, 105 Mass. 443; *Phelps v. Stone*, 172 Mass. 355, 52 N. E. 517.

Michigan. — *Welch v. Marvin*, 36 Mich. 60; *Butters Salt & Lumb. Co. v. Vogel*, 130 Mich. 33, 89 N. W. 560; *Loranger v. Foley*, 79 Mich. 244, 44 N. W. 781; *Larson v. Jensen*, 53 Mich. 427, 19 N. W. 130.

Minnesota. — *Maurin v. Fogelberg*, 37 Minn. 23, 32 N. W. 858.

Mississippi. — *Lombard v. Martin*, 39 Miss. 147.

Missouri. — *Rottman v. Fix*, 25 Mo. App. 571; *Price v. Chicago, M. & St. P. R. Co.*, 40 Mo. App. 189.

Nebraska. — *Williams v. Auten*, 62 Neb. 832, 87 N. W. 1061; *Waters v. Shafer*, 25 Neb. 225, 41 N. W. 181; *Lindsey v. Heaton*, 27 Neb. 662, 43 N. W. 420.

New Jersey. — *Hoppock v. Wilson*, 4 N. J. L. 168.

New York. — *Dougherty v. Stone*, 66 Hun 498, 21 N. Y. Supp. 375; *Brown v. Bradshaw*, 1 Duer 199; *McRoberts v. Mathews*, 18 App. Div. 624, 45 N. Y. Supp. 431.

North Carolina. — *White v. Tripp*, 125 N. C. 523, 34 S. E. 686; *Threadgill v. McLendon*, 76 N. C. 24; *Garrett-Williams Co. v. Hamill*, 131 N. C. 57, 42 S. E. 448.

Oregon. — *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974.

Tennessee. — *Hazen v. Bearden*, 4 Sneed 48.

Texas. — *Cobb v. Ward*, 4 Will. Civ. Cas. § 307.

Vermont. — *Greene v. Burton*, 59 Vt. 423, 10 Atl. 575; *Mead v. Watson*, 57 Vt. 426.

Wisconsin. — *Champion v. Doty*, 31 Wis. 190.

"Where goods furnished are charged to the debtor's account, there is a presumption that the debt is his, and a vendor who seeks to establish that they were furnished under either an express or implied contract with a third person, by which he was the original purchaser, has the burden of proving such a claim." *Shaw v. Gilmer* (Tex. Civ. App.), 66 S. W. 679.

And see in *Marx v. Bell*, *Moore*

& Co., 48 Ala. 497, an entry in an account book made by order of the plaintiff, "Isaac Marx responsible," was held not to be admissible in an action by the plaintiff against the defendant as surety for another. The objection "should have been sustained. It was admitting the declaration and act of one of the plaintiffs, in relation to this matter in the absence of the defendant, as the person by whom the order was presented and to whom the check for the money was given, to be used as evidence in their own behalf."

Rendering of Accounts. — An agreement by which the defendant promised to pay the plaintiff the board and supply bills of defendant's employes for goods furnished them by the plaintiff, and deduct the same from their wages, was held a separate and primary agreement, not collateral, and so not within the statute of frauds, and was established by proof that the plaintiff rendered his accounts to the defendant and not to the employes. *Cerrusite Min. Co. v. Steele*, 18 Colo. App. 216, 70 Pac. 1091; *Chicago & C. Coal Co. v. Liddell*, 69 Ill. 639.

Admission by Promisor. — The admission of the defendant concerning an account against a third person, whose debt he is alleged to have promised to pay, and his oral promise to pay, made on rendering the account, are competent evidence to establish the default of the original debtor, though they would be incompetent to prove the promise to pay. *Harbert v. Skinner*, 37 Iowa 208. See the following cases:

Colorado. — *Wagner v. Hallack*, 3 Colo. 176, 185.

Illinois. — *Clark v. Smith*, 87 Ill. App. 409.

Kansas. — *Hentig v. Kernke*, 25 Kan. 559.

Massachusetts. — *Phelps v. Stone*, 172 Mass. 355, 52 N. E. 517.

Michigan. — *Hagadorn v. Stronach Lumb. Co.*, 81 Mich. 56, 45 N. W. 650.

Missouri. — *Kansas City Pipe Co. v. Smith*, 36 Mo. App. 608, 621; *Glenn v. Lehnen*, 54 Mo. 45.

another to be stated in a writing, parol evidence is admissible to establish it.¹⁸

D. QUESTION OF FACT. — Whether the promise to answer for the debt of another is original or collateral is a question for the determination of the jury, unless the facts are undisputed.¹⁹

3. Parol Evidence. — While parol evidence is inadmissible to add to or vary the terms of a written promise to answer for the debt of another,²⁰ it is admissible to explain an ambiguity,²¹ or to show the situation of the parties and the circumstances surrounding the transaction.²²

Rhode Island. — Wood v. Patch, 11 R. I. 445.

South Carolina. — Speer v. Meschine, 46 S. C. 505, 24 S. E. 329.

Vermont. — Whitman v. Bryant, 49 Vt. 512.

18. Nichols v. Bell, 46 N. C. 32. See Leonard v. Vredenburg, 8 Johns. (N. Y.) 29.

Parol Evidence of Consideration. Under the New York statute it is held that in a promise to answer for the debt of another, the consideration must be expressed in the writing or be fairly inferable therefrom, and that "in arriving at a correct construction of the instrument, all of the facts and circumstances connected with its delivery, the reasons therefor, and the purpose to be accomplished, may be shown by parol proof." Union Nat. Bank v. Leary, 77 App. Div. 332, 79 N. Y. Supp. 217; Coe v. Tough, 116 N. Y. 273, 22 N. E. 550; Barney v. Forbes, 118 N. Y. 580, 23 N. E. 890; Brumm v. Gilbert, 50 App. Div. 430, 64 N. Y. Supp. 144.

In Lindsay v. McRae, 116 Ala. 542, 22 So. 869, it was held that an agreement to answer for the debt of another was not enforceable unless the consideration upon which it was made was expressed in writing, under par. 1732, subd. 3, Code 1886, and that parol evidence to show that the consideration of a written agreement to pay what may be due on the note of a third party was the satisfaction of a mortgage made by the latter was not admissible. Foster v. Napier, 74 Ala. 393; Westmoreland v. Porter, 75 Ala. 452.

19. Boykin & McRae v. Dohlond & Co., 37 Ala. 577; Moshier v. Kitchell, 87 Ill. 18; Lusk v. Throop, 189 Ill. 127, 59 N. E. 529; Myer v. Grafflin, 31 Md. 350, 100 Am. Dec. 66;

Cropper v. Pittman, 13 Md. 190; Elder v. Warfield, 7 Har. & J. (Md.) 391.

"The form of the defendant's promise, 'I will see you paid,' as testified to by McCall, primarily imports a collateral promise to answer for the debt of another, and the facts that the lumber was charged to McCall and the bills for it were sent to him, *prima facie* indicate a purpose to give credit to him; but neither of these circumstances, nor all of them together, are conclusive if accompanied by other words or facts sufficient to authorize a jury to find from all the evidence that credit for the lumber was in fact given to Walderman. In view of the testimony . . . we think the case should have gone to the jury to determine from all the evidence to whom the credit for the lumber was given." East Baltimore Lumb. Co. v. K'Nessett Cong., 100 Md. 125, 59 Atl. 180.

20. First Nat. Bank v. Sowles, 46 Fed. 731; Clarke v. Russel, 3 Dall. (U. S.) 415; Vaughn v. Smith & Co., 58 Iowa 553, 12 N. W. 604.

21. In Grant v. Naylor, 4 Cranch (U. S.) 224, a letter importing a promise to answer for the debt of the bearer, addressed to John & Joseph Naylor & Co., was delivered to John and Jeremiah Naylor and acted upon by them. It was held that parol evidence was inadmissible to prove that the letter was really intended for the latter, although that was clearly the intention of the parties, since there was no ambiguity or fraud, and the mistake was the mistake of the writer only.

22. Bennett v. Thuett, 98 Minn. 497, 108 N. W. 1; Sullivan v. Arcand, 165 Mass. 364, 43 N. E. 198; East

VII. AGREEMENTS IN CONSIDERATION OF MARRIAGE.

An agreement in consideration of marriage need not be made in express terms but may be implied from correspondence between the parties.²³ Such an agreement cannot be proved by parol evidence,²⁴

Baltimore Lumb. Co. v. K'Nessett Cong., 100 Md. 125, 59 Atl. 180.

"There is no doubt under the authorities that the letter and receipt, as well as the paper containing the promise, may be used to complete the memorandum in writing required by the statute of frauds to make such a contract binding. It is also well settled that parol evidence may be introduced to show the situation of the parties and the circumstances attendant upon the transaction, for the purpose of applying the contract to the subject-matter and of showing the connection of different writings constituting the memorandum with one another." *Lee v. Butler*, 167 Mass. 426, 46 N. E. 52.

Contemporaneous Circumstances.

"Where a writing or writings are insufficient of themselves to satisfy the statute, they are to be construed together, if there is reference upon their faces to each other. Such reference need not be express, but parol evidence is admissible to show the circumstances under which the transaction occurred, and to connect the several papers constituting the contract between the parties, and if under such conditions the writings show unmistakably that they refer to the same matter and constitute the several parts of one connected transaction, there is such a reference of one to the other as satisfies the rule." *Strouse v. Elting*, 110 Ala. 132, 20 So. 123.

Parol Evidence of the Debt.

Parol evidence is admissible to show an acceptance and receipt of property by the vendee sufficient to satisfy the statute of frauds, where the statute is pleaded in an action against a party who has promised to answer for the debt of the vendee. *Bennett v. Thuet*, 98 Minn. 497, 108 N. W. 1.

Indorser.—"As applied to commercial paper drawn and endorsed so as to create the usual contract of endorsement, the weight of authority greatly preponderates against the ad-

mission of parol evidence of an agreement between the parties to qualify or vary the contract of indorsement, whether it be made in blank or in full." *Chaddock v. Vanness*, 35 N. J. L. 517. See the following cases:

England.—*Hoare v. Graham*, 3 Campb. 57, 13 R. R. 752; *Leadbitter v. Farrow*, 5 M. & S. 345, 17 R. R. 345.

United States.—*Bank of United States v. Dunn*, 6 Pet. 51.

Alabama.—*Tankersley v. Graham*, 8 Ala. 247.

Georgia.—*Stubbs v. Goodall*, 4 Ga. 106.

Indiana.—*Wilson v. Black*, 6 Blackf. 509; *Drake v. Markle*, 21 Ind. 433, 83 Am. Dec. 358.

Maine.—*Crocker v. Getchell*, 23 Me. 392.

Massachusetts.—*Prescott Bank v. Caverly*, 7 Gray 217; *Bigelow v. Colton*, 13 Gray 309.

New Hampshire.—*Barry v. Morse*, 3 N. H. 132.

New York.—*Bank of Albion v. Smith*, 27 Barb. 489; *Hauck v. Hund*, 1 Bosw. 431; *Hall v. Newcomb*, 7 Hill 416, 42 Am. Dec. 82.

Pennsylvania.—*Temple v. Baker*, 125 Pa. St. 634, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 789; *Wilson v. Martin*, 74 Pa. St. 159.

Contra.—*Perkins v. Catlin*, 11 Conn. 212, 29 Am. Dec. 382; *Castle v. Candee*, 16 Conn. 223; *Eilbert v. Finkbeiner*, 68 Pa. St. 243, 8 Am. Rep. 176.

23. In *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41, the agreement made in consideration of the marriage was held to be established by the production of eleven letters constituting the correspondence of the parties concerning the subject, since no parol evidence was necessary to connect the various letters with the transaction and with each other.

24. An agreement in consideration of marriage cannot be enlarged by parol proof showing that it does not fully and exclusively express the

but to this rule there is an exception where the agreement is only collaterally in issue.²⁵

VIII. SALES.

1. The Contract. — A. PROOF OF THE CONTRACT. — The testimony of an agent of the party against whom a contract for the sale of goods is sought to be enforced is not competent to establish the contract. The agent is not within the reason of the rule that such contract may be shown by the testimony of the party himself.²⁶

B. PROOF OF AGENT'S INSTRUCTIONS. — The instructions given an agent may be shown by parol, as may the fact that they were in writing,²⁷ and his authority is provable thus.²⁸

C. THE PARTIES. — It is held in some courts that oral evidence is competent to extend the obligations of a written contract to persons who are not parties to it, but not to discharge those who are parties.²⁹ Such evidence, Baron Parke said, does not deny that the contract is binding on those whom, on its face, it purports to bind, but shows that it also binds another, because the act of the agent in signing the agreement in pursuance of his authority, is the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such would be to allow parol evidence to contradict the written agreement.³⁰ The last question

antenuptial contract, though it is silent on the question to which such proof is directed, and it is immaterial that the action is in a court of equity. *Russell v. Russell*, 60 N. J. Eq. 282, 47 Atl. 37.

Lost Writing. — A contract in consideration of marriage, made by means of letters which were lost at the time of the trial, if it can be established by parol, can only be so established by testimony giving the language of the letters; the opinions of witnesses as to the meaning of the language used is not sufficient. *Elwell v. Walker*, 52 Iowa 256, 3 N. W. 64.

25. In an action to cancel a deed conveying land which had been previously conveyed to the grantor's wife in consideration of marriage, she may testify to his oral promise prior to marriage to convey the land to her. Such testimony only showed the consideration for the deed. *Harlan v. Moore*, 132 Mo. 483, 34 S. W. 70.

26. *Burnside v. Rawson*, 37 Iowa 639.

Admission. — A letter signed by

the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or bargain to satisfy the 17th section of the statute of frauds. *Gibson v. Holland*, L. R., 1 Com. Pl. (Eng.) 1, 1 Harr. & R. 1, 35 L. J. C. P. 5, 13 L. T. 293.

Interlineations. — It is competent to show what interlineations were in the contract and which of them had been erased when it was assented to by the parties. *Stewart v. Eddowes*, L. R. 9 Com. Pl. (Eng.) 311, 43 L. J. (C. P.) 204, 30 L. T. 333, 22 Wkly. Rep. 534.

27. *Ridgway v. Wharton*, 6 H. L. Cas. (Eng.) 238, 27 L. J. Ch. 46.

28. *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. 646.

29. *Thomson v. Davenport*, 2 Smith's Lead. Cas. (Am. Ed.) 212, 9 Barn. & C. (Eng.) 86, 4 Moo. & Ry. 110.

30. *Higgins v. Senior*, 8 Mees. & W. (Eng.) 834, 11 L. J. Ex. 199.

considered was the one before the court, and though the previous observations were *dicta* they have been approved to a considerable extent.³¹ Some courts limit the application of the rule to cases in which the principal was known, but do so upon the ground of estoppel. Hence, we are not concerned with decisions on that point.³² In New Jersey the view first stated has been explicitly disapproved,³³ and other courts have favored the doctrine that a contract which does not name the parties to it does not satisfy the statute and cannot be aided by parol.³⁴

D. PERFORMANCE IN GENERAL. — Parol testimony is competent to show compliance with the contract.³⁵

E. CONSIDERATION MAY BE SHOWN BY PAROL. — The consideration for a contract may be shown by parol where it is provided that it shall be the same as was paid and received by the parties to it for the same property,³⁶ or where the contract is silent as to the consideration.³⁷

F. MEMORANDUM NOT CONCLUSIVE EVIDENCE. — The memorandum is not conclusive as to the agreement made. Thus, it may be shown by parol that the party who made the contract was not authorized to do so, and that no contract was made,³⁸ or not such a one as is set out,³⁹ or that the contract is not within the statute; in which case the agreement as made may be established.⁴⁰

31. See *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 453; *Ford v. Williams*, 21 How. (U. S.) 287 (these cases do not involve the statute of frauds).

Measure of Proof. — The identity of the party in interest may be established by a preponderance of the evidence. *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378.

32. Ground on Which Courts Disagree. — The underlying principle upon which the authorities seem to diverge is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party where the principal is known. Is this presumption conclusive, or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presumption thus created is a disputable one, and that the intention of the party must be gathered from his words and the various circumstances which surround the transaction. *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378.

33. *Schenck v. Spring Lake Beach Imp. Co.*, 47 N. J. Eq. 44, 19 Atl. 881.

34. *State v. Bowers* (N. J.), 52 Atl. 218; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713.

35. *Abba v. Smyth*, 21 Utah 109, 59 Pac. 756.

36. *Atwood v. Cobb*, 16 Pick. (Mass.) 227.

37. *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Monahan v. Colgin*, 4 Watts (Pa.) 436; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Harlan v. Moore*, 132 Mo. 483, 34 S. W. 70.

38. *Coddington v. Goddard*, 16 Gray (Mass.) 436; *Pym v. Campbell*, 6 El. & Bl. (Eng.) 370, 25 L. J. Q. B. 277; *Wake v. Harrop*, 6 Hurlst. & C. (Eng.) 202, 31 L. J. Ex. 451, 7 L. T. 96.

39. *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383; *Pitts v. Beckett*, 13 Mees. & Welsb. (Eng.) 743.

40. *Bennett v. Nye*, 4 G. Gr. (Iowa) 410.

Nature of Contract May Be Shown by Parol Evidence. — It may be shown that an unsigned writing purporting to be an order for goods was given to a manufacturer, that the parties had previously had business relations with each other, and

G. EVIDENCE TO SHOW VALIDITY. — If the memorandum is unsigned and is incomplete and indefinite, evidence is admissible to show the contemporaneous conversations and transactions between the parties for the purpose of determining whether a valid contract existed.⁴¹

H. EXPLANATION AND SCOPE. — Parol evidence is competent to apply the contract to the parties as to show that one of the signers acted as agent for the plaintiff or the defendant,⁴² and to identify one of the parties named in the memorandum.⁴³

I. PROOF OF CIRCUMSTANCES OF MAKING. — The circumstances attending the making of a contract may be proven for the purpose of aiding in its application and construction; and oral evidence is competent to show that the writing, either because of fraud, mistake or surprise, does not embody the contract made.⁴⁴ Contracts governed by the statute of frauds, like other contracts, are to be read by the light of surrounding circumstances; hence parol evidence is admissible to show the situation and relation of the parties and such circumstances.⁴⁵

J. AMBIGUITIES MAY BE REMOVED. — Parol evidence may be received to remove ambiguities in the contract, as to show the names of the parties, which was the buyer and which the seller,⁴⁶ and to prove that an itemized bill of the goods purchased was sent to the buyer.⁴⁷ It is also received to show that trade abbreviations have a recognized meaning and to inform concerning them,⁴⁸ and to apply

that the writing was an order for goods to be manufactured. *Becker v. Calmenson* (Minn.), 113 N. W. 1014.

41. *Becker v. Calmenson* (Minn.), 113 N. W. 1014.

42. *Trueman v. Loder*, 11 Ad. & El. 589, 39 E. C. L. 178; *Higgins v. Senior*, 8 Mees. & Welsb. (Eng.) 834, 11 L. J. Ex. 199; *Gowen v. Klous*, 101 Mass. 449.

43. *Fessenden v. Mussey*, 11 Cush. (Mass.) 127.

44. *Clinan v. Cooke*, 1 Sch. & Lef. (Eng.) 32, 9 R. R. 3; *Macdonald v. Longbottom*, 1 El. & El. (Eng.) 977, 29 L. J. Q. B. 256, 2 L. T. 606; *Glass v. Hulbert*, 102 Mass. 24, 35; *New England Dressed Meat & W. Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112.

45. *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665; *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867.

46. *Newell v. Radford*, L. R. 3 Com. Pl. (Eng.) 52, 37 L. J., C. P. 1, 17 L. T. 118; *Sanborn v. Flagler*, 9 Allen (Mass.) 474.

Parties Must Be Described. — The memorandum must show who are the vendors, though they need not be named. It is enough if they are described, in which case parol evidence is admissible to apply the description and to identify the persons meant. *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861, 25 Am. St. Rep. 632, 10 L. R. A. 815, *citing Jones v. Dow*, 142 Mass. 130, 140, 7 N. E. 839; *Catling v. King*, 5 Ch. Div. (Eng.) 660, 46 L. J. Ch. 384, 36 L. T. 526; *Rossiter v. Miller*, 3 App. Cas. (Eng.) 1124, 1141, 5 Ch. Div. 648, 48 L. J. Ch. 10, 39 L. T. 173. To the same effect is *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800.

47. *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446.

48. *Spicer v. Cooper*, 1 Q. B. (Eng.) 424, 1 G. & D. 52, 10 L. J. Q. B. 241; *Marshall v. Lynn*, 6 Mees. & Welsb. (Eng.) 109; *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *New England Dressed Meat & W. Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112; *Hagan v.*

the contract and its covenants to the subject-matter thereof.⁴⁹

K. CANNOT BE SHOWN BY PAROL.—The writings must contain all that is necessary to form a contract; defects or omissions therein cannot be supplied by verbal testimony.⁵⁰ If the memorandum is executed and delivered as a complete writing and is capable of a clear and intelligible exposition, parol evidence is not admissible to contradict or vary its terms or construction.⁵¹ Though the contract recites that it is partial, such evidence is not admissible to vary its terms in so far as they are complete.⁵²

L. NOT TO BE VARIED BY PAROL.—The substance of the contract must be ascertained from the memorandum without recourse

Domestic Sewing Mach. Co., 9 Hun (N. Y.) 73.

Parol Evidence.—Parol evidence is admissible to explain the meaning of characters, marks and technical terms used in a particular business which are unintelligible to persons not acquainted therewith, where they occur in a written memorandum. See *Dana v. Fiedler*, 12 N. Y. 40.

^{49.} *Barry v. Coombe*, 1 Pet. (U. S.) 640; *Williams v. Morris*, 95 U. S. 444, 456; *Clark v. Burnham*, 2 Story 1, 5 Fed. Cas. No. 2,816; *Abba v. Smyth*, 21 Utah 109, 59 Pac. 756.

Fictitious Names.—Parties referred to by fictitious names may be identified by parol evidence. *Bibb v. Allen*, 149 U. S. 481, 496.

^{50.} *California.*—*Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179.

Maine.—*Jenness v. Mt. Hope Iron Co.*, 53 Me. 20.

Massachusetts.—*Hastings v. Weber*, 142 Mass. 232, 7 N. E. 846, 56 Am. Rep. 671.

Michigan.—*McElroy v. Buck*, 35 Mich. 434.

Mississippi.—*Alexander v. Western Union Tel. Co.*, 67 Miss. 386, 7 So. 280; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

New York.—*Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 19 Am. St. Rep. 514, 11 L. R. A. 97; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 325, 44 N. E. 959; *Slade v. Boutin*, 63 App. Div. 537, 71 N. Y. Supp. 740; *Odell v. Montross*, 68 N. Y. 499, 506; *Wright v. Weeks*, 25 N. Y. 153, 161; *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783.

^{51.} *Williams v. Robinson*, 73 Me. 186, 195, 40 Am. Rep. 352; *citing Coddington v. Goddard*, 16 Gray (Mass.) 436; *Hawkins v. Chace*, 19

Pick. (Mass.) 502; *Ryan v. Hall*, 13 Met. (Mass.) 520; *Warren v. Wheeler*, 8 Met. (Mass.) 97; *Cabot v. Winsor*, 1 Allen (Mass.) 546; *Remick v. Sandford*, 118 Mass. 102. To the same effect are *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775; *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. The rule in this respect is the same as in the case of contracts not affected by the statute of frauds.

What Are Essentials.—The essentials must appear without parol proof either from the memorandum or from a reference therein to some other writing or thing, and such essentials, to make a complete agreement, must consist of the subject-matter of the sale, the terms, and the names or a description of the parties. *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 19 Am. St. Rep. 514, 11 L. R. A. 97; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

Separate Instruments.—Parol evidence is inadmissible to connect separate written instruments; they must have been so physically united or such reference made by one of them to the other that they may be construed together as one instrument without the aid of oral evidence. *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550; *citing Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Wright v. Weeks*, 25 N. Y. 153; *Stone v. Browning*, 68 N. Y. 598; *Drake v. Seaman*, 97 N. Y. 230.

^{52.} *Williams v. Stifel*, 64 Mo. App. 138.

Purposes for Which Parol Evidence Is Admissible.—"Parol testi-

to parol proof;⁵³ but no other rule prevails in this respect as to contracts within the statute that is applicable to written agreements in general. If a deed purports to convey the house and lot on which A now lives, it may be shown by parol what property that description fitted when the language was used.⁵⁴ Personal property may be identified by extrinsic evidence if the memorandum refers thereto.⁵⁵

M. MAY BE EVIDENCED BY SEVERAL WRITINGS.—The written evidence of the contract need not be embodied in a single paper, nor is it essential that the memorandum be in any particular form. The statute is satisfied if proof of the contract is clearly established by

mony will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which, by a reference in the signed memorandum, are made parts of it. Benjamin on Sales 152; 3 Parsons on Contracts 17; 1 Smith's Lead. Cas. 465, notes to Birkmyr v. Darnell; Boydell v. Drummond, 11 East. 142; Coles v. Trecothick, 9 Ves. 250; Climan v. Cooke, 1 Sch. & Lef. 22; Dobell v. Hutchinson, 3 Ad. & El. 355; Ridgway v. Wharton, 6 H. L. Cas. 237; Parkhurst v. Van Cortlandt, 5 Johns. Ch. 273." Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

53. Peltier v. Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; Norris v. Lain, 16 Johns. (N. Y.) 151; Baltzen v. Nicolay, 53 N. Y. 467; Williams v. Morris, 95 U. S. 444, 456.

It cannot be shown by parol to whom payment is to be made; the sum to be paid each of the parties referred to was the gross sum to be paid to them all. Lang v. Henry, 54 N. H. 57.

Agency May Be Shown by Parol. Parol evidence is competent to show the agency of the person who conducted the correspondence, there being an agreement between the testimony and the writings. McBlain v. Cross, 25 L. T. (Eng.) 804.

No Presumption Indulged.—The fact that a party has received a telegram confirming a sale will not be accepted as evidence of a sufficient memorandum to charge the parties. Such fact cannot be held to prove anything more than that some sale was confirmed, and it devolved on the plaintiff to show what sale was confirmed, and it was not sufficient

to prove it by parol. Rector v. Sauer, 69 Miss. 235, 13 So. 623.

54. Tallman v. Franklin, 14 N. Y. 584; Easton v. Thatcher, 7 Utah 99, 25 Pac. 728; Mead v. Parker, 115 Mass. 413; Bacon v. Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134; Ross v. Purse, 17 Colo. 24, 28 Pac. 473.

Instrument Must Contain Indicia. A description which may be referred to any city where a street of the name of the one designated may be found is too indefinite to satisfy even the most liberal view of the statute of frauds. Broadway Hospital & Sanitorium v. Decker (Wash.), 92 Pac. 445, citing Ross v. Allen, 45 Kan. 231, 25 Pac. 570, 10 L. R. A. 835; Nippolt v. Kammon, 39 Minn. 372, 40 N. W. 266; Omaha Loan & T. Co. v. Goodman, 62 Neb. 197, 86 N. W. 1082; Preston v. Preston, 95 U. S. 200; Wilstach v. Heyd, 122 Ind. 574, 23 N. E. 963.

Description Not Aided by Parol. Parol evidence is not admissible to show what land was intended by the words "a piece of land I have sold her before witness." Whelan v. Sullivan, 102 Mass. 205.

Incomplete Description.—If the description given is consistent but incomplete and its completion does not require the contradiction nor alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property. Howard v. Adkins, 167 Ind. 184, 78 N. E. 665.

55. Bowers v. Ocean Acc. & G. Corp., 110 App. Div. 691, 97 N. Y. Supp. 485.

several writings of the parties, though made at different times.⁵⁶

N. PAPERS CANNOT BE CONNECTED BY PAROL. — If the answer expressly refers to the papers containing the completed contract, these may be identified by parol testimony.⁵⁷ But the connection between the papers relied on must be made from the internal evidence they supply; it cannot be shown by parol that the several papers were actually intended by the parties to be read together, nor can facts and circumstances be established by parol to raise an inference from which such intention can be inferred.⁵⁸ Neither can the conditions of sale read before the biddings opened, but not annexed to the other papers or referred to therein, be used to supply omissions in these.⁵⁹ In order to show compliance with the statute

56. *England.* — *Ridgway v. Wharton*, 6 H. L. Cas. 238, 27 L. J. Ch. 46; *Allen v. Bennet*, 3 Taunt. 169, 12 R. R. 633; *Dobell v. Hutchinson*, 3 Ad. & El. 355, 30 E. C. L. 120; *Griffiths Corp. v. Humber*, 2 Q. B. (1899) 414.

United States. — *Bibb v. Allen*, 149 U. S. 481; *Kleinhans v. Jones*, 68 Fed. 742, 15 C. C. A. 644.

California. — *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *Elbert v. Los Angeles Gas Co.*, 97 Cal. 244, 32 Pac. 9.

Colorado. — *Little v. Dougherty*, 11 Colo. 103, 17 Pac. 292.

Georgia. — *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383.

Iowa. — *American Oak Leather Co. v. Porter*, 94 Iowa 117, 62 N. W. 658.

Maryland. — *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

Minnesota. — *Ferguson v. Trovaten*, 94 Minn. 209, 102 N. W. 373; *Sanborn v. Nockin*, 20 Minn. 163; *Tice v. Freeman*, 30 Minn. 389, 15 N. W. 674; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125.

Nebraska. — *Fowler Elev. Co. v. Cottrell*, 38 Neb. 512, 57 N. W. 19.

New Jersey. — *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

New York. — *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

South Carolina. — *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212.

Texas. — *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867.

Washington. — *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031.

57. *Gough v. Williamson*, 62 N. J. Eq. 526, 50 Atl. 323.

58. *Potter v. Peters*, 64 L. J. Ch. (Eng.) 357, 72 L. T. 624; *Broadway Hospital & Sanitorium v. Decker* (Wash.), 92 Pac. 445; *Rector v. Sauer*, 69 Miss. 235, 13 So. 623; *Whaley v. Hinchman*, 22 Mo. App. 483; *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; *Watt v. Wisconsin Cranberry Co.*, 63 Iowa 730, 18 N. W. 898; *Duff v. Hopkins*, 33 Fed. 599.

Papers Must Be Connected. — “No doubt the reference may be made in various ways, but it must be of such a nature as to make it clear that the one does refer to the other; and on that point there seems to me to be a failure here to connect these two documents together. It is impossible to do it except by the intervention of parol evidence. That would be going beyond any purpose for which parol evidence is admissible.” *Pierce v. Corf*, L. R. 9 Q. B. (Eng.) 210, 43 L. J. Q. B. 52, 29 L. T. 219.

Reason for the Rule. — If it be necessary to produce parol evidence to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the former to show a reference to, or connection with, the latter, then the several papers taken together do not constitute a memorandum in writing of the bargain so as to satisfy the statute. *North & Co. v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879.

59. *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Morton v. Dean*, 13 Met. (Mass.) 388; *Boardman v. Spooner*, 13 Allen (Mass.) 353.

by means of letters and other writings, these must all be signed by the party authorized to convey.⁶⁰

2. Delivery, Receipt and Acceptance. — A. PROOF OF THE DELIVERY OF GOODS. — Receipts given for property by an employe of the purchaser in pursuance of his employment are competent to show its delivery and the quantity and quality of it.⁶¹

B. EFFECT OF ORDER TO DELIVER. — If goods sold are held by a bailee for the seller, proof of the delivery of an order to turn them over to the buyer does not show their delivery to him unless the order is presented and the bailee assents to hold the goods for the buyer.⁶²

C. PROOF OF CONSTRUCTIVE DELIVERY. — To establish a constructive delivery of goods in the possession of the buyer at the time of sale, it may be shown what he then said to the seller, that he afterward sold them to a third party and debited himself with the amount he agreed to pay for them in an account delivered to the seller.⁶³ Delivery of the seller's evidence of title is sufficient proof of compliance with the statute in some cases.⁶⁴

D. ACTS OF OWNERSHIP AND ABANDONMENT. — Evidence of acts on the part of the buyer indicating ownership of the property may be proven, though their probative force may not be great,⁶⁵ and so of acts of abandonment on the part of the seller.⁶⁶

E. WORDS NOT SUFFICIENT. — The evidence to show delivery must go beyond mere words.⁶⁷ It has been said by Professor Mechem: "So long as the statute by its terms requires an actual receipt, it would seem that that rule must be the true one which demands something more than the mere words of the parties indicative merely of their assent to the agreement. It certainly cannot be possible that one portion of the verbal agreement which it is sought to

60. *Ferguson v. Trovaten*, 94 Minn. 209, 102 N. W. 373; *Johnson v. Miller*, 35 N. J. L. 338, 10 Am. Rep. 243; *Broadway Hospital & Sanitorium v. Decker* (Wash.), 92 Pac. 445.

61. *Guthrie v. Mann* (Tex. Civ. App.), 35 S. W. 710.

62. *Bentall v. Burn*, 3 Barn. & C. 423, 10 E. C. L. 138.

63. *Edan v. Dudfield*, 1 Q. B. (Eng.) 302, 4 P. & D. 656.

64. "Where the goods are so situated that a delivery cannot be made at the time of sale, as a vessel at sea, a delivery of such evidence of title, as the seller possesses, is sufficient until the purchaser can obtain possession. And where goods, though not at sea, are not in the actual, but in the constructive possession of the seller, as goods in another's warehouse, or logs in a river; and where

it would be very difficult on account of the weight or bulk, as a vessel on the stocks, and in other cases of a peculiar character, what is denominated a symbolical delivery is sufficient, and this requires the performance of such an act as shows, without any other act to be performed, that the purchaser has a right to take possession and that the right of the seller to control the property has terminated." *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245.

65. *Edan v. Dudfield*, 1 Q. B. (Eng.) 302, 4 P. & D. 656; *Walden v. Murdock*, 23 Cal. 540.

66. *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Carter v. Willard*, 19 Pick. (Mass.) 1.

67. *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *Hinchman v. Lincoln*, 124 U.

establish can be made use of to authenticate the whole contract. The evident purpose of the statute is that the mere words of the contract shall be supplemented by acts in addition to and in pursuance of that contract.⁶⁸

F. ENTIRETY OF THE CONTRACT. — On the issue as to whether purchases were made in one contract so that the receipt and acceptance of a part of the articles would take them all out of the statute, it may be shown how and where the transaction took place, the conduct of the parties in connection with it, the employment of the seller, the language used, and other circumstances indicative of the intention of the parties.⁶⁹

G. INTENTION MAY BE TESTIFIED TO BY BUYER DIRECTLY. — It is competent for the buyer of goods who has exercised acts indicative of their ownership to testify concerning his intention in so doing.⁷⁰

H. PROOF MUST BE CLEAR. — In the absence of a manual delivery or actual change in the custody of property, the proof must be clear and unequivocal not only as to the language used, but concerning the intention of the parties.⁷¹ The acceptance of goods for the purpose of reshipping them to the owner is not such an act of ownership as concludes the buyer.⁷²

I. WHAT FACTS MATERIAL. — It is competent to show when the goods reached the buyer, how long he retained them, and the reason given for returning them;⁷³ that he resold the goods,⁷⁴ or offered them for sale,⁷⁵ or exercised other acts consistent with ownership;⁷⁶

S. 38; *Edwards v. Grand Trunk R. Co.*, 54 Me. 105; *Kirby v. Johnson*, 22 Mo. 354. But see *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729.

68. *Mechem on Sales*, Vol. I, § 383.

69. *Weeks v. Crie*, 94 Me. 458, 48 Atl. 107.

70. **Evidence of Intention.** There can be no doubt that the intent of the buyer is material and relevant in a case of this kind. The only question is whether the buyer can testify to his own intent. We do not see any valid reason for excluding such evidence. It is, of course, not conclusive, but the opposite party can prove such facts and circumstances as he can obtain which reflect upon the question. It might be that a purchaser might do some act which would be conclusive of his intention as to the question as to whether there has been such an acceptance and receipt as complies with the requirements of the statute of frauds. The court could then in-

struct the jury that, if they found the purchaser had done such acts, the statute was complied with, and the mere fact that the purchaser would swear that he did not intend thereby to become the owner of the goods would not release him. *Jarrell v. Young* (Md.), 66 Atl. 50.

Intention Material. — The question of intent is a controlling one in cases under the statute of frauds. *Thompson v. Frakes*, 112 Iowa 585, 84 N. W. 703; *Welch v. Spies*, 103 Iowa 389, 72 N. W. 548.

71. *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562; *s. c.* 75 Conn. 375, 53 Atl. 782.

72. *Jarrell v. Young* (Md.), 66 Atl. 50.

73. *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744.

74. *Morton v. Libbett*, 15 Ad. & El. (N. S.) 428, 69 E. C. L. 428; *Chaplin v. Rogers*, 1 East (Eng.) 192.

75. *Blenkinsop v. Clayton*, 7 Taunt. 597, 2 E. C. L. 230.

76. *Swafford v. Spratt*, 93 Mo. App. 631, 67 S. W. 701.

that the seller notified the wife of the person in possession of the property of the sale.⁷⁷

J. DELIVERY TO CARRIER. — It is a question of fact whether the property sold has been accepted and actually received.⁷⁸ Proof of delivery to a common carrier does not show an acceptance in the absence of testimony showing that the carrier was the agent of the buyer for the purpose of accepting the property⁷⁹ neither does the removal of it from the railroad station by a truck man.⁸⁰

K. ADMISSIONS. — The buyer does not admit acceptance of an article in the course of manufacture by procuring a third person to do work upon it while it is in the maker's possession; it would have been otherwise if the article had then been completed and ready for delivery.⁸¹ Dealing with goods as though the title had passed from the vendors is an admission of acceptance.⁸² Continued and unexplained detention of goods may be shown to prove acceptance,⁸³ and so may the fact that the buyer selected, at the time of contracting, the particular article he wanted.⁸⁴

IX. CONVEYANCE OF AN INTEREST IN LANDS.

1. Admissions. — A written admission of the contract by the party to be charged, which contains internal evidence of the contract, or refers to some writing that does, is competent evidence of such contract, and will, if otherwise sufficient, satisfy the statute. Such admissions, as will appear from the cases cited, have ordinarily been found in letters to the agent of the person sought to be charged,⁸⁵

77. *Welch v. Spies*, 103 Iowa 389, 72 N. W. 548.

78. *Small v. Stevens*, 65 N. H. 209, 18 Atl. 196; *Pinkham v. Mattox*, 53 N. H. 600; *Morton v. Libbett*, 15 Ad. & El. (N. S.) 428, 69 E. C. L. 428; *Swafford v. Spratt*, 93 Mo. App. 631, 67 S. W. 701.

79. *Shepherd v. Pressey*, 32 N. H. 49; *Johnson v. Cuttle*, 105 Mass. 447; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744; *Jarrell v. Young* (Md.), 66 Atl. 50.

80. *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744; *Atherton v. Newhall*, 123 Mass. 141.

81. *Maberley v. Sheppard*, 10 Bing. 99, 25 E. C. L. 43.

82. *Morton v. Tibbett*, 15 Q. B. 428, 69 E. C. L. 427; *Currie v. Anderson*, 2 El. & El. 592, 105 E. C. L. 591.

83. *Coleman v. Gibson*, 1 Mo. & R. (Eng.) 168; *Bushel v. Wheeler*, 15 Q. B. (Eng.) 443, 8 Jur. 532. See *Norman v. Phillips*, 14 Mees. & Welsb. (Eng.) 277.

Goods May Be Thoroughly Examined. — An acceptance is not shown by proof that the goods were unpacked and subjected to a thorough examination. *Curtis v. Pugh*, 10 Q. B. (Eng.) 111, 16 L. J. Q. B. 199; *Parker v. Wallis*, 5 El. & Bl. 21, 85 E. C. L. 21.

84. *Cusack v. Robinson*, 1 Best & S. (Eng.) 299, 30 L. J. Q. B. 261, 4 L. T. 506.

85. *England.* — *Leroux v. Brown*, 12 C. B. 801, 22 L. J. C. P. 1; *Birkmyr v. Darnell*, 1 Smith Lead. Cas. 272; *Welford v. Beazely*, 3 Atk. 503, 26 Eng. Reprint 1090; *Hawkins v. Holmes*, 1 P. Wms. 770, 24 Eng. Reprint 606; *Clerk v. Wright*, 1 Atk. 12, 26 Eng. Reprint 9; *Bailey v. Sweeting*, 9 C. B. (N. S.) 843, 30 L. J. C. P. 150.

California. — *Moss v. Atkinson*, 44 Cal. 3.

Illinois. — *Ballingall v. Bradley*, 16 Ill. 373.

Iowa. — *Warfield v. Wisconsin*

but sometimes in letters to third persons, and also in pleadings.⁸⁶

2. Connected Writings.—Several writings, though executed at different times, are admissible where their relationship to each other and to the subject-matter of the agreement appears upon their face, or can be reasonably implied from their inspection and comparison.⁸⁷

Cranberry Co., 63 Iowa 312, 19 N. W. 224.

Kansas.—*Miller v. Kansas City, Ft. S. & M. R. Co.*, 58 Kan. 189, 48 Pac. 853.

Mississippi.—*Rector Prov. Co. v. Sauer*, 69 Miss. 235, 13 So. 623.

Missouri.—*Moore v. Mountcastle*, 61 Mo. 424.

New York.—*Peabody v. Speyers*, 56 N. Y. 230.

North Carolina.—*Nicholson v. Dover*, 58 S. E. 444; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744.

Admissions.—“An admission in a letter, telegram, or other writing by the person to be charged, to his agent or to a third person, is a sufficient memorandum, if it otherwise comply with the statute.” *Winders v. Hill* (N. C.), 57 S. E. 456.

Not Conclusive.—A parol agreement by a grantee to reconvey real estate was held to be within the statute of frauds, and a reconveyance of a portion was not such an admission by the grantee as to establish the existence of a promise to reconvey and to satisfy the statute; but even treated as an admission, the court declared that the statute could still be relied upon as a defense as the admission was not conclusive. *Thomas v. Churchill*, 48 Neb. 266, 67 N. W. 182.

86. *Cook v. Barr*, 44 N. Y. 156.

Answer.—Under the Iowa statute (Code 1873, § 3666) which allows the enforcement of a contract not denied in the pleadings, an answer which admitted the execution of a deed to the plaintiff was held not to be an admission of the contract. *Benedict v. Bird*, 103 Iowa 612, 72 N. W. 768.

87. *Peirce v. Corf*, 43 L. J. Q. B. (Eng.) 52, L. R. 9 Q. B. 210, 29 L. T. 919; *Pollock v. Brainard*, 26 Fed. 732; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Jenkins v. Harrison*, 66 Ala. 345; *Ferguson v. Trovaten*, 94 Minn. 209, 102 N. W. 373; *Tice v. Freeman*, 30 Minn.

389, 15 N. W. 674; *Collyer v. Davis*, 72 Neb. 887, 101 N. W. 1001.

Rule Stated.—“That several writings, though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the operation of the statute of frauds, is fully settled. . . . In such cases, however, the mutual relation of the several writings to the same transactions must appear in the writings themselves, parol evidence being inadmissible for the purpose of showing their connection. If one only of such papers be signed by the party to be charged in the action, the rule seems to be that special reference must be made therein to those papers that are not so signed; but if the several papers relied on be signed by such party, it is sufficient if their connection and relation to the same transaction can be ascertained and determined by inspection and comparison.” *Thayer v. Luce*, 22 Ohio St. 62.

In *Potter v. Peters*, 64 L. J. Ch. (Eng.) 357, 72 L. T. 624, the names of the vendor, the vendee and the description of the land to be sold appeared in one document and the question arose whether parol evidence could be used to connect another document with the transaction for the purpose of showing the amount of the purchase money and making a complete memorandum. *Held*, it could not. “On the document itself there must be some inference from the one to the other, leaving nothing to be supplied by oral evidence except the identity, as it were, of the document.”

Intrinsic Identification.—Where several letters are relied upon to make a complete memorandum, “and they are connected in such a manner, under the proof offered, that each communication refers in apt terms to some other, so that the entire correspondence is identified

3. Parol Evidence. — Parol evidence is inadmissible to add to or vary the terms of a written agreement concerning land.⁸⁸ But parol evidence may be used to show the situation and relation of the parties and the surrounding circumstances,⁸⁹ to identify the property referred to in the agreement,⁹⁰ to establish fraud in the inception

by its own contents, and not by parol evidence," a sufficient memorandum is established. *Collyer v. Davis*, 72 Neb. 887, 101 N. W. 1001.

Cotemporaneous Writings. — "All writings executed between the same parties, at the same time, and about the same subject, must be held one instrument and construed together." *Collyer v. Davis*, 72 Neb. 887, 101 N. W. 1001; *Peabody v. Speyers*, 56 N. Y. 230. See *Tallman v. Franklin*, 14 N. Y. 584.

88. England. — *Blagden v. Bradbear*, 12 Ves. 466; *Boydell v. Drummond*, 11 East 142.

Alabama. — *Carroll v. Powell*, 48 Ala. 298; *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.

Missouri. — *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171; *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800.

New York. — *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, 14 Johns. 15, 7 Am. Dec. 427; *First Baptist Church v. Bigelow*, 16 Wend. 28.

In order for a compliance with the provisions of the statute of frauds in regard to contracts for the sale of real estate, the writings must state the contract with such certainty that its essentials can be known from the memorandum itself, or reference contained in it to some other writing, without recourse to parol proof to supply them. *Patt v. Gerst (Ala.)*, 42 So. 1001.

Parol Evidence of Consideration. Under the Indiana statute the consideration need not be stated in writing, but may be proved by parol evidence. *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665; *Hiatt v. Hiatt*, 28 Ind. 53; *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Martindale v. Parsons*, 98 Ind. 174.

Parol Evidence to Add a Party. See notes under VIII, 1, C, *ante*.

89. United States. — *Williams v. Morris*, 95 U. S. 444.

Alabama. — *Angel v. Simpson*, 85 Ala. 53, 3 So. 758.

California. — *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301; *Towle v. Carmelo Land Co.*, 99 Cal. 397, 33 Pac. 1126.

Connecticut. — *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

Florida. — *Lente v. Clarke*, 22 Fla. 515, 1 So. 149.

Indiana. — *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Ransdøl v. Moore*, 153 Ind. 393, 53 N. E. 767; *Mace v. Jackson*, 38 Ind. 162; *Cole- rick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505; *Torr v. Torr*, 20 Ind. 118; *Guy v. Barnes*, 29 Ind. 103; *Tewks- bury v. Howard*, 138 Ind. 103, 37 N. E. 355.

Kansas. — *Bacon v. Leslie*, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536.

Kentucky. — *Moayon v. Moayon*, 114 Ky. 855, 72 S. W. 33, 102 Am. St. Rep. 303, 60 L. R. A. 415.

Massachusetts. — *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671.

Michigan. — *Goodenow v. Curtis*, 18 Mich. 298.

New Jersey. — *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

Wisconsin. — *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176.

90. Indiana. — *Howard v. Ad- kins*, 167 Ind. 184, 78 N. E. 665; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355.

Massachusetts. — *Mead v. Parker*, 115 Mass. 413, 20 Am. Rep. 110; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657.

Missouri. — *Weil v. Willard*, 55 Mo. App. 376.

New York. — *Daniels v. Rogers*, 108 App. Div. 338, 96 N. Y. Supp. 642; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Lee v. Briggs*, 53

of the agreement,⁹¹ to determine the identity of an unnamed principal,⁹² or that a person signing a writing signed at the dictation of another and not as agent,⁹³ but not to establish ratification by a principal of the unauthorized acts of an agent;⁹⁴ and in all those cases in which the agreement in question is only collaterally at issue.⁹⁵ A

Hun 634, 6 N. Y. Supp. 98, *affirmed*, 127 N. Y. 653, 27 N. E. 857; Hagan v. Domestic Sew. Mach. Co., 9 Hun 73.

Parol Evidence to Identify.—“I understand the rule to be in cases where a memorandum relating to the sale of real estate is attacked under the statute of frauds for insufficiency in respect to the identification of the subject matter, that while parol evidence may not be admitted as to the terms of the agreement, it nevertheless is receivable to show extrinsic circumstances relating to the situation of the parties in respect to the land so as to enable the court definitely to ascertain the property to which the contract referred.” Miller v. Tuck, 95 App. Div. 134, 88 N. Y. Supp. 495.

91. Fraud.—See article “PAROL EVIDENCE,” Vol. IX, p. 309.

In *Gillett v. Knowles*, 108 Mich. 602, 66 N. W. 497, parol evidence of an agreement to make good any deficiency in the value of land agreed to be given in part payment for other lands was admitted, where the deed to the latter land having been delivered to a third person to be held until a written agreement to make good such deficiency should be executed, was fraudulently obtained by the grantee therein before the execution and delivery of such agreement, and the transaction was thereupon repudiated by the grantor.

92. Mantz v. Maguire, 52 Mo. App. 136.

93. Amanuensis.—The fact that a letter written by the hand of another was written at the dictation and in the presence of the party to be charged may be proved by parol evidence of the statements of the party to be charged, or of any other relevant circumstances. The writer is not an agent. *Morton v. Murray*, 176 Ill. 54, 51 N. E. 767.

94. Ratification.—Ratification of an agreement to convey land, made by an agent, but beyond the scope

of his authority, can be proved only by written evidence, parol evidence being incompetent. *People's Min. & Mill. Co. v. Central Consol. Mines Corp.*, 20 Colo. App. 561, 80 Pac. 479. See *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Videau v. Griffin*, 21 Cal. 389.

95. Party Wall.—Under the Iowa statute requiring special agreements between the parties as to walls on lines between them to be evidenced by a writing, parol evidence was held admissible to show the applicability of other statutes, *e. g.*, to determine whether the wall was a party wall or not and also whether it had been rebuilt or repaired. *Howell v. Goss*, 128 Iowa 569, 105 N. W. 61.

Waste.—A lease, invalid under the statute of frauds, is competent evidence in an action against the lessee for waste. *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486.

Use and Occupancy.—In an action to recover for the use and occupation of premises, a parol lease invalid under the statute of frauds is competent evidence of the value of such occupation. *Herrmann v. Curiel*, 3 App. Div. 511, 38 N. Y. Supp. 343.

Fixtures.—In an action to recover a fixture, evidence of a parol contract to convey an interest in lands was held admissible, since such a contract, if established and followed by possession, would create the relation of landlord and tenant between the owner of the chattel and the owner of the land and give to the tenant well established rights as to fixtures he annexed. *Yater v. Mullen*, 23 Ind. 562.

Withdrawal of Offer.—Parol evidence has been held admissible to prove the withdrawal of an oral offer after it had been orally accepted, on the ground that it was simply proof of a fact which prevented a sale

contract may be established by parol evidence, as a preliminary to a subsequent showing that some exception to the statute governed the case.⁹⁶

X. PART PERFORMANCE IN EQUITY.

1. General Statement of the Rule.—After the breach of an oral contract to convey land the buyer may, if he has acted in reliance on such contract, by taking possession, making valuable and permanent improvements and paying part of the consideration, go into a court of equity and obtain a decree for its specific enforcement.⁹⁷

2. Presumption.—From the fact of part performance an agreement may be presumed.⁹⁸ What that was may be established by parol evidence.⁹⁹ It may be inferred from the character of improvements that they were permanent and valuable.¹

from being completed. *Levy v. Levy*, 114 La. 239, 38 So. 155.

Sale or Exchange.—“It is true, as has been often said, there is no difference between a parol sale and an exchange in regard to the requisites to take it out of the statute of frauds and perjuries. . . . But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. . . . But an exchange necessarily has a subject on each side which stand related to the other. . . . Evidence of possession that might seem weak and inconclusive in the case of a parol sale, is thus made clear and convincing in the case of an exchange.” *Moss v. Culver*, 64 Pa. St. 414, 3 Am. Rep. 601.

96. Where the defense to an action of forcible detainer was part performance under an oral contract, the defendant could prove the oral contract since that was necessary before he could establish part performance. *Jones v. Com. (Ky.)*, 104 S. W. 782.

97. Basis of Relief.—It is said by an English writer that the jurisdiction of equity has stretched itself to those cases where the illusory hope has been raised not only by words and assurances, but simply by looking on in silence, whilst false impressions which we are able either to correct or verify are inducing a fruitless expenditure on improvements. This equity is strong and salutary, and the jealousy of juris-

diction has shut out the statute of frauds where this principle of belief applies. These instances of encouragement, either tacit or express, to make improvements, incur expense, etc., are not proper cases of part performance, but of actual fraud, which courts of equity have always been forward to relieve against. And the court will supply an agreement out of fraudulent suppressions as well as misrepresentations of the party deceiving, who is considered as virtually agreeing to make good the expectations he has raised. *Roberts on Fraud*, pp. 131, 132, 134.

Estoppel.—In Texas, parol sales of real estate, accompanied by possession and the making of improvements, are upheld on the ground of estoppel, and any evidence tending to establish the estoppel is admissible. *Bringhurst v. Texas Co. (Tex. Civ. App.)*, 87 S. W. 893, citing *Woolridge v. Hancock*, 70 Tex. 18, 6 S. W. 818; *Ann Berta Lodge v. Leverton*, 42 Tex. 18.

98. *Forster v. Hale*, 3 Ves. Jr. (Eng.) 696, 712.

99. *Parkhurst v. Van Cortland*, 14 Johns. (N. Y.) 15, 32, 1 Johns. Ch. 273, 7 Am. Dec. 427.

1. *Ferguson v. Trovaten*, 94 Minn. 209, 102 N. W. 373.

Improvements Must Be Valuable. Where one relies upon a parol gift of land to prevent its being sold for the debts of the donor or of one claiming under him, it is incumbent upon him to clearly establish the gift, and also to prove to the court

3. Evidence To Show. — In order to show a part performance the plaintiff must first prove acts done by himself or on his behalf which point clearly to a contract with the defendant, which cannot in the ordinary course of human conduct be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and, although these acts of part performance cannot of themselves indicate all the terms of the agreement sought to be enforced, they must be consistent with it and in conformity with its provisions, when these shall have been shown by the subsequent parol evidence.²

4. Reliance Upon the Contract. — The evidence must show, where the plaintiff was in possession under a lease, that his continuance in possession and the making of improvements on the premises were exclusively referable to the contract on which he relies.³

5. Evidence Not Inconsistent. — Under an answer alleging a contract for the sale and purchase of land and such performance as would take an oral agreement out of the statute, proof may be made of either a valid written contract or an oral one, with proof of such performance as would satisfy the statute.⁴ And it was immaterial

and jury that in pursuance of the gift and induced thereby, he took possession of the land and made valuable improvements thereon. "We think that simply repairing a well on the land, and the roof, floor and window shutters of the dwelling is not sufficient." There should also be permanent improvements. *Holland v. Atkinson*, 112 Ga. 346, 37 S. E. 380.

Parol Evidence of a Contract for the Sale of Lands is inadmissible upon the trial of an issue ordered by a court of equity, although the issue is upon a wager and such court had directed that such evidence be received. *Hammond v. Barber*, 1 Brev. (S. C.) 166.

2. *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234, quoting the text from *Pomeroy on Specific Performance*, § 108; *Houston v. Townsend*, 1 Del. Ch. 416, 426, 12 Am. Dec. 109.

Necessary Proof. — "To take a case of parol contract for the purchase of land out of the operation of the statute of frauds, under the plea of part performance, the alleged contract should be first shown to be clear, definite and unequivocal in its terms; and second, the acts of part performance should clearly appear to have been done solely in pursuance of the contract alleged, and solely with a view to such contract being

performed." *Long v. Duncan*, 10 Kan. 294.

Acceptance. — The execution of a mortgage in payment for land conveyed is sufficient evidence of acceptance of the deed to the land and constitutes part performance so as to make the contract enforceable. *McCoy v. McCoy*, 32 Ind. App. 38, 69 N. E. 193.

Sufficiency of Proof. — Part performance of an agreement by a parent to convey land to a child is established by proof of possession by the child and improvements made thereon in reliance upon such a promise. *Horner v. McConnell*, 158 Ind. 280, 63 N. E. 472, citing *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541; *Drum v. Stevens*, 94 Ind. 181; *Cut-singer v. Ballard*, 115 Ind. 93, 17 N. E. 206; *Starkey v. Starkey*, 136 Ind. 349, 36 N. E. 287; *Loddell v. Loddell*, 36 N. Y. 327; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Fouts v. Roof*, 171 Ill. 568, 50 N. E. 653.

3. *Hutton v. Doxsee*, 116 Iowa 13, 89 N. W. 79; *Broadway Hospital & Sanitorium v. Decker* (Wash.), 92 Pac. 445.

4. *Slingerland v. Slingerland*, 46 Minn. 100, 48 N. W. 605.

Parol Evidence is competent to establish that a party entered upon and improved land under an oral con-

that written evidence insufficient to satisfy the statute had been received.⁵

6. Payment.—Because the payment of money by the plaintiff to the defendant is not necessarily an act which would not have been done but for the alleged contract and does not involve mutual assent, such as does the entering into possession of the land as owner with the vendor's consent, thus furnishing evidence *per se* of an agreement, it has been doubted whether payment may be proved by parol. Thus, it is said that the money may have been paid for a purpose different from that alleged; and if the party paying can prove by parol the fact of payment and the object, then it is apparent the door is open to perjury and fraud. If the testimony shows that the payment is connected with the concurrent acts of the vendor in receiving the money and appropriating it as purchase money, and this is shown either by his answer or proved by him by writing, it will be conclusive evidence of an existing agreement of which payment was part performance.⁶ It is essential that the evidence show, beyond all reasonable doubt, that the payment was understood by the

tract, though the owner denies that such contract was made. *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143; *Houston v. Townsend*, 1 Del. Ch. 416, 12 Am. Dec. 109.

5. *Ferguson v. Trovaten*, 94 Minn. 209, 102 N. W. 373.

6. *Houston v. Townsend*, 1 Del. Ch. 416, 12 Am. Dec. 109. See the following cases selected from the great number upon this subject, holding that payment is not by itself sufficient part performance to warrant a decree of specific performance. *Cooper v. Colson*, 66 N. J. Eq. 328, 58 Atl. 337; *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234; *Ross v. Cook*, 71 Kan. 117, 80 Pac. 38; *Riddell v. Riddell*, 70 Neb. 472, 97 N. W. 609; *Terry v. Craft* (Tex. Civ. App.), 87 S. W. 844; *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107; *Harney v. Burhans*, 91 Wis. 348, 64 N. W. 1031. But where payment is accompanied by other acts, it is sufficient. See *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489; *Day v. Cohn*, 65 Cal. 508, 4 Pac. 511; *Low v. Low*, 173 Mass. 580, 54 N. E. 257; *Rosenberger v. Jones*, 118 Mo. 559, 24 S. W. 203. And see *Query v. Liston*, 92 Iowa 288, 60 N. W. 524; *Robinson v. Driver*, 132 Ala. 169, 31 So. 495.

Payment To Be Proven by Writing.—It is said in 1 Bac. Abr. p. 74, title, "Agreement": "Where the price is paid, there it doth not stand

upon the parol proof of the agreement only, but upon the execution of part of the agreement, which is evidence that the agreement was really made; and, therefore, there is the same reason that the plaintiff in equity should have the land for his money as it is that he should deliver the goods where he has received the money; but the doubt in these cases is, what shall be a proof of the receipt of the money. Thus far it seems certain that, if the defendant in his answer confesseth the receipt of the money for that purpose in the bill, or if he denies the money and it be proved upon by him in writing, as by letter under his hand or other written evidence, he shall be obliged specifically to perform the whole agreement because he hath carried part into execution; but if the defendant confesses the receipt of the money, but says that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then the plaintiff must prove the receipt of the money by the defendant for the purpose in the bill, by some written agreement," for, as said by the chancery court of Delaware, parol evidence as to the receipt of the money seems to be as much excluded by the statute as parol evidence relating to the agree-

parties to have been in part performance of the contract relied upon.⁷ But less strictness is exacted in some cases; thus it is said that the doctrine of part performance and payment assumes the admissibility of parol evidence to explain and apply them.⁸

7. Consent to Possession. — A memorandum may be competent to show that the plaintiff went into possession of the premises with the assent of their owner, though permission by parol would have been of equal force. If the memorandum is void for uncertainty it may be rejected and the case be rested entirely upon parol proof. It is, perhaps, the better opinion that where part performance is made the basis of a claim for a specific performance, parol proof may be connected with written evidence to make out the contract.⁹ Declarations of the defendant since the date of the contract may be proved to show recognition of the defendant's right to the possession.¹⁰

8. Evidence Must Be Convincing. — The testimony concerning parol gift of land must be proved with reasonable certainty,¹² and show all the essentials thereof, and that they are fair and equitable and clearly establish these facts.¹¹ In some cases it is said that a parol gift of land must be proved with reasonable certainty,¹² and that a contract to convey land may be established by a fair preponderance of the evidence.¹³ But the same court has said that the parol contract, agreement or gift should be established by clear, unequivocal, and definite testimony, and that the acts done thereunder should be shown to be equally clear and definite and to be referable exclusively to the contract or gift.¹⁴

ment. *Houston v. Townsend*, 1 Del. Ch. 416, 12 Am. Dec. 109.

7. *Thompson v. Tod*, 1 Pet. C. C. 380, 388, 23 Fed. Cas. No. 13,978.

8. *Collins v. Vandever*, 1 Iowa 573.

9. *Parkhurst v. Van Cortland*, 14 Johns. (N. Y.) 15, 32, 1 Johns. Ch. 273, 7 Am. Dec. 427; *Allan v. Bower*, 3 Bro. Ch. Cas. 149, 29 Eng. Reprint 459.

10. *Monahan v. Colgin*, 4 Watts (Pa.) 436; *Hutton v. Doxsee*, 116 Iowa 13, 89 N. W. 79; *Jamison v. Jamison*, 113 Iowa 720, 84 N. W. 705.

Declarations. — In an action of ejectment where the defense was a parol sale of the land followed by payment and possession by the vendee, declarations of the vendor are admissible to prove such sale. *Clarke v. Vankirk*, 14 Serg. & R. (Pa.) 354.

Admissions. — In an action to recover earnest money on the ground that the parol sale of the property was void under the statute of frauds,

the character of the plaintiff's possession was put in issue; *held*, that statements of the plaintiff claiming exclusive ownership and offers to sell were admissible. "If circumstances which characterize and explain human action when so closely connected therewith as to fall within the limits of *res gestae*, were not permitted to be given in evidence, the judicial search after truth would often fail where common sense and common reason point clearly the way to the desired object." *Cuddy v. Foreman*, 107 Wis. 519, 83 N. W. 1103.

11. *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118.

12. *Rowe v. Henderson*, 4 Ind. Ter. 597, 76 S. W. 250.

13. *Hutton v. Doxsee*, 116 Iowa 13, 89 N. W. 79; *Jamison v. Jamison*, 113 Iowa 720, 84 N. W. 705.

14. *Williamson v. Williamson*, 4 Iowa 279. See *Cooper v. Colson*, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660; *Stellmacher v. Bruder*,

89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609; *Laird v. Vila*, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420; *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125.

Quantum of Proof.—It is the rule in a court of equity that one who invokes its aid must prove his case, not by vague or shadowy evidence, not even by a mere preponderance of evidence, but by evidence so unquestionable in its character, so clear, cogent and convincing that no reasonable doubt can be entertained of its truth; that no such doubt can linger either as to the existence of the contract or the certainty of its terms, or that the plaintiff has wholly performed his part. *Russell v. Sharp*, 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496.

Proof as Affected by the Relation-

ship of the Parties.—“The very nature of the relation, therefore, requires the contracts between parent and child to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it, and nothing else.” *Poorman v. Kilgore*, 26 Pa. St. 365, 67 Am. Dec. 425; *Cox v. Cox*, 26 Pa. St. 375, 67 Am. Dec. 432; *Ackerman v. Fisher*, 57 Pa. St. 457.

Declarations of Deceased Persons.—“Loose declarations of parties since dead are to be received with great caution, and testimony as to oral admissions of parties since dead, must be clear, strong and unequivocal, if relied on.” *Carney v. Carney*, 95 Mo. 353, 8 S. W. 729.

STATUTE OF LIMITATIONS.—See Limitation of Actions.

STATUTES.

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CROSS-REFERENCES:

Foreign Laws;
Judicial Notice;
Presumptions;
Records.

I. JUDICIAL NOTICE.

1. Public Statutes. — A. IN GENERAL. — Public statutes enacted by the legislature of a state will be judicially noticed by the courts of that state.¹ State courts also judicially notice the public acts of Congress.²

1. Alabama. — *Davis v. State*, 141 Ala. 84, 37 So. 454 (local statutes).

California. — *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448.

Georgia. — *Lane v. Harris*, 16 Ga. 217; *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161; *Bass v. State*, 1 Ga. App. 790, 57 S. E. 1054.

Illinois. — *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634; *Pittsburgh, Ft. Wayne & C. R. Co. v. Moore*, 110 Ill. App. 304.

Indiana. — *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524.

Kentucky. — *Laidley v. Cummings*, 83 Ky. 606; *Norman v. Kentucky Board*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556; *Crigler v. Com.*, 120 Ky. 512, 27 Ky. L. Rep. 918, 87 S. W. 276.

Louisiana. — *Doss v. Board of Comrs.*, 117 La. 450, 41 So. 720.

Maryland. — *Chesapeake & O. Canal Co. v. Western Maryland R. Co.*, 99 Md. 570, 58 Atl. 34.

Minnesota. — *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714.

Missouri. — *Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541, 24 S. W. 436.

New York. — *Townsend v. Trustees*, 97 App. Div. 316, 89 N. Y. Supp. 982.

North Carolina. — *State v. Snow*, 117 N. C. 774, 23 S. E. 322; *State v. Piner*, 141 N. C. 760, 53 S. E. 305 (local pub. enactments).

Pennsylvania. — *Flanigan v. Washington Ins. Co.*, 17 Pa. St. 306.

Texas. — *Duren v. Houston & T. C. R. Co.*, 86 Tex. 287, 24 S. W. 258.

Virginia. — *Duncan v. Lynchburg*, 48 L. R. A. 331.

Vermont. — *State v. Scampini*, 77 Vt. 92, 59 Atl. 201.

Washington. — *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 19 L. R. A. 500.

Wisconsin. — *Berliner v. Waterloo*, 14 Wis. 378; *Horn v. Chicago & N. W. R. Co.*, 38 Wis. 463.

2. Alabama. — *Kansas City, M. &*

B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

Arkansas. — *St. Louis, I. M. & S. R. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865; *St. Louis, I. M. & S. R. Co. v. Maddy*, 57 Ark. 306, 21 S. W. 472.

California. — *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Semple v. Hagar*, 27 Cal. 163; *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089.

Georgia. — *Mims v. Davidson*, 49 Ga. 361.

Indiana. — *Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749.

Iowa. — *Coughran v. Gilman*, 81 Iowa 442, 46 N. W. 1005.

Kentucky. — *Laidley v. Cummings*, 83 Ky. 606.

Louisiana. — *Pollard v. Cook*, 4 Rob. 199.

Maryland. — *Chesapeake & O. Canal R. Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 1; *Eastwood v. Kennedy*, 44 Md. 563.

Minnesota. — *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118.

Missouri. — *Papin v. Ryan*, 32 Mo. 21.

Montana. — *State v. County Comrs.*, 34 Mont. 426, 87 Pac. 450.

Nebraska. — *Davis' Estate v. Watkins*, 56 Neb. 288, 76 N. W. 575.

New Mexico. — *United States v. Fuller*, 4 N. M. 358, 20 Pac. 175.

New York. — *Kessel v. Albetis*, 56 Barb. 362; *Benner v. Atlantic Dredging R. Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220.

Texas. — *Overton v. McCabe*, 35 Tex. Civ. App. 133, 79 S. W. 861; *Bink v. State*, 89 S. W. 1075.

Virginia. — *Bayly's Admr. v. Chubb*, 16 Gratt. 284.

Vermont. — *Metropolitan Stock Exch. v. Lyndonville Nat. Bank*, 76 Vt. 303, 57 Atl. 101.

Bankruptcy Act Noticed. — And so the state courts take judicial cognizance of the bankruptcy act of Con-

When Exercising Original Jurisdiction the federal courts are bound to take judicial notice not only of the public statutes of the state wherein they are sitting,³ but also of those of all other states of the union.⁴

When Exercising Appellate Jurisdiction, the United States supreme court in reviewing a judgment or decree of an inferior federal court will take judicial notice of state statutes co-extensively with other federal courts in exercising original jurisdiction.⁵ The United States supreme court, in reviewing on appeal or writ of error a judgment or decree of a state court, will judicially notice the stat-

gress and how it operates. *Morris v. Davidson*, 49 Ga. 361; *Wheelock v. Lee*, 15 Abb. Pr. N. S. (N. Y.) 24; *Mims v. Swartz*, 37 Tex. 13.

Where State Statutes Are Incorporated in an Act of Congress and thereby put in force in the Indian Territory, such statutes will be judicially noticed. *Overton v. McCabe*, 35 Tex. Civ. App. 133, 79 S. W. 861. See also *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306; *Belt v. Gulf, C. & S. F. R. Co.*, 4 Tex. Civ. App. 231, 22 S. W. 1062; *Apollos v. Staniforth*, 3 Tex. Civ. App. 502, 22 S. W. 1060.

3. *Smith v. Tallapoosa County*, 2 Woods 574, 22 Fed. Cas. No. 13,113; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

In *Martin v. Baltimore & O. R. Co.*, 151 U. S. 673, it was held that where statutes of a state creating railroad corporations, or licensing them to exercise their franchises within the state, were deemed to be public acts of which they would take judicial notice, such statutes must be judicially noticed by the circuit court of the United States sitting within the state.

4. *Merchants' Exch. Bank v. McGraw*, 59 Fed. 972, 8 C. C. A. 420; *Newberry v. Robinson*, 36 Fed. 841; *Knower v. Haines*, 24 Blatch. 488, 31 Fed. 513; *Swann v. Swann*, 21 Fed. 299; *Jasper v. Porter*, 2 McLean 579, 13 Fed. Cas. No. 7,229; *Jones v. Hays*, 4 McLean (U. S.) 521; *Toppan v. Cleveland, C. & C. R. Co.*, 24 Fed. Cas. No. 14,099; *Noonan v. Delaware, L. & W. R. Co.*, 68 Fed. 1; *Barry v. Snowden*, 106 Fed. 571; *Andruss v. People's Bldg. Assn.*, 94 Fed. 575, 36 C. C. A. 336; *Mutual Life Ins. Co. v. Hill*, 97 Fed. 263, 38

C. C. A. 159, 49 L. R. A. 127; *L'Engle v. Gates*, 74 Fed. 513.

Statutes in Force Prior to Adoption of Federal Constitution.—In *Loree v. Abner*, 57 Fed. 159, 6 C. C. A. 302, it was held that a federal court may properly judicially notice the statutes of Pennsylvania as they existed prior to the adoption of the federal constitution.

Railroad Act Judicially Noticed.

Acts of state legislatures providing for the construction, operation and leasing of a railroad are of a class generally regarded as public acts, of which the federal courts will take judicial cognizance. *Western & A. R. Co. v. Roberson*, 61 Fed. 592, 9 C. C. A. 646.

Subsequent Statutes Noticed.

Where a party asserts a right under a state statute, and at the time of trial another statute has been passed affecting the former, the federal court will not ignore this latter statute although it has not been pleaded, but will take judicial cognizance thereof. *Hathaway v. Mutual Life Ins. Co.*, 99 Fed. 534.

5. *Gormley v. Bunyan*, 138 U. S. 623; *Martin's Admr. v. Baltimore & O. R. Co.*, 151 U. S. 673; *Elwood v. Flannigan*, 104 U. S. 562; *Mitchell v. Overman*, 103 U. S. 62; *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Griffing v. Gibb*, 2 Black (U. S.) 519; *Harpending v. New York Reformed P. D. Church*, 16 Pet. (U. S.) 455; *Owings v. Hull*, 9 Pet. (U. S.) 607.

In *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, the court said: "In the court below statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the circuit court of the United

utes of the state from which the appeal was taken.⁶ But where a writ of error is taken to a state supreme court, the United States supreme court, on review, will not take judicial notice of the statutes of another state which the state supreme court refused to notice,⁷ on the ground that it was a foreign statute.⁸

Public Statute Declared To Be Such. — Where the legislature declares an act to be a public one, it will be noticed as such.⁹

States, as well as this court on appeal or error from that court, takes judicial notice of the laws of every state of the union."

In *Lamar v. Micou*, 114 U. S. 218, confirming 112 U. S. 452, which was a petition for a rehearing of an appeal from a decree of the circuit court of the United States, it was held that the law of any state of the union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.

6. *Hanley v. Donoghue*, 116 U. S. 1; *Beaty v. Knowler*, 4 Pet. (U. S.) 152; *Pennie v. Reis*, 132 U. S. 464.

7. *Lloyd v. Matthews*, 155 U. S. 222; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615.

In *Hanley v. Donoghue*, 116 U. S. 1, the court said: "Upon principle, therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin), whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions in *Ohio v. Hinchman*, 27 Penn. St. 479, and *Paine v. Schenectady Ins. Co.*, 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. When exercising an original jurisdiction under the Constitution and laws of the

United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. *Course v. Stead*, 4 Dall. 22, 27, note; *Hinde v. Vattier*, 5 Pet. 398; *Owings v. Hull*, 9 Pet. 607, 625; *United States v. Turner*, 11 How. 663, 668; *Pennington v. Gibson*, 16 How. 65; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 230; *Cheever v. Wilson*, 9 Wall. 108; *Junction Railroad Co. v. Bank of Ashland*, 12 Wall. 226, 230; *Lamar v. Micou*, 114 U. S. 218. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determination whether a question of law depending upon the Constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up."

8. See *infra*, "Statutes of Sister States," I, 1, B, b.

9. *England*. — *Beaumont v. Moun-*

B. FOREIGN PUBLIC STATUTES. — a. *Statutes of Sister States.*

In some of the states laws have been enacted requiring courts to take judicial notice of the public statutes of sister states,¹⁰ but in

tain, 10 Bing. 404, 25 E. C. L. 183.

United States. — Case *v. Kelly*, 133 U. S. 21; *Beaty v. Knowler*, 4 Pet. 152; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227.

Arkansas. — *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

Illinois. — *Doyle v. Village of Bradford*, 90 Ill. 416.

Iowa. — *State v. Olinger*, 72 N. W. 441.

Maine. — *State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495.

New Jersey. — *Hawthorne v. Hoboken*, 32 N. J. L. 172.

Texas. — *Missouri, K. & T. R. Co. v. Colburn*, 90 Tex. 230, 38 S. W. 153.

In *Bowie v. Kansas City*, 51 Mo. 454, which was an action brought for personal injuries against the city of Kansas City, the court said: "A trial was had upon the issues made by those pleading, a verdict rendered for the plaintiff for five thousand dollars, upon which judgment was rendered by the court. The defendant filed its several motions for a new trial and in arrest of judgment. . . . That said petition does not refer to any act or statute of Missouri whereby defendant was incorporated, and that there is no public act for said purpose. That the cause is founded on a statute of the state and no reference thereto is made in the petition. This motion in arrest of judgment was by the court sustained. To which ruling of the court, the plaintiff excepted. The court then notified the plaintiff that leave would be granted to amend his petition. Plaintiff refused to amend his petition, and the cause was dismissed, to which plaintiff again excepted, and has sued out his writ of error and brought the cause to this court. . . . The remaining question in this case is, whether the petition of the plaintiff in the cause was sufficient after verdict, and as a consequence, whether the court that tried the cause erred in arresting the judgment and dismissing plaintiff's petition and suit. This depends to some extent on the question whether the law organizing

or incorporating the defendant is a public or private statute, which depends upon the construction of the Act of the Legislature on said subject, approved March 12th, 1867 (Session Acts 1867, p. 18), and the Act approved March 17th, 1868, amendatory thereof. (Session Acts 1868, p. 208.) By the 12th section of the 11th article of the first named Act, it is provided as follows: 'This act is hereby declared to be a public act, and may be read in evidence in all courts of law and equity in this state, without further proof when specially pleaded.' I do not think that this section is to be construed to be a public act only for the purposes of being read in evidence without proof, as provided in the last clauses; in fact, it is difficult to say what was intended by said clause, or what use there was for such clause. The language is, that the act is declared to be a public act, and that it shall be read in evidence, &c. To my mind, the intention is plain that the legislature intended to make it a public act, so that the court would take judicial notice of the act, and that it was made so for the convenience of the defendant. When the existence of a corporation is admitted, if a public corporation within the state, and particularly in reference to municipal corporations, the courts are judicially informed of the laws regulating their organization, rights and duties, just as they are of all other public statutes."

Railroad Charters Made Public Acts. — Where charters of railroad companies are declared to be public acts, the courts will take judicial notice of their provisions and give effect to them the same as to any other public acts. *Peoria, D. & E. R. Co. v. People*, 116 Ill. 401, 6 N. E. 497. See also *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524.

10. *Bates v. McCully*, 27 Miss. 584; *Hobbs v. Memphis & Charleston R. Co.*, 9 Heisk. (Tenn.) 873; *F. E. Creelman Lumb. Co. v. Lesh*, 73 Ark. 16, 83 S. W. 320.

most of the states no such laws exist, and in these the courts do not judicially recognize the public statutes of a sister state or territory.¹¹ And so an enactment of a state legislature as to what shall be a legal rate of interest will not be noticed in the courts of another

11. *Alabama*.—*Insurance Co. of North America v. Forcheimer*, 86 Ala. 541, 5 So. 870; *Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718; *Drake v. Glover*, 30 Ala. 382; *Bradley v. Harden*, 73 Ala. 70; *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Clarke v. Pratt*, 20 Ala. 470.

Arkansas.—*McNeill v. Arnold*, 17 Ark. 154.

Colorado.—*Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216.

Connecticut.—*Hempstead v. Reed*, 6 Conn. 480.

Delaware.—*Kinney v. Hosea*, 3 Har. 77.

Florida.—*Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; *Tuten v. Gazan*, 18 Fla. 751.

Illinois.—*Leathe v. Thomas*, 218 Ill. 246, 75 N. E. 810; *s. c.* 109 Ill. App. 434; *Baltimore & O. S. R. Co. v. McDonald*, 112 Ill. App. 391; *Bonnell v. Holt*, 89 Ill. 71; *Hyman v. Bayne*, 83 Ill. 256; *Tinkler v. Cox*, 68 Ill. 119; *Chumasero v. Gilbert*, 24 Ill. 293; *Buckmaster v. Job*, 15 Ill. 328; *McCurdy v. Alaska & Chicago Com. Co.*, 102 Ill. Assn. 120; *Rand v. Continental Mut. F. Ins. Co.*, 58 Ill. App. 665.

Indiana.—*Robards v. Marley*, 80 Ind. 185; *Patterson v. Carrell*, 60 Ind. 128; *Kenyon v. Smith*, 24 Ind. 11; *Comparet v. Jernegan*, 5 Blackf. 375; *Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923; *Old Wayne Mut. L. Assn. v. Flynn*, 31 Ind. App. 473, 68 N. E. 327; *Teutonia Loan & B. Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

Iowa.—*Neese v. Farmers' Ins. Co.*, 55 Iowa 604, 8 N. W. 450; *David v. Porter*, 51 Iowa 254, 1 N. W. 528; *Taylor v. Runyan*, 9 Iowa 522; *Carey v. Cincinnati & Chicago R. Co.*, 5 Iowa 357; *Bean v. Briggs*, 4 Iowa 464.

Kansas.—*Loyal Mystic Legion v. Brewer*, 75 Kan. 729, 90 Pac. 247; *Ferd Heim Brew. Co. v. Gimber*, 67

Kan. 834; 72 Pac. 859; *Shed v. Augustine*, 14 Kan. 282.

Louisiana.—*Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

Maryland.—*Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752.

Massachusetts.—*Witters v. Globe Sav. Bank*, 171 Mass. 425, 50 N. E. 932; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414; *Chipman v. Peabody*, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437; *Haines v. Hanrahan*, 105 Mass. 480; *Eastman v. Crosby*, 8 Allen 206.

Michigan.—*Phelps v. American Sav. & L. Assn.*, 121 Mich. 343, 80 N. W. 120; *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Jones v. Palmer*, 1 Dougl. 379.

Minnesota.—*Swing v. Red River Lumb. Co.*, 101 Minn. 428, 112 N. W. 393; *Myers v. Chicago, St. P., M. & O. R. Co.*, 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 572; *Hoyt v. McNeil*, 13 Minn. 390; *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118.

Mississippi.—*Hemphill v. Alabama Bank*, 6 Smed. & M. 44.

Missouri.—*Southern Illinois Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; *Snuffer v. Karr*, 197 Mo. 182, 94 S. W. 983; *Nenno v. Chicago, R. I. & P. R. Co.*, 105 Mo. App. 540, 80 S. W. 24; *Smith v. Aultman*, 120 Mo. App. 462, 96 S. W. 1034; *Witascheck v. Glass*, 46 Mo. App. 209; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147.

Montana.—*McKnight v. Oregon Short Line R. Co.*, 33 Mont. 40, 82 Pac. 661.

Nebraska.—*People's Bldg. & L. Assn. v. Backus*, 89 N. W. 315; *Scroggin v. McClelland*, 37 Neb. 644, 56 N. W. 208, 40 Am. St. Rep. 520, 22 L. R. A. 110; *Moses v. Comstock*, 4 Neb. 516.

New Jersey.—*Condit v. Blackwell*,

state.¹² While it has been held by some of the state courts, in ac-

19 N. J. Eq. 193; *Campion v. Kille*, 14 N. J. Eq. 229.

New York.—*Harris v. White*, 81 N. Y. 532; *Cutler v. Wright*, 22 N. Y. 472; *Miller v. Avery*, 2 Barb. Ch. 582; *Moore v. Coler*, 106 App. Div. 331, 94 N. Y. Supp. 630.

North Carolina.—*Hilliard v. Outlaw*, 92 N. C. 266; *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642.

Ohio.—*Smith v. Bartram*, 11 Ohio St. 690; *Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197; *Lewis v. Kentucky Bank*, 12 Ohio 132, 40 Am. Dec. 469; *Ingraham v. Hart*, 11 Ohio 255; *Barr v. Closterman*, 2 Ohio C. C. 387.

Oregon.—*Cressey v. Taton*, 9 Or. 541.

Pennsylvania.—*Spellier Elec. T. Co. v. Geiger*, 147 Pa. St. 399, 23 Atl. 547; *Ripple v. Ripple*, 1 Rawle 386.

Rhode Island.—*Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001.

South Carolina.—*Bridger v. Asheville R. Co.*, 25 S. C. 24; *Whitesides v. Poole*, 9 Rich. 68; *Building & L. Assn. v. Rice*, 68 S. C. 236, 47 S. E. 63.

Tennessee.—*Templeton v. Brown*, 86 Tenn. 50, 5 S. W. 441; *Bagwell v. McTighe*, 85 Tenn. 616, 4 S. W. 46; *Anderson v. May*, 10 Heisk. 84; *Hobbs v. Memphis & Charleston R. Co.*, 9 Heisk. 873; *Owen v. State*, 5 Sneed 493.

Texas.—*Trigg v. Moore*, 10 Tex. 197; *Ramsay v. McCauley*, 2 Tex. 189; *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312; *Missouri, K. & T. R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

Vermont.—*Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779; *Taylor v. Boardman*, 25 Vt. 581; *Adams v. Gay*, 19 Vt. 358.

Virginia.—*App v. App*, 106 Va. 253, 55 S. E. 672; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271; *Bayly v. Chubb*, 16 Gratt. 284.

Washington.—*McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209.

West Virginia.—*Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268.

Wisconsin.—*Osborn v. Blackburn*,

78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 400, 10 L. R. A. 367; *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409.

Notice Taken for Purposes of Construing Laws of Forum.—"We cannot take judicial notice of the constitution or laws or judicial decisions of Alabama, or of any other state. They must be proved by the introduction of evidence. Gen. St. 700, § 370; *Porter v. Wells*, 6 Kan. 455; 1 Greenl. Ev., § 489; 2 Phil. Ev. (5th Ed. Amer. Ed. Cowen & H. and Edw. Notes), original page 428, note 1. It is true, for the purpose of construing our own laws or of determining what our own laws are, we take judicial notice of everything that can in any manner aid us in such construction or determination, for we are bound to know what our own laws are without any proof thereof. And, as we are bound to take judicial notice of what our own laws are, we are bound to take judicial notice of everything that will in any manner aid us in determining what our own laws are. For this purpose, and so far as they are applicable, we may take judicial notice of the existence and history of the laws of every country and of every age. We may, indeed, take judicial notice of everything that can be known or understood of every law that has ever been passed, of every decision that has ever been promulgated, of every transaction that has ever occurred, of every event that has ever transpired, and of every fact that has ever existed. But except for the purpose of construing our own laws, and of determining what they are, we can know but very little except through the medium of evidence. Except for that purpose we can know the laws of other states only as they are proved to us, like other facts. Hence we cannot take judicial notice (against the agreement of the parties) that said section 758 (640) of the Alabama Code is unconstitutional and void." *Hunter's Admr. v. Ferguson's Admr.*, 13 Kan. 462.

¹² *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541, 5 So. 870; *Kenyon v. Smith*, 24 Ind. 11;

tions on judgments rendered in other states, that they will judicially notice the statutes of a sister state for the purpose of giving full faith and credit to "the public acts, records, etc.," of a sister state under the provision, to that effect, of the federal constitution,¹³ yet other state courts and the United States supreme court have held that the act of Congress does not profess to determine in what manner the state courts shall ascertain the faith and credit to be given to foreign judgments, and cannot be construed as making it imperative on them to take judicial cognizance of the statutes of other states for that purpose.¹⁴

b. *Statutes of Foreign Countries.* — As a general rule the American as well as the English courts do not take judicial notice of the

Dorsey v. Dorsey, 28 Ky. 280, 22 Am. Dec. 33; Millard v. Truax, 73 Mich. 381, 41 N. W. 328; Cooke v. Crawford, 1 Tex. 9.

13. Hull v. Webb, 78 Ill. App. 617; Kopperl v. Nagy, 37 Ill. App. 23; Draggoo v. Graham, 9 Ind. 212; Paine v. Schenectady Ins. Co., 11 R. I. 411; Coffee v. Neely, 2 Heisk. (Tenn.) 304; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

In State v. Hinchman, 27 Pa. St. 479, the court said: "This was an action of debt brought to recover a large bill of costs, for which judgment had been rendered against the defendant by the probate court of Hamilton County, Ohio, in a proceeding by *habeas corpus* before that court. When the plaintiff offered the certified copy of the record in evidence, attested by J. B. Warren, probate judge, and *ex officio* clerk, under the seal of the court, and certified by J. B. Warren, as probate judge also under the seal of the court, the defendant objected to it as not being such a record as is within the Act of Congress, and not being authenticated agreeably to the same act. The court overruled the objection, and having admitted the record, decided that the proceedings under a writ of *habeas corpus* would support the present action, and these are the grounds of the errors assigned. There was no proof offered in reference to the constitution and jurisdiction of the probate courts of Ohio, but we suppose we are bound, in the circumstances of this case, to take notice *ex officio* of the local laws of Ohio. The questions before us

arise under the constitution and laws of the United States. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, says the federal constitution, and the Act of Congress of 26th May, 1790, providing for the mode of authenticating the records and judicial proceedings of the state courts, declares that 'the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.' A judgment of this court, adverse to the right arising out of the federal constitution and legislation, would be reviewable in the supreme court of the United States, and there the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort, we should take notice of the local laws of a sister state in the same manner the supreme court of the United States would do on a writ of error to our judgment."

14. *United States.* — Lloyd v. Matthews, 155 U. S. 222; Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615; Hanley v. Donoghue, 116

statutes of a foreign country,¹⁵ although where a foreign country has been annexed to the United States the statutes of that country prevalent therein prior to annexation are judicially noticed by all courts in the United States, not as foreign statutes, but as those of an antecedent government.¹⁶

Exception to the Rule. — But an exception to the above rule is made in respect to those foreign statutes which are looked upon as a part of the general maritime and international law.¹⁷

2. Private Statutes. — A. STATE COURTS. — As a general rule a

U. S. 1 (see excerpt from this case in note 7).

Florida. — *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526.

Iowa. — *Taylor v. Runyan*, 9 Iowa 522.

Massachusetts. — *Knapp v. Abell*, 10 Allen 485.

Texas. — *Gill v. Everman*, 94 Tex. 209, 59 S. W. 531; *Porcheler v. Bronson*, 50 Tex. 555.

Wisconsin. — *Osborn v. Blackburn*, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 460, 10 L. R. A. 367.

15. England. — *De Bode's Case*, 8 Q. B. 208, 55 E. C. L. 208; *Nelson v. Bridport*, 8 Beav. 527, 10 Jur. 871; *Bristow v. Sequeville*, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289; *Fremoult v. Dedire*, 1 P. Wms. 429, 24 Eng. Reprint 458.

United States. — *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Dainese v. Hale*, 91 U. S. 13; *Ennis v. Smith*, 14 How. 400; *Strother v. Lucas*, 6 Pet. 763; *Church v. Hubbard*, 2 Cranch 187; *Robinson v. Clifford*, 2 Wash. 1, 20 Fed. Cas. No. 11,948.

Alabama. — *Doe v. Eslava*, 11 Ala. 1028.

Delaware. — *Thomas v. Grand Trunk R. Co.*, 1 Penn. 593, 42 Atl. 987.

Illinois. — *Rand v. Continental Mut. F. Ins. Co.*, 58 Ill. App. 665.

Iowa. — *Banco de Sonora v. Bankers' Mut. Casualty Co.*, 95 N. W. 232.

Louisiana. — *Kohn v. The Renaissance*, 5 La. Ann. 25, 52 Am. Dec. 577.

Maryland. — *Baptiste v. De Volunbrun*, 5 Har. & J. 86.

Massachusetts. — *Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845, 75 Am. St. Rep. 348, 47 L. R. A. 495.

Mississippi. — *Sessions v. Doe*, 7 Smed. & M. 130.

Missouri. — *Charlotte v. Chouteau*,

25 Mo. 465; *Chouteau v. Pierre*, 9 Mo. 3.

New York. — *Monroe v. Douglass*, 5 N. Y. 447; *Munroe v. Guillaume*, 3 Abb. Dec. 334, 3 Keyes 30; *Bates v. Violet*, 33 App. Div. 436, 53 N. Y. Supp. 893; *Thompson v. Ketcham*, 4 Johns. 285.

Oregon. — *State v. Moy Looke*, 7 Or. 54.

South Carolina. — *McFee v. South Carolina Ins. Co.*, 2 McCord 503, 13 Am. Dec. 757.

Texas. — *Bryant v. Kelton*, 1 Tex. 434.

Vermont. — *McLeod v. Connecticut & P. R. Co.*, 58 Vt. 727, 6 Atl. 648; *Woodrow v. O'Conner*, 28 Vt. 776; *Peck v. Hibbard*, 26 Vt. 698, 62 Am. Dec. 605.

16. United States. — *United States v. Perot*, 98 U. S. 428; *Brownsville v. Cavazos*, 2 Woods 293, 4 Fed. Cas. No. 2,043; *United States v. Philadelphia*, 11 How. 609; *United States v. Turner*, 11 How. 663; *United States v. Chaves*, 159 U. S. 452; *Bouldin v. Phelps*, 30 Fed. 547.

Alabama. — *Farmer's Heirs v. Es-lava*, 11 Ala. 1028.

California. — *Wells v. Stout*, 9 Cal. 479.

Louisiana. — *Malpica v. McKown*, 1 La. 248, 20 Am. Dec. 279; *Berluchaux v. Berluchaux*, 7 La. 539.

Missouri. — *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, 9 Mo. 581.

Texas. — *State v. Sais*, 47 Tex. 307.

17. In *The New York*, 175 U. S. 187, reversing 82 Fed. 819, 27 C. C. A. 154, the court said: "We are of opinion that the Canadian statute of 1886 may properly be considered by us. (Judicially noticed.) The question how far this court may take judicial notice of the laws of a foreign country has been the subject of some discussion, and was first con-

state court will not judicially notice private statutes enacted by the local legislature,¹⁸ or by the legislature of a sister state.¹⁹

sidered by this court in the case of *Talbot v. Seeman*, 1 Cranch 1, 38. That was a case of salvage upon recapture from the French. It became necessary to inquire whether the laws of France were such as to have rendered the condemnation so probable as to create a case of such real danger that her recapture could be considered a meritorious service. To prove this, counsel offered several decrees of the French government, to the reading of which objection was made upon the ground that they were the laws of a foreign nation, and therefore to be proved as facts. In holding that the decree, having been promulgated in the United States as a law of France, was entitled to be read, Mr. Chief Justice Marshall observed 'that the laws of a foreign nation, designed only for the direction of its own affairs are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact. The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice), in which the marine ordinances of a foreign nation are read as law without being proved as facts.' . . . The reference to the Canadian statute of 1886, used in the district court and printed as a part of the record here, shows it to be, except as to the waters covered by it and as to certain immaterial local regulations, a literal copy of the Congressional act of 1885."

18. *Alabama*.—*Kelly v. Alabama & C. R. Co.*, 58 Ala. 489; *City of Mobile v. Louisville & N. R. Co.*, 124 Ala. 132, 26 So. 902; *Broad*

Street Hotel Co. v. Weaver, 57 Ala. 26; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 Am. St. Rep. 740; *Montgomery v. Montgomery & W. Plank-Road Co.*, 31 Ala. 76; *Drake v. Flewellen*, 33 Ala. 106; *Moore v. State*, 26 Ala. 88.

California.—*Ellis v. Eastman*, 32 Cal. 447.

Illinois.—*Minck v. People*, 6 Ill. App. 127.

Indiana.—*Toledo, L. & B. R. Co. v. Nordyke*, 27 Ind. 95; *Danville Plank Road Co. v. State*, 16 Ind. 456.

Kansas.—*Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477.

Kentucky.—*Nichols v. Bardwell Lodge*, 20 Ky. L. Rep. 1236, 48 S. W. 1091; *Rudd v. Owensboro Deposit Bank*, 105 Ky. 443, 49 S. W. 207, 971, 20 Ky. L. Rep. 1276, 1497.

Louisiana.—*Workingmen's Bank v. Converse*, 33 La. Ann. 963; *Mower v. Kemp*, 42 La. Ann. 1007, 8 So. 830.

Missouri.—*Bailey v. Lincoln Academy*, 12 Mo. 174; *Kirby v. Wabash R. Co.*, 85 Mo. App. 345.

New Jersey.—*State v. Haddonfield & C. Tp. Co.*, 65 N. J. L. 97, 46 Atl. 700; *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367.

North Carolina.—*Carrow v. Washington Toll-Bridge Co.*, 61 N. C. 118.

Ohio.—*Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543.

Pennsylvania.—*City of Allegheny v. Nelson*, 25 Pa. St. 332; *Timlow v. Philadelphia & Reading R. Co.*, 99 Pa. St. 284; *Hestonville, M. & F. R. Co. v. Schuylkill River Pass. R. Co.*, 6 Phila. 141; *Handy v. Philadelphia & Reading R. Co.*, 1 Phila. 31.

Texas.—*Hailes v. State*, 9 Tex. App. 170; *Conley v. Columbus Tap R. Co.*, 44 Tex. 579; *Holmes v. Anderson*, 59 Tex. 481.

Vermont.—*Pearl v. Allen*, 2 Tyler 311.

Virginia.—*Legrand v. Hampden Sidney College*, 5 Munf. 324.

West Virginia.—*Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

Wisconsin.—*Horn v. Chicago & N. W. R. Co.*, 38 Wis. 463.

19. *Miller v. Johnston*, 71 Ark.

Exceptions. — But there are instances where the state courts will take judicial cognizance of a private statute. For example, an enactment clearly in its nature of a private character will be judicially noticed as a public statute if it is declared to be such by general law,²⁰ or by a clause contained within itself.²¹ So also will a pri-

174, 72 S. W. 371. In this case it was held that a statute providing that courts shall take judicial notice of the laws of other states does not apply to private acts. But see *Hobbs v. Memphis & Charleston R. Co.*, 9 Heisk. (Tenn.) 873, and *Bates v. McCully*, 27 Miss. 584.

20. *White Water Val. Canal Co. v. Boden*, 8 Blackf. (Ind.) 130; *State v. McAllister*, 24 Me. 139; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

21. *United States*. — *Case v. Kelly*, 133 U. S. 21; *Beaty v. Knowler*, 4 Pet. 152.

Illinois. — *Nimmo v. Jackman*, 21 Ill. App. 607.

Indiana. — *Brookville Ins. Co. v. Records*, 5 Blackf. 170.

Iowa. — *State v. Olinger*, 72 N. W. 441.

Missouri. — *Bowie v. Kansas City*, 51 Mo. 544.

Nebraska. — *Hornberger v. State*, 47 Neb. 40, 66 N. W. 23.

Texas. — *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

Where a Law of Incorporation, although of a private nature, contains a provision that it is to be considered as a public act, such provision must be regarded and the act noticed without being specially pleaded. *Beaty v. Knowler*, 4 Pet. (U. S.) 152.

Original Declared To Be a Public Act, Supplement Thereto Will Also Be Considered as Such. — In *Stephens & Condit Transp. Co. v. Central R. Co.*, 33 N. J. L. 229, the court said: "The counts of the declaration in this case which have been demurred to, charge, in substance, that the defendants have built a bridge, or viaduct, over Newark bay, whereby its navigability is diminished. It is also shown that, from this cause, special damage has been sustained by the plaintiffs. The defendants take exception to

these counts, on the ground that, by a supplement to their charter, passed on the 23d February, 1860, they are authorized to bridge this water for the purposes of their road, and that there is nothing which appears in the counts in question which shows that the bridge, whose erection is complained of, is not a proper exercise of such authority. To this position the plaintiffs answer, *first*, that the supplement to the charter, upon which the defendants rely as their license for doing the acts complained of, is not a public act, and, consequently, cannot be judicially noticed, but must be set up by plea. But this objection, I think, cannot be supported. In the original act chartering the defendants, it is declared that such act 'shall be deemed and taken as a public act, and shall at all times be recognized as such in all courts and places whatsoever.' Thus, the charter being made a public act, its supplements, of necessity, would seem to become such also; because the supplement is a mere modification or addition to the original act. This charter, in express terms, is made a part of the public law of the state; the supplement in question modifies that public law, and I cannot understand by what process such a statute is to be held to be a matter of mere private interest. Certainly, there would be some inconvenience attending the adoption of such a rule, for the courts would no longer, even in theory, be cognizant of the whole of the public law of the state. By stress of the doctrine thus claimed, one of these laws, although repealed, would have to be enforced, unless judicial blindness should be enlightened by the requisite proofs. No authority was referred to in support of this proposition of the counsel of the plaintiffs, and I do not perceive any solid ground on which it can rest." See also to the same effect,

vate enactment be judicially noticed which has been amended by a public act,²² or which is recognized by a public act,²³ or by the constitution,²⁴ or by a decision of the same court²⁵ in which the question of judicial notice has arisen.

Special Private Acts of Congress are not judicially noticed by the state or territorial courts.²⁶

Hawthorne v. Hoboken, 32 N. J. L. 172.

In *Smith v. Billings*, 76 Ill. App. 454, affirmed in 177 Ill. 446, 53 N. E. 81, the court discussing cases holding that the competency of a deposition is governed by the conditions existing when the testimony was taken, says: "They hold that if the witness be competent at the time he testifies, his competency cannot be affected by the subsequent death of the adverse litigant. It would seem that this reasoning is based upon analogy to the doctrine of the common law, that when a witness is made incompetent by reason of interest (under the common law rule making parties in interest incompetent), yet the testimony of such witness, taken before his interest existed, is competent. The common law rule incapacitating an interested witness is based upon his supposed bias. The only objection to the testimony of an interested witness being his supposed bias, the reason of a rule which declares his testimony competent if taken before such interest and hence before such bias came into existence, is apparent. But the analogy is doubtful. Here the purpose and motive of the statutory rule is to preserve equality of litigants in the admission of the testimony of interested parties. It is because, and solely because, one litigant has deceased and can not be heard to give his version of mutual transactions that the surviving litigant is also debarred from presenting his version. It is the use of the testimony and the time of its use which should govern if the spirit and purpose of the statute is to be regarded. We do not think that the common law rule as to competency of testimony of an interested witness, when such testimony is taken before interest accrued, should by analogy govern here. The testimony,

being such at the time it is to be considered by the court as would, if admitted, contravene the spirit and purpose of the statute, in that it would be in effect permitting the living litigant to bring his version of mutual transactions to the consideration of the court at a time when the adverse litigant has been precluded by death from answering such version of the mutual transactions, should, we think, be treated as incompetent under the statute."

²². *Lavalle v. People*, 6 Ill. App. 157.

²³. *Webb v. Bidwell*, 15 Minn. 479.

²⁴. *Vance v. Farmers' & Mechanics' Bank*, 1 Blackf. (Ind.) 80.

²⁵. In *Mower v. Kemp*, 42 La. Ann. 1007, 8 So. 830, the question arose as to whether judicial notice should be taken of a private act authorizing the execution of a certain mortgage. The court said: "While it may be true, as a general proposition, that the act of the legislature authorizing the execution of this act of mortgage, being a private act, should have been introduced in evidence; yet, that it was not, can make no difference, as we are bound to take judicial cognizance of our own decisions, and by the terms of the decision just quoted we are informed that the mortgage was duly authorized and executed."

²⁶. *Denver & R. G. R. Co. v. United States*, 9 N. M. 389, 54 Pac. 336; *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Wright v. Paton*, 10 Johns. (N. Y.) 300. *Compare Bayly's Admr. v. Chubb*, 16 Gratt. (Va.) 284.

Judicial Notice Is Based Upon the Presumption that a fact is of general knowledge, with persons of ordinary intelligence living in the jurisdiction of the court. A private act of Congress must be pleaded and proven, because the people generally are

B. FEDERAL COURTS. — The federal courts will not judicially notice special private acts of the state legislatures,²⁷ but the federal, circuit and district courts will judicially notice all private acts of the legislature of the state wherein they are sitting, which according to the law of the state must be recognized by the state courts.²⁸

3. **Legislative Resolutions.** — Legislative resolutions of a public nature are judicially recognized.²⁹ The rule as to private resolutions is otherwise.³⁰

4. **Comprehensiveness of Judicial Knowledge.** — Judicial knowledge of a statute includes knowledge as to the time when it became effective,³¹ its amendment,³² suspension,³³ or repeal,³⁴ and as to mat-

neither interested in a private act nor presumed to know about one which in no way affects their welfare. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353, 60 Pac. 249. In this case it was held that where a private statute is printed in the general statutes, the fact of its existence, although not its substance, should be noticed by the state courts.

27. *Leland v. Wilkinson*, 6 Pet. (U. S.) 317.

28. "The courts in Indiana are authorized by the constitution of that state to take judicial notice of all its laws (including private acts); and, therefore, the circuit court could take notice of this law." (A private act). *Junction Railroad Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226.

29. *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3; *State v. Delesdenier*, 7 Tex. 76; *Fuller v. Transit and Land Co.*, 16 Hawaii 1.

30. *Simmons v. Jacobs*, 52 Me. 147.

31. *California*. — *Fowler v. Pearce*, 2 Cal. 165.

Illinois. — *Young v. Thompson*, 14 Ill. 380; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571.

Indiana. — *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Heaton v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896.

Iowa. — *Allen v. Dunham*, 1 G. Gr. 89; *Pierson v. Baird*, 2 G. Gr. 235.

Minnesota. — *State v. Stearns*, 72 Minn. 200, 75 N. W. 210; *Supervisors v. Keenan*, 2 Minn. 330.

New York. — *Ottman & Co. v.*

Hoffman, 7 Misc. 714, 28 N. Y. Supp. 28; *DeBow v. People*, 1 Denio 9; *Purdy v. People*, 4 Hill 384; *People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379.

Pennsylvania. — *Speer v. Plank-Road Co.*, 22 Pa. St. 376.

Utah. — *People v. Hopt*, 3 Utah 396, 4 Pac. 250.

Wisconsin. — *Attorney General v. Foote*, 11 Wis. 14, 78 Am. Dec. 689; *Berliner v. Waterloo*, 14 Wis. 378.

In *Vermont* it was held that this principle of law is none the less applicable where the time of a statute's becoming operative depends upon the result of a popular vote, to be declared, together with the time when the act shall take effect, by proclamation issued by the Secretary of State, as is provided in the statute under consideration. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201.

In *Kentucky* judicial notice will be taken of the fact that special acts as to the sale of liquors do not take effect until submitted to the vote of the people. *Com. v. Throckmorton*, 17 Ky. L. Rep. 550, 1124, 32 S. W. 130.

In *Louisiana* the date of the promulgation of laws in the different parishes will be noticed without proof. *L'Eglise v. Brenton*, 3 La. 435.

32. *Lavalle v. People*, 6 Ill. App. 157; *Parent v. Walmsly*, 20 Ind. 82; *Belmont v. Morrill*, 69 Me. 314.

33. *Buckingham v. Walker*, 48 Miss. 609; *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.) 742; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52.

34. *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807; *Wikel v. Board*,

ters concerning in any way its meaning, validity and construction.³⁵

5. Legislative Journals—Reference To. — A. FOR PURPOSE OF ASCERTAINING TIME WHEN STATUTE BECOMES EFFECTIVE, TERMS, ETC. — Whenever a question arises as to the existence of a statute or as to the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information, including legislative journals and other records which in their nature are capable of conveying to the judicial mind a clear and satisfactory answer to such questions.³⁶

B. VALIDITY. — But upon the question as to whether legislative journals and other records can be introduced in evidence for the purpose of raising a question as to the validity of the completely enrolled act, duly recorded and authenticated, the courts are about evenly divided. While most of the state courts hold affirmatively,³⁷ the courts of England, the United States supreme court and others

120 N. C. 451, 27 S. E. 117; *State v. O'Conner*, 13 La. Ann. 486; *Springfield v. Worcester*, 2 Cush. (Mass.) 52.

Notice Taken of Fact That Statute Has Not Been Repealed. — In *Com. v. Bierman*, 13 Bush (Ky.) 345, it was held that notice might be taken of legislation conferring on certain persons or corporations lottery privileges for the benefit of the schools of Frankfort; and if those privileges were to continue in existence until formally revoked, notice might be taken of the fact that there had been no legislative revocation.

35. *Stout v. Board of Comrs.*, 107 Ind. 343, 8 N. E. 222; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Division of Howard County*, 15 Kan. 194; *Central Trust Co. v. Ashville Land Co.*, 72 Fed. 361, 18 C. C. A. 590; *Smith v. Speed*, 50 Ala. 276; *People v. Mahaney*, 13 Mich. 481; *State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30.

36. *United States*. — *Field v. Clark*, 143 U. S. 649, *distinguishing* *Gardner v. Collector*, 6 Wall. 499, 511; *United States v. Ballin*, 144 U. S. 1.

Indiana. — *City of Evansville v. State*, 118 Ind. 426, 434, 21 N. E. 267; *Edger v. Randolph County*, 70 Ind. 331, 338.

Louisiana. — *Hollingsworth v. Thompson*, 45 La. Ann. 222, 12 So. 1, 40 Am. St. Rep. 220.

Maryland. — *Strauss v. Heiss*, 48 Md. 292.

Mississippi. — *Ex parte Wren*, 63 Miss. 512, 535, 56 Am. Rep. 825.

Missouri. — *Pacific R. Co. v. Governor*, 23 Mo. 353, 364, 66 Am. Dec. 673.

Pennsylvania. — *Southwark Bank v. Com.*, 26 Pa. St. 446.

37. *Alabama*. — *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28.

Arkansas. — *Worthen v. Badgett*, 32 Ark. 496.

Maryland. — *Legg v. Mayor*, 42 Md. 203.

Michigan. — *People v. Mahaney*, 13 Mich. 481.

Minnesota. — *Supervisors v. Keenan*, 2 Minn. 330.

Missouri. — *State v. Mead*, 71 Mo. 266.

New Hampshire. — Opinion of the Judges, 52 N. H. 622.

Ohio. — *Fordyce v. Godman*, 20 Ohio St. 1.

Pennsylvania. — *Southwark Bank v. Com.*, 26 Pa. St. 446.

South Carolina. — *State v. Platt*, 2 S. C. 150.

Vermont. — *In re Welman*, 20 Vt. 653.

West Virginia. — *Osburn v. Stealey*, 5 W. Va. 85.

See *Ritchie v. Richards*, 14 Utah 345, 47 Pac. 670, 678, and cases cited, and also *Field v. Clark*, 143 U. S. 649, where the authorities on both

of the state courts have decided this question in the negative.³⁸ The constitutions of most of the states require journals to be kept. By the courts holding affirmatively, this fact is used as an argument that the journals were intended by the framers of the constitution to be resorted to; while on the other hand, the opposing line of authorities hold that legislative journals are required to be kept merely for the purpose of insuring publicity to legislative proceedings.

II. PROOF OF STATUTES.

1. Foreign Statutes. — **A. SISTER STATES.** — The proper method of proving the statutes of another state is by offering in evidence an exemplified copy of the law under the great seal of the state, or the printed volume properly authenticated. Statutes have been enacted in most of the states providing for the mode of proof of foreign statutes.³⁹

It will be observed that the statutes of some of the states leave it within the discretion of the court to allow oral evidence or to require written evidence in addition to oral evidence as to the statute of a sister state. Under most of the state statutes parol evidence is not allowable, and so the courts generally hold that statutes of another state cannot be proved by oral evidence.⁴⁰ There are cases

sides of this question are cited by states in a note.

38. England. — The *Edinburgh R. Co. v. Wauchope*, 8 Cl. & F. 710.

Canada. — *London & Can. Loan Co. v. Rural Municipality*, 7 Manitoba 128.

United States. — *Field v. Clark*, 143 U. S. 649; *Harwood v. Wentworth*, 162 U. S. 547.

California. — *Sherman v. Story*, 30 Cal. 253.

Connecticut. — *Eld v. Gorham*, 20 Conn. 8.

Indiana. — *Evans v. Browne*, 30 Ind. 514.

Iowa. — *Duncombe v. Prindle*, 12 Iowa 1.

Louisiana. — *Louisiana State Lottery v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602.

Mississippi. — *Green v. Weller*, 32 Miss. 650.

Nevada. — *State v. Swift*, 10 Nev. 176.

New Jersey. — *State ex rel. Pangborn v. Young*, 32 N. J. L. 29.

New York. — *People v. Devlin*, 33 N. Y. 269.

See also *Field v. Clark*, 143 U. S. 649, where the authorities on both

sides of this question are cited by states in a note.

39. See "Foreign Laws," Vol. V, p. 821, note 47, and statutes cited by states.

Private Publication Held Not Admissible. — A book purporting to contain the statutes of a state, printed by a private printer, are not admissible as evidence of the statutes. *Bostwick v. Bogardus*, 2 Root (Conn.) 250; *Canfield v. Squire*, 2 Root (Conn.) 300, 1 Am. Dec. 71.

40. Alabama. — *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498.

Arkansas. — *McNeill v. Arnold*, 17 Ark. 154, 168.

Illinois. — *Merritt v. Merritt*, 20 Ill. 65.

Indiana. — *Comparet v. Jernegan*, 5 Blackf. 375.

Iowa. — *Lattourett v. Cook*, 1 Iowa 1, 63 Am. Dec. 428.

Louisiana. — *Isabella v. Pecot*, 2 La. Ann. 387.

Massachusetts. — *Raynham v. Canton*, 3 Pick. 293; *Legg v. Legg*, 8 Mass. 99.

Nebraska. — *Cook v. Chicago, R. I. & P. R. Co.*, 110 N. W. 718.

holding that the statutes of a sister state can be proved by parol.⁴¹

Burden of Proof.—In proving the statutes of a sister state the *onus* rests upon the party claiming rights under it.⁴²

B. FOREIGN COUNTRIES.—Statutes of a foreign country are proved by the printed volume purporting to contain such statutes and shown to have been published under the authority of that particular sovereignty.⁴³ As a rule, statutes of foreign countries like

New Hampshire.—*Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622.

New York.—*Kenny v. Clarkson*, 1 Johns. 385, 394, 3 Am. Dec. 336.

Pennsylvania.—*Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520.

Texas.—*Tryon v. Rankin*, 9 Tex. 595; *Martin v. Payne*, 11 Tex. 292.

41. Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59; *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161; *Danforth v. Reynolds*, 1 Vt. 259.

42. *Iowa.*—*Bean v. Briggs*, 4 Iowa 464.

Minnesota.—*Desnoyer v. McDonald*, 4 Minn. 515; *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118; *Hoyt v. McNeil*, 13 Minn. 390.

Missouri.—*Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147.

New York.—*Leavenworth v. Brockway*, 2 Hill 201; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Latham v. De Loiselle*, 3 App. Div. 525, 38 N. Y. Supp. 270; *Sullivan v. Babcock*, 63 How. Pr. 120.

43. *Lacon v. Higgins*, 3 Stark. 178, 14 E. C. L. 176; *Gardner v. Wright*, 15 L. T. N. S. 325; *Clarke v. Emery*, 1 F. & F. (Eng.) 446; *Jones v. Maffet*, 5 Serg. & R. (Pa.) 523; *Watson v. Walker*, 23 N. H. 471.

In *Ennis v. Smith*, 14 How. (U. S.) 400, the court said: "The question in this case is, has the Code Civil (of France), which was offered in evidence, a verification equivalent to the oath of an individual? Opinions and cases may be found in conflict with the cases cited, but, from a perusal of many of them, we find that they have been formed and decided without a careful discrimination between what should be the proof of foreign written and unwritten law; and when written laws, either singly or in statute books, or in codes, have been offered in evidence, without

a sufficient authentication that they were official publications, by the government which had legislated them; or when written laws have been offered, properly proved to be official, but which were equivocal in their terms, and in the judicial administration of which there have been, or may be, various interpretations, making it necessary to call in experts, as in cases of an unwritten law, to state how the law offered in evidence is administered in the courts of the country of which it is said to be the law. In England, until recently, it was not doubted that a foreign written law was admissible in evidence, when properly authenticated. But, in the *Sussex Peerage* case, 1844 (in 11 Clark & Fennelly, 115), several of the judges gave their opinions upon the subject. Lord Brougham, in that case, differed from Lord Campbell, and said that the Code Napoleon ought not to be received in an English court, and that before it could be received from the book, that an expert, acquainted with the text and the interpretation of it, must be called. And so it was ruled, afterwards, by Erle, Justice, in 1846, in *Cocks v. Purdy*, (2 C. & K. 269), in which fragments of a code were offered as evidence. But his Lordship's opinion, and the case of *Clark v. Purdy*, must be taken, subject to the facts upon which the point arose. In the first, it was, whether Doctor Wiseman, who had been called as a witness, could refer, whilst giving his evidence of the law of Rome on the subject of marriage, to a book, whilst it was lying by him. In the other case, fragments of laws were offered. This point had been settled by Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hagg. 54. Lord Brougham again expressed the same opinion, in his sketch of Lord Stowell, in the second series of the *statemen of the time of*

statutes of sister states are not provable by parol unless express provision is made therefor by statute in accordance with the doctrine that the best evidence attainable must be produced.⁴⁴ But the con-

George III, 76. But Lord Langdale, who also sat with the other judges, in the Sussex Peerage case, gave the rule, with its qualifications, in the case of the Earl of Nelson *v.* Lord Bridport, 8 Beav. 527. After stating the rule, coincidently with the opinion of Lord Brougham, he says: 'Such I conceive to be the general rule, but the case to which it is applicable admits of great variety. Though a knowledge of foreign laws is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness was required, in every case, justice might often stand still; and I am not disposed to say that there may not be cases in which the judge may not, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question; especially, if there should be a variance or want of clearness in the testimony.' Notwithstanding the differences in the cases cited, we think that the true rule in respect to the admissibility of foreign law in evidence, may be gathered from them. In our view it is this, that a foreign written law may be received, when it is found in a statute book, with proof that the book has been officially published by the government which made the law."

Statutes Not Properly Authenticated Are Not Admissible.—In *Church v. Hubbard*, 2 Cranch (U. S.) 187, 237, it was held that the edicts of Portugal offered in evidence would have been admissible if the copies of them had been sworn to be true copies by the American consul at Lisbon, instead of his having given his consular certificate that they were true copies, because it was not one of the functions of a consul to authenticate foreign laws in that way.

In *Ennis v. Smith*, 14 How. (U.

S.) 400, 427, the court, referring to *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 394, 3 Am. Dec. 336, said: "The Supreme Court of New York has held that an unofficial copy of the Commercial Code of France could not be proved by the French consul residing at New York, though he stated that it conformed to the official publications and that it was an exact copy of the laws furnished by the French government to its consul at New York. Had it been an official copy, and sworn to be such by the consul, it would have been received in evidence."

Proof of foreign laws is to a large extent regulated by statute. See "Foreign Laws," Vol. V, p. 821, note 47, and statutes cited by states.

44. United States.—*Seton v. Delaware Ins. Co.*, 2 Wash. C. C. 175, 21 Fed. Cas. No. 12,675; *Church v. Hubbard*, 2 Cranch 187; *Livingston v. Maryland Ins. Co.*, 6 Cranch 274; *Robinson v. Clifford*, 2 Wash. C. C. 1; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Consequa v. Willings*, 1 Pet. C. C. 225.

Maine.—*Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

Michigan.—*Kermott v. Ayer*, 11 Mich. 181; *Kopke v. People*, 43 Mich. 41, 4 N. W. 551.

Mississippi.—*Stewart v. Swanzy*, 1 Cushm. 502.

Missouri.—*Charlotte v. Chouteau*, 25 Mo. 465.

New York.—*Chanoine v. Fowler*, 3 Wend. 173; *Hill v. Packard*, 5 Wend. 375; *Lincoln v. Battelle*, 6 Wend. 475; *In re Roberts' Will*, 8 Paige Ch. 446; *Hynes v. McDermott*, 82 N. Y. 41, 52, 37 Am. Rep. 538.

Pennsylvania.—*Phillips v. Gregg*, 10 Watts 158, 169, 36 Am. Dec. 158.

Texas.—*Bryant v. Kelton*, 1 Tex. 434; *Martin v. Payne*, 11 Tex. 292.

Vermont.—*Woodbridge v. Austin*, 2 Tyler 364, 4 Am. Dec. 740; *Smith v. Potter*, 27 Vt. 304, 65 Am. Dec. 198.

In *Sussex Peerage*, 11 Cl. & F. (Eng.) 35, Lord Campbell said:

trary has been held.⁴⁵ Parol evidence has sometimes been held inadmissible on the ground that the witness testifying was not properly qualified as an expert.⁴⁶

2. Private Statutes. — A. AT COMMON LAW. — At common law, in order to prove a private statute it was necessary to introduce in evidence an exemplified or an examined copy.⁴⁷ A printed statute book could not be used to prove a private act.⁴⁸

B. UNDER MODERN STATUTES. — Statutes have been enacted in both England and the United States allowing copies of private acts, printed by authority, to be admitted in evidence in the courts of the jurisdiction where such acts were passed, thus obviating the inconvenience of the common law rule.⁴⁹

"The most authoritative form of getting at foreign law is to have the book which lays down the law. Thus we have had the Code Napoleon in our courts. It is better than to examine a witness whose memory may be defective, and who may have a bias influencing his mind upon the law."

45. England. — *De Bode's Case*, 8 Q. B. 208, 55 E. C. L. 208; *Vander Donckt v. Thellusson*, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812; *Sussex Peerage Case*, 11 Cl. & Fl. 85, 8 Eng. Reprint 1034.

United States. — *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325.

Louisiana. — *Rosine v. Bonnabel*, 5 Rob. 163.

Massachusetts. — *Frith v. Sprague*, 14 Mass. 455.

New Hampshire. — *Pickard v. Bailey*, 26 N. H. 152; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207.

New York. — *Mauri v. Heffernan*, 13 Johns. 58.

Rhode Island. — *Barrows v. Downs & Co.*, 9 R. I. 446, 11 Am. Rep. 283.

In *Barrows v. Downs*, 9 R. I. 446, a Spanish lawyer, who had practiced in Cuba, was allowed to testify as to the laws regulating special partnerships in Cuba, refreshing his memory from a copy of the Spanish code of commerce.

In *Pickard v. Bailey*, 26 N. H. 152, a copy of a power of attorney, executed before a notary in Canada, was offered in evidence and a witness was introduced who testified that he was not a lawyer, but for

several years had acted as a magistrate in Canada, and had long been extensively engaged in mercantile business there, and in such employment had become acquainted with the statutes in relation to notarial instruments; that it was part of the sworn duty of every notary not to suffer any original paper executed before him to be taken out of his custody, and that notarial instruments are received in all courts in Canada without further proof of the execution of the original. *Held*, that the witness was competent to testify to the statutes of Canada upon this point.

46. Phelps v. Town, 14 Mich. 374.

In *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49, a former policeman of New Jersey who had no more than a layman's knowledge of the statute law of that state was not allowed to testify as to such statutes.

47. 1 Greenl. Ev. § 480; Stark. Ev. 276.

48. Duncan v. Dubois, 3 Johns. Cas. (N. Y.) 125. It was intimated in this case that a statute book containing a private statute might be admitted as against the party for whose benefit the act was passed, since he must be presumed to be conversant with the contents of the statute and therefore could not be surprised by its introduction in evidence.

49. 13 and 14 Vict., c. 21, § 7. See the codes and statutes of the various states of the American union.

III. PRESUMPTIONS.

1. **As to Validity.** — A. ENACTMENT. — Where an act has been signed by the governor, deposited with the secretary of state and duly published as a law of the state, it will be presumed, in the absence of any showing to the contrary, that it was duly enrolled, and that the rules of the legislature were complied with in its passage.⁵⁰

B. CONSTITUTIONALITY. — Legislative acts are entitled to great respect, and are presumed to be constitutional. To destroy the presumption they must be shown manifestly to violate the organic law—the federal or state constitutions.⁵¹

2. **As to Foreign Statutes.** — A. STATUTES OF SISTER STATES. Some courts will act upon the presumption that the statutes of another state are the same as those of the *lex fori*.⁵² But others hold

50. *Pelt v. Payne*, 60 Ark. 637, 30 S. W. 426; *Chicot County v. Davies*, 40 Ark. 200.

51. *Alabama*. — *South and North Ala. R. Co. v. Morris*, 65 Ala. 197; *Sadler v. Langham*, 34 Ala. 311.

California. — *French v. Teschemaker*, 24 Cal. 518.

Georgia. — *Allison v. Thomas*, 44 Ga. 649.

Illinois. — *Larrison v. Peoria, Atl. & D. R. Co.*, 77 Ill. 11; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247.

Indiana. — *Brown v. Buzan*, 24 Ind. 194.

Iowa. — *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98.

Louisiana. — *City of New Orleans v. Robira*, 42 La. Ann. 1098, 8 So. 402, 11 L. R. A. 141.

Michigan. — *People v. McElroy*, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609.

New York. — *New York & O. M. R. Co. v. VanHorn*, 57 N. Y. 473; *People v. Rice*, 135 N. Y. 473, 31 N. E. 921; *People v. Westchester Board Co.*, 147 N. Y. 1, 41 N. E. 563.

West Virginia. — *Slack v. Jacob*, 8 W. Va. 612.

Wisconsin. — *Attorney-General v. Eau Claire*, 37 Wis. 400.

52. *California*. — *In re Dunphy's Estate*, 147 Cal. 95, 81 Pac. 315; *In re Harrington's Estate*, 140 Cal. 244, 73 Pac. 1000; *s.c.* 140 Cal. 294, 74 Pac. 136; *Bovard v. Dickenson*, 131 Cal. 162, 63 Pac. 162; *Cavallaro v. Texas & P. R. Co.*, 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

District of Columbia. — *Howard v. Chesapeake & O. R. Co.*, 11 App. D. C. 300.

Indian Territory. — *Wilhite v. Skelton*, 5 Ind. Ter. 621, 82 S. W. 932.

Iowa. — *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 100 N. W. 532, 104 Am. St. Rep. 367; *McMillan v. American Exp. Co.*, 123 Iowa 236, 98 N. W. 629; *Barringer v. Ryder*, 119 Iowa 121, 93 N. W. 56; *Bresser v. Saarman*, 112 Iowa 720, 84 N. W. 920; *Tolman v. Janson*, 106 Iowa 455, 76 N. W. 732; *Sieverts v. National Benev. Assn.*, 96 Iowa 710, 69 N. W. 671; *Peck v. Parchen*, 52 Iowa 46, 2 N. W. 597.

Kansas. — *Mutual Home & Sav. Assn. v. Worz*, 67 Kan. 506, 73 Pac. 116; *Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847; *Woolacott v. Case*, 63 Kan. 35, 64 Pac. 965; *Scott v. Beard*, 5 Kan. App. 560, 47 Pac. 986.

Kentucky. — *Chesapeake & N. R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427.

Louisiana. — *Sandidge v. Hunt*, 40 La. Ann. 766, 5 So. 55.

Michigan. — *Crane v. Hardy*, 1 Mich. 56.

Nebraska. — *Cook v. Chicago R. Co.*, 110 N. W. 718; *Staunichfield v. Jeutter*, 96 N. W. 642; *People's Bldg. & L. Assn. v. Backus*, 89 N. W. 315; *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Welton v. Atkinson*, 55 Neb. 674, 76 N. W. 473, 70 Am. St. Rep. 416.

New Jersey. — *Dittman v. Dis-*

to the contrary,⁵⁸ especially where there has been a radical change

tilling Co., 64 N. J. Eq. 537, 54 Atl. 570.

Oklahoma.—Betz v. Wilson, 17 Okla. 383, 87 Pac. 844; Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

Pennsylvania.—Peter Adams Paper Co. v. Cassard, 206 Pa. St. 179, 55 Atl. 949.

South Dakota.—Baird v. Vines, 18 S. D. 52, 99 N. W. 89; Windhorst v. Bergendahl, 111 N. W. 544.

Tennessee.—Star Clothing Mfg. Co. v. Nordeman, 100 S. W. 93; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124; Bagwell v. McTighe, 85 Tenn. 616, 4 S. W. 46.

Texas.—Southern Kan. R. Co. v. Burgess Co. (Tex. Civ. App.), 90 S. W. 189; Southern Kan. R. Co. v. Curtis (Tex. Civ. App.), 99 S. W. 566; Western Union Tel. Co. v. Sloss (Tex. Civ. App.), 100 S. W. 354; Blethen v. Bonner, 93 Tex. 141, 53 S. W. 1016; Caledonia Ins. Co. v. Wenar (Tex. Civ. App.), 34 S. W. 385; Texarkana & Ft. S. R. Co. v. Gray (Tex. Civ. App.), 65 S. W. 85.

Utah.—Dignan v. Nelson, 26 Utah 186, 72 Pac. 936; American Oak Leather Co. v. Union Bank, 9 Utah 87, 33 Pac. 246.

Washington.—Mauntle v. Dabney, 87 Pac. 122; Dormitzer v. German Sav. & L. Soc., 23 Wash. 132, 62 Pac. 862.

Wisconsin.—Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56; Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664; MacCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707.

In *Wisconsin* it was held that it would be presumed, in the absence of any evidence, that the statutes of Michigan were the same as those of the forum in relation to liens for supplies furnished in logging operations. Hyde v. German Nat. Bank, 115 Wis. 170, 91 N. W. 230.

In *Minnesota* it was held that it would be presumed that the statute of limitations in Wisconsin was the same as that of Minnesota. Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348. Although as to other statutory provisions of sister states the courts

of Minnesota have refused to entertain any presumption of similarity. See Myers v. Chicago, St. P., M. & O. R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579.

53. Alabama.—Downs v. Minchew, 30 Ala. 86.

Georgia.—Selma R. Co. v. Lacy, 43 Ga. 46. Compare Rooney v. Southern Bldg. & L. Assn., 119 Ga. 941, 47 S. E. 345.

Illinois.—Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; Jo Daviess County v. Staples, 108 Ill. App. 539.

Indiana.—Baltimore & O. S. W. R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396.

Maryland.—Dickey v. Pocomake City Nat. Bank, 89 Md. 280, 43 Atl. 33; State v. Pittsburgh & C. R. Co., 45 Md. 41.

Massachusetts.—Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456, 105 Am. St. Rep. 381, 67 L. R. A. 33; Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806; Murphy v. Collins, 121 Mass. 6.

Michigan.—Gordon v. Ward, 16 Mich. 360.

Minnesota.—Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955, 5 L. R. A. (N. S.) 938; Myers v. Chicago, St. P., M. & O. R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579; Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348.

Missouri.—Nenno v. Chicago, R. I. & P. R. Co., 105 Mo. App. 540, 80 S. W. 24; Eckles v. Missouri Pac. R. Co., 112 Mo. App. 240, 87 S. W. 99; State v. Clark, 178 Mo. 20, 76 S. W. 1007; Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894; Rohan Bros. Boiler Mfg. Co. v. Richmond, 14 Mo. App. 595.

New Hampshire.—Leach v. Pillsbury, 15 N. H. 137.

New York.—Robb v. Washington College, 185 N. Y. 485, 78 N. E. 359; Waters v. Spencer, 44 Misc. 15, 89 N. Y. Supp. 693; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Harris v. White, 81

from the common law,⁵⁴ or where a forfeiture would be worked in the local jurisdiction by assuming the existence of a statute in a foreign jurisdiction similar to that of the forum.⁵⁵

Statute Presumed To Continue in Force.—When the enactment or existence of a foreign statute is properly proved, it will ordinarily be presumed to remain in force without additional negative proof, showing that it has not been repealed or modified.⁵⁶

No Presumption of Repeal.—Where a statute of a sister state has been shown to be similar to that of the forum, the repeal of the statute of the local jurisdiction will not justify the presumption that the foreign statute has also been repealed; such repeal, if it exists, must be proved by the party interested to establish it.⁵⁷

B. STATUTES OF FOREIGN COUNTRIES.—Statutes of foreign countries proved to have once been in existence will be presumed to remain in force, in the absence of evidence showing their repeal or modification.⁵⁸

N. Y. 532; *Bradley v. Mutual Benefit L. Ins. Co.*, 3 Lans. 341; *Wright v. Delafield*, 23 Barb. 498.

North Carolina.—*Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

South Carolina.—*Rosemand v. Southern R. Co.*, 66 S. C. 91, 44 S. E. 574.

South Dakota.—*Meuer v. Chicago, M. & St. P. R. Co.*, 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774.

54. *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33.

55. *Westheimer & Sons v. Habinck*, 131 Iowa 643, 109 N. W. 189; *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337; *Allen-West Com. Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314; *Hull v. Augustine*, 23 Wis. 383.

56. *Bush v. Garner*, 73 Ala. 162; *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98, 43 S. E. 494; *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581; *State v. Cheek*, 35 N. C. (13 Ired. L.) 114; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

Presumption Cannot Run Retrospectively.—In *State v. Armstrong*, 4 Minn. 335, where the statutes of a

foreign state were attempted to be shown, the court said: "Statutes passed in 1852 raise no presumption of what the law was in 1845. The production of the statutes of another state may raise the presumption that the law has continued to be the same as at the date of their passage, until an amendment or repeal is shown, but it cannot run retrospectively."

57. *Ex parte Lafonta*, 2 Rob. (La.) 495.

58. *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286.

Upon the trial of a case in about the year 1890 a copy of the laws and statutes of the Grand Duchy of Baden, printed by governmental authority in the official printing office in 1832 was introduced in evidence. The supreme court was of the opinion that the statutes were not of sufficiently recent publication to warrant their consideration, but on appeal it was held that when proof of a law of a foreign state has been given from a publication made under authority of the government of that state, in the absence of equally good evidence that it has been changed or repealed, it is to be considered as the existing law. *In re Huss*, 126, N. Y. 537, 27 N. E. 784, 12 L. R. A. 620.

STEALING.—See Burglary; Embezzlement; False Pretenses; Kidnaping; Larceny, Receiving Stolen Goods; Robbery.

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I. WHAT STIPULATIONS MAY BE USED AS EVIDENCE.

1. By Whom Made. — A. BY THE ATTORNEY. — a. *Implied Authority.* — Under the rules governing the relation of attorney and client, an attorney has implied power and authority to bind his client by all acts and agreements necessary for the proper management and control of the case.¹ But in the absence of express au-

1. *United States.* — *Pierce v. Strickland*, 2 Story 292; *Bonnifield v. Thorp*, 71 Fed. 924.

Alabama. — *Rosenbaum v. State*, 33 Ala. 354.

California. — *Preston v. Hill*, 50 Cal. 43; *Hart v. Spalding*, 1 Cal. 213.

District of Columbia. — *Strong v. District of Columbia*, 3 McArthur, 499.

Georgia. — *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624.

Illinois. — *Wilson v. Spring*, 64 Ill.

14. *Indiana.* — *Whitestown Milling Co.*

v. Zahn, 9 Ind. App. 270, 36 N. E. 653.

Iowa. — *Ohlquest v. Farwell*, 71 Iowa 231, 32 N. W. 277.

Kansas. — *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394.

Kentucky. — *Talbot v. McGee*, 4 T. B. Mon. 375; *Smith v. Dixon*, 3 Met. 438.

Louisiana. — *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122.

Maine. — *Benson v. Carr*, 73 Me. 76; *Jenney v. Delesdernier*, 20 Me. 183.

Maryland. — *Kent v. Ricards*, 3 Md. Ch. 392.

thority, he has no right or power to deal with the subject-matter of the action.²

Limitations of the Implied Power.—It is not always easy to determine in particular cases whether stipulations come within the implied power or not, but the tendency of the courts is to construe the power of the attorney liberally.³

Massachusetts.—*Ma'honey v. County Comrs.*, 144 Mass. 459, 11 N. E. 689; *Moulton v. Bowker*, 115 Mass. 36.

Mississippi.—*Levy v. Brown*, 56 Miss. 83.

Missouri.—*Wonderly v. Martin*, 69 Mo. App. 84.

Nebraska.—*State Bank v. Green*, 8 Neb. 297, 307.

New Hampshire.—*Alton v. Gilman*, 2 N. H. 520; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468.

New Jersey.—*Butler v. Kitchen*, 41 N. J. L. 229.

New York.—*Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Beardsley v. Pope*, 88 Hun 560, 34 N. Y. Supp. 846; *Cox v. New York Cent. & H. R. Co.*, 63 N. Y. 414.

North Carolina.—*Covington v. Rockingham*, 93 N. C. 134.

Ohio.—*Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256.

Pennsylvania.—*Truby v. Seybert*, 12 Pa. St. 101.

Rhode Island.—*Wilbur v. Wilbur*, 18 R. I. 654, 30 Atl. 455.

South Carolina.—*Daniel v. Ray*, 1 Hill 32.

Vermont.—*Vail v. Conant*, 15 Vt. 314.

Washington.—*Haynes v. Tacoma R. Co.*, 7 Wash. 211, 34 Pac. 922.

"An attorney, in all matters relating to the progress and trial of the cause may bind his client. And so admissions made by the attorney for the purpose of alleviating the stringency of some rule of practice or of dispensing with the formal proof of some fact at the trial, are binding on the client." *Nichols v. Jones*, 32 Mo. App. 657.

"As a general rule, whatever a party can properly do, and which is necessary for the proper commencement of an action and the prosecution of it to its legitimate results, and is part and parcel of the proceeding in an action, an attorney, em-

ployed to conduct the action, is also authorized by his employment to do." *White v. Hildreth*, 13 N. H. 104.

Out of Court.—The acts may be done out of court as well as in court. *Lewis v. Sumner*, 13 Met. (Mass.) 269; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382.

The attorney must be attorney of record in the case. *Earhart v. United States*, 30 Ct. Cl. 343. See *Butler v. Kitchen*, 41 N. J. L. 229.

2. *Bonnifield v. Thorp*, 71 Fed. 924; *Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256. And see *infra*, notes 10, 11, 12, under I, 1, B.

3. *Stone v. Bank of Commerce*, 174 U. S. 412; *Security Loan & Trust Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257; *Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969; *Levy v. Brown*, 56 Miss. 83; *North Missouri R. Co. v. Burton*, 30 Mo. 372; *Read v. French*, 28 N. Y. 285.

"As a general rule, whatever conditions the court, in the progress of the action may lawfully impose in granting an application made in the usual course of the litigation in behalf of one of the parties, the attorney by whom the application is made may consent to them to secure the advantage sought, and may bind his client thereby. It pertains to the procedure in the action and it is a just implication that the authority of the attorney extends to the management of the cause in all the exigencies that arise during its progress." *Cox v. New York Cent. & H. R. Co.*, 63 N. Y. 414, holding that a stipulation that a cause of action should not abate by death of the plaintiff, was within the implied power of the attorney for the defendant.

Construed Liberally.—That courts construe the implied power of an attorney under retainer liberally, on account of the questions that are likely to arise in the progress of the action that demand the exercise of

There Must Be Pending Litigation. — A mere general retainer will not authorize an attorney to act in an action. He must have been retained for the particular action or in contemplation of it.⁴

Presumption of Authority. — In all cases there is a presumption that an attorney's appearance and acts in court are pursuant to authority regularly given by the client.⁵

discretion upon the part of an attorney when there is no chance to consult with the client, see *Wieland v. White*, 109 Mass. 392; *Paxton v. Cobb*, 2 La. 137.

Statutes. — In some jurisdictions, statutes regulating the making of stipulations are to be considered in determining the extent of this implied power. See *Ex parte Hayes*, 92 Ala. 120, 9 So. 156; *Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262; *Barnard v. Daggett*, 68 Ind. 305; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *McLeran v. McNamara*, 55 Cal. 508.

4. *Wagstaff v. Wilson*, 4 Barn & Ad. 339, 24 E. C. L. 70; *Marshall v. Cliff*, 4 Camp. (Eng.) 133; *Stone v. Bank of Commerce*, 174 U. S. 412; *Lord v. Bigelow*, 124 Mass. 185; *Starr v. Hall*, 87 N. C. 381; *Haynes v. Tacoma*, O. & G. H. R. Co., 7 Wash. 211, 34 Pac. 922. See *Haas v. Gaddis*, 1 Wash. 89, 23 Pac. 1010.

"No attorney by virtue merely of a general retainer can have authority to bind his client to any particular action." *Probate Judge v. Abbott*, 9 Metc. (Mass.) 281.

Anticipated Suit. — "An attorney may be employed in contemplation of a suit to be brought, and when thus employed his client would be bound by his stipulations in relation to the same, to the same extent as if he had stipulated after the suit was instituted." *Hefferman v. Bert*, 7 Iowa 320, 71 Am. Dec. 445.

General Counsel. — The general attorney of a railroad has power by virtue of his position, to stipulate in an action against the company for damages for an injury to a passenger. *Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29.

5. "There is no principle of practice better settled than that an appearance in court by an attorney for a client carries with it the presump-

tion of authority to appear and act." *Bonnifield v. Thorp*, 71 Fed. 924.

United States. — *Osborn v. Bank*, 9 Wheat. 739; *Hill v. Mendenhall*, 21 Wall. 453; *Alexandria Canal Co. v. Swann*, 5 How. 83.

California. — *Garrison v. McGowan*, 48 Cal. 592.

Georgia. — *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624.

Kansas. — *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61.

Louisiana. — *Taylor v. New Orleans*, 41 La. Ann. 891, 6 So. 723; *Dangerfield v. Thruston*, 8 Mart. N. S. 232.

Maryland. — *Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18; *Kent v. Richards*, 3 Md. Ch. 392.

Massachusetts. — *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137; *Lewis v. Sumner*, 13 Met. 269.

Michigan. — *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481.

Nebraska. — *Vorce v. Page*, 28 Neb. 294, 44 N. W. 452.

New Hampshire. — *Bank v. Fellows*, 28 N. H. 302.

New Mexico. — *Coler v. Sante Fe County*, 6 N. M. 88, 27 Pac. 619.

New York. — *Insurance Co. v. Oakley*, 9 Paige 496.

Oregon. — *Carter v. Koshland*, 12 Or. 492, 8 Pac. 556.

Burden of Proof. — The burden of proof of want of authority is on the party who alleges it. *Valle v. Picton*, 91 Mo. 207, 3 S. W. 860.

Stipulations Contrary to Instructions. — On account of this presumption, a stipulation of the attorney within his implied authority, will be enforced although contrary to the express instructions of his client. *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641; *Lewis v. Gunn*, 63 Ga. 542; *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133; *State Bank v. Green*, 8 Neb. 297, 307; *Anonymous*, 1 Wend. (N. Y.) 108; *Herbert v. Lawrence*,

Delegation of Authority. — An attorney may act through another person,⁸ though he cannot delegate his authority.⁷

After the Termination of the Authority. — No stipulation made by the attorney after the termination of his authority, no matter what the occasion of such termination, is binding upon the client.⁸

b. *Exclusive Authority.* — The power of the attorney over the management of the case is complete and exclusive and any stipulations made by the client in relation to its control or management without the express consent of his attorney will, if the attorney objects, be disregarded by the court.⁹

18 N. Y. Supp. 95, 21 N. Y. Civ. Proc. 336; *Pierce v. Perkins*, 17 N. C. (2 Dev. Ch.) 250.

"But When the Adverse Party as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act on the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof." *Knowlton v. Mackenzie*, 110 Cal. 183, 42 Pac. 580.

6. *Mahoney v. County Com.*, 144 Mass. 459, 17 N. E. 689; *Kingston Bank v. Roosa*, 2 How. Pr. (N. Y.) 8.

7. *Wright v. Evans*, 53 Ala. 103; *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

8. *Goben v. Goldsberry*, 72 Ind. 44; *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66; *Quinn v. Lloyd*, 36 How. Pr. (N. Y.) 378.

9. *United States*. — *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338; *Earhart v. United States*, 30 Ct. Cl. 343.

California. — *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809; *Commissioners v. Younger*, 29 Cal. 747; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797.

Illinois. — *Wilson v. Spring*, 64 Ill. 14.

Massachusetts. — *Moulton v. Bowker*, 115 Mass. 36.

Michigan. — *Jackson v. Cole*, 81 Mich. 440, 45 N. W. 826; *People v. Pratt*, 15 Mich. 184.

Missouri. — *State v. Hawkins*, 28 Mo. 366.

New Hampshire. — *Edgerton v. Brackett*, 11 N. H. 218.

New York. — *Anonymous*, 1 Wend. 108; *Webb v. Dill*, 18 Abb. Pr. 264;

Read v. French, 28 N. Y. 285; *Ulster County v. Brodhead*, 44 How. Pr. 426.

South Dakota. — *Frederick Mill Co. v. Frederick Farmers Alliance Co.*, 106 N. W. 298.

"All the proceedings in court to enforce the remedy, to bring the claim to hearing, trial, determination, judgment, and execution are within the exclusive control of the attorney. All acts, in or out of court, necessary for the management of the suit and which affect the remedy only and not the cause of action, are to be performed by the attorney." *Bonnifield v. Thorp*, 71 Fed. 924.

"The stipulation signed by the plaintiff in person goes for nothing. He had at the time an attorney of record who as such had the exclusive control and management of the case." *Mott v. Foster*, 45 Cal. 72.

But If No Objection is made by the attorney, the court will ordinarily enforce such a stipulation; so in *McBratney v. Rome, Watertown, & O. R. Co.*, 87 N. Y. 467, a plaintiff who stipulated for a discontinuance was held to be precluded from later objecting that, having appeared by an attorney, the attorney alone was authorized to make such a stipulation. The decisions in a multitude of cases have differentiated the stipulations which an attorney may make from those which should be made by the party himself as a result of these decisions and the principles they have established, it is well settled that an attorney may stipulate:

Concerning the Evidence. — *England.* — *Young v. Wright*, 1 Camp. 140; *Doe v. Bird*, 7 Car. & P. 6, 32 E. C. L. 415.

Alabama. — *Starke v. Kenan*, 11

B. BY A PARTY.—Although a party to an action appears by an attorney, he retains exclusive control of the subject-matter of the

Ala. 818; *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600.

Arkansas.—*Flynn v. State*, 43 Ark. 289.

California.—*Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227.

Illinois.—*Wilson v. Spring*, 64 Ill. 14; *Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242.

Indiana.—*Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470; *Hays v. Hynds*, 28 Ind. 531.

Kansas.—*Central Branch Union Pac. R. v. Shoup*, 28 Kan. 394.

Kentucky.—*Talbot v. McGee*, 4 T. B. Mon. 375.

Maryland.—*Farmer's Bank v. Sprigg*, 11 Md. 389.

Massachusetts.—*Lewis v. Sumner*, 13 Met. 269.

Missouri.—*Nichols v. Jones*, 32 Mo. App. 657; *Moling v. Barnard*, 65 Mo. App. 600.

New Hampshire.—*Page v. Brewsters*, 54 N. H. 184; *Alton v. Gilmanton*, 2 N. H. 520.

New York.—*Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537.

Ohio.—*Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256.

West Virginia.—*McGinnis v. Curry*, 13 W. Va. 29, 49.

As to the Pleadings.—*United States.*—*Bonnifield v. Thorp*, 71 Fed. 924.

California.—*Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809.

Minnesota.—*Bingham v. Board of Supervisors*, 6 Minn. 136; *Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262.

New Hampshire.—*Hanson v. Hoitt*, 14 N. H. 56.

New York.—*Milbank v. Jones*, 60 N. Y. Super Ct. 259, 17 N. Y. Supp. 464; *Van Zandt v. Van Zandt*, 23 Abb. N. C. 328, 10 N. Y. Supp. 200.

North Carolina.—*Greenlee v. McDowell*, 39 N. C. (4 Ired. Eq.) 481.

As to the Conduct of the Trial.
Windmiller v. Chapman, 38 Ill. App. 276; *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270, 36 N. E. 653; *McCann v. McLennan*, 3 Neb. 25; *Hanson v. Hoitt*, 14 N. H. 56; *Wilson v. Young*, 9 Pa. St. 101; *Vail v. Conant*, 15 Vt. 314.

As to Costs.—*Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227; *People v. Westchester Co.*, 15 N. Y. Supp. 580; *Matter of Maxwell*, 66 Hun 151, 21 N. Y. Supp. 209.

As to the Manner of Enforcing a Judgment.—*Read v. French*, 28 N. Y. 285; *Wieland v. White*, 109 Mass. 392; *Branch v. Walker*, 92 N. C. 87.

Waiving the Right to Appeal.
Ball v. State Bank, 8 Ala. 590, 599; *Matter of Heath*, 83 Iowa 215, 48 N. W. 1037; *McDonough v. Daly*, 3 Mo. App. 606; *People v. Auburn*, 85 Hun 601, 33 N. Y. Supp. 165.

As to the Record on Appeal.
American Emigrant Co. v. Lang, 105 Iowa 194, 74 N. W. 940.

As to the Form of Judgment.
United States.—*Farmer's Trust Bank v. Ketchum*, 4 McLean 120.

Alabama.—*Charles v. Miller*, 36 Ala. 141.

Arkansas.—*Wood v. Wood*, 59 Ark. 441, 27 S. W. 641.

California.—*Preston v. Hill*, 50 Cal. 43; *Sampson v. Ohleyer*, 22 Cal. 200.

Georgia.—*Wade v. Powell*, 31 Ga. 1.

Illinois.—See *Wadhams v. Gay*, 73 Ill. 415, 426.

Indiana.—*Thompson v. Pershing*, 86 Ind. 303; *Indianapolis R. Co. v. Sands*, 133 Ind. 433, 32 N. E. 722.

Iowa.—*Ohlquest v. Farwell*, 71 Iowa 231, 32 N. W. 277.

Kentucky.—*Story v. Hawkins*, 8 Dana 12.

Massachusetts.—*Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N. E. 261.

Missouri.—*Tuppery v. Hertung*, 46 Mo. 135; *Barlow v. Steel*, 65 Mo. 611.

Montana.—*Jubilee Placer Min. Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716.

New York.—*Palen v. Starr*, 7 Hun 422.

Pennsylvania.—*North Whitehall Twp. v. Keller*, 100 Pa. St. 105.

Vermont.—*Sawyer v. Child*, 68 Vt. 360, 35 Atl. 84.

action and he may stipulate as to its compromise, dismissal, or re-

West Virginia.—McGinnis v. Curry, 13 W. Va. 29, 49.

To Submit to Arbitration or Reference.—*United States*.—Alexandria Canal Co. v. Swann, 5 How. 83; Holker v. Parker, 7 Cranch 449.

Alabama.—Beverly v. Stephens, 17 Ala. 701; Wright v. Evans, 53 Ala. 103.

Georgia.—Wade v. Powell, 31 Ga. 1.

Indiana.—Kelley v. Adams, 120 Ind. 340, 22 N. E. 317.

Kentucky.—Holbert v. Montgomery, 5 Dana 11; Talbot v. McGee, 4 T. B. Mon. 375.

Massachusetts.—Buckland v. Conway, 16 Mass. 396; Everett v. Charlestown, 12 Allen 93.

Nebraska.—German-American Ins. Co. v. Buckstaff, 38 Neb. 135, 56 N. W. 692.

New Hampshire.—Brooks v. New Durham, 55 N. H. 559; Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468.

New York.—Tilton v. United States Life Ins. Co., 8 Daly 84; People v. New York, 11 Abb. Pr. 66; Tiffany v. Lord, 40 How. Pr. 481.

North Carolina.—Pierce v. Perkins, 17 N. C. (2 Dev. Eq.) 250; Morris v. Grier, 76 N. C. 410; Stevenson v. Felton, 99 N. C. 58, 5 S. E. 399.

Pennsylvania.—Sargeant v. Clark, 108 Pa. St. 588; Willis v. Willis, 12 Pa. St. 159.

South Carolina.—Bollmann v. Bollmann, 6 Rich. 29; Smith v. Bossard, 2 McCord Eq. 406; *Ex parte* Jones, 47 S. C. 393, 25 S. E. 285.

West Virginia.—McGinnis v. Curry, 13 W. Va. 29.

For a Continuance.—*United States*.—Nightingale v. Oregon Cent. R. Co., 2 Sawy. 338.

Alabama.—Norman v. Burns, 67 Ala. 248.

District of Columbia.—Strong v. District of Columbia, 3 MacArthur 499.

Iowa.—Council Bluffs Co. v. Jennings, 81 Iowa 470, 46 N. W. 1006.

Maine.—Phillips v. Rounds, 33 Me. 357.

Massachusetts.—Wieland v. White, 109 Mass. 392.

Texas.—Field v. Fowler, 62 Tex. 65.

Virginia.—Kibler v. Com., 94 Va. 804, 26 S. E. 858.

That an Action Shall Not Abate.—*McGuire v. New York Cent. & H. R. Co.*, 6 Daly (N. Y.) 70; *Cox v. New York Cent. & H. R. Co.*, 63 N. Y. 414; *Mundt v. Glokner*, 20 Misc. 63, 44 N. Y. Supp. 430; *Thompson v. Ft. Worth R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29.

To Dismiss an Action.—*Ball v. State Bank*, 8 Ala. 590, 599; *McLeran v. McNamara*, 55 Cal. 508; *Monson v. Hawley*, 30 Conn. 51; *Paxton v. Cobb*, 2 La. 137; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382; *Gaillard v. Smart*, 6 Cow. (N. Y.) 383; *Vail v. Conant*, 15 Vt. 314.

To Abide the Judgment in Another Action.—*United States*.—*Stone v. Bank of Commerce*, 174 U. S. 412.

Arkansas.—*State v. Bradley*, 45 Ark. 31.

Iowa.—*Lockwood v. Black Hawk County*, 34 Iowa 235.

Missouri.—*North Missouri R. Co. v. Stephens*, 36 Mo. 150; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382; *Scarritt Furn. Co. v. Moser*, 48 Mo. App. 543; *Schaeffer v. Siegel*, 9 Mo. App. 594.

New York.—*People v. Auburn*, 85 Hun 601, 33 N. Y. Supp. 165.

But Not to Compromise the Action.—*United States*.—*Holker v. Parker*, 7 Cranch 436.

Alabama.—*Robinson v. Murphy*, 69 Ala. 543.

Arkansas.—*Saleski v. Boyd*, 32 Ark. 74.

California.—*Preston v. Hill*, 50 Cal. 43.

Colorado.—*Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568.

Illinois.—*Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513; *Wadhams v. Gay*, 73 Ill. 415, 426.

Iowa.—*Ohlquest v. Farwell*, 71 Iowa 231, 32 N. W. 277; *Potter v. Parsons*, 14 Iowa 286.

Kansas.—*Marbourg v. Smith*, 11 Kan. 554.

Massachusetts.—*Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N.

lease, without his attorney's consent or even against his wishes.¹⁰ A stipulation by the attorney beyond his implied powers, may be ratified by the party;¹¹ and if a party has no attorney of record, he

E. 261; *New York N. H. & H. R. Co. v. Martin*, 158 Mass. 313, 33 N. E. 578.

Missouri.—*Willard v. Siegel Gas Co.*, 47 Mo. App. 1.

New York.—*People v. New York*, 11 Abb. Pr. 66; *Beers v. Hendrickson*, 45 N. Y. 665.

Pennsylvania.—*North Whitehall Twp. v. Keller*, 100 Pa. St. 105; *Mackey v. Adair*, 99 Pa. St. 143.

Vermont.—*Granger v. Batchelder*, 54 Vt. 248; *Vail v. Conant*, 15 Vt. 314.

West Virginia.—*Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

But the English Cases Are Contra. *Butler v. Knight*, L. R. 2 Ex. 109, 36 L. J. Ex. 66, 15 L. T. 621; *Swinfen v. Swinfen*, 37 Eng. L. & Eq. 433, 443.

10. *United States.*—*Holker v. Parker*, 7 Cranch 436.

Colorado.—*Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568; *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227.

Florida.—*Mitchell v. Cotten*, 3 Fla. 134.

Indiana.—*Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441.

Iowa.—*Martin v. Capital Ins. Co.*, 85 Iowa 643, 52 N. W. 534.

Kansas.—*Herriman v. Shoman*, 24 Kan. 387.

Massachusetts.—*Moulton v. Bowker*, 115 Mass. 36.

Michigan.—*Wright v. Hake*, 33 Mich. 525.

Mississippi.—*Mosely v. Jamison*, 71 Miss. 456, 14 So. 529.

Nebraska.—*Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201.

New Jersey.—*Dickerson v. Hodges*, 43 N. J. Eq. 45, 10 Atl. 111; *Howe v. Lawrence*, 22 N. J. L. 99.

New York.—*Bates v. Voorhees*, 20 N. Y. 525; *Herzfeld v. Strauss*, 24 App. Div. 93, 48 N. Y. Supp. 1016; *Pilger v. Gou*, 21 How. Pr. 155; *Coughlin v. New York Cent. & H. R. R. Co.* 71 N. Y. 443; *Carstens v. Barnstorff*, 11 Abb. Pr. N. S.

442; *Levis v. Burke*, 51 Hun 71, 3 N. Y. Supp. 386.

Pennsylvania.—*North Whitehall Twp. v. Keller*, 100 Pa. St. 105.

Texas.—*Peters v. Lawson*, 66 Tex. 336, 17 S. W. 734.

Washington.—*South Bend Land Co. v. Denio*, 7 Wash. 303, 35 Pac. 64; *Hood v. California Wine Co.*, 4 Wash. 88, 29 Pac. 768.

West Virginia.—*Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

Wisconsin.—*Sullivan v. Bruhling*, 70 Wis. 388, 36 N. W. 23; *Dolloff v. Curran*, 59 Wis. 332, 18 N. W. 266.

"The line of demarcation between the respective rights and powers of an attorney and client is clearly defined. The cause of action, the claim or demand sued upon, the subject-matter of the litigation, are within the exclusive control of the client, and the attorney may not impair, compromise, settle, surrender, or destroy them without the client's consent." *Bonnifield v. Thorp*, 71 Fed. 924.

Express Authority.—A stipulation made by the attorney on the basis of express authority may be set aside, if there was, in fact, no such express authority given. *Schaefer v. Schoenborn*, 94 Minn. 490, 103 N. W. 501.

11. *United States.*—*Mayer v. Foulkrod*, 4 Wash. 503.

Georgia.—*Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430.

Illinois.—*Connett v. Chicago*, 114 Ill. 233, 29 N. E. 280; *Leahy v. Stone*, 115 Ill. App. 138; *Selz Schwab & Co. v. Guthman*, 62 Ill. App. 624.

Iowa.—*Hefferman v. Burt*, 7 Iowa 320, 71 Am. Dec. 445.

Kansas.—*Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969.

New York.—*Banks v. American Tract Society*, 4 Sand. Ch. 438; *Smith v. Barnes*, 9 Misc. 368, 29 N. Y. Supp. 692.

South Dakota.—*Frederick Mill Co. v. Frederick Farmers' Alliance Co.*, 106 N. W. 298.

Washington.—*Denney v. Parker*, 10 Wash. 218, 38 Pac. 1018.

has himself power to stipulate as to the conduct of the action.¹²

C. SPECIAL CASES. — a. *By Counsel*. — A counsel can bind a party by a stipulation relating to matters arising at the trial or hearing, but he has nothing to do with the general conduct of the case; and any stipulation made by him which affects its control or management will be disregarded by the court.¹³

b. *By a Former Attorney*. — The fact that the attorney who made the stipulation has retired from the case or has been superseded does not affect the stipulation, which remains as binding and effective as when originally made.¹⁴

c. *Persons Acting in a Representative Capacity*. — Courts scrutinize closely the stipulations of persons acting in a representative capacity, such as guardians of infants, executors and administrators of estates, and receivers for insolvents; and while stipulations made by them for facilitating trial will be upheld, the court will not rec-

12. *Estate of Arguello*, 50 Cal. 308.

See the following cases holding that a party may stipulate:

To Dismiss an Action. — *Mosely v. Jamison*, 71 Miss. 456, 14 So. 529; *Pilger v. Gou*, 21 How. Pr. (N. Y.) 155; *Sullivan v. Bruhling*, 70 Wis. 388, 36 N. W. 23.

But See Contra. — *Commissioners v. Younger*, 29 Cal. 747; *Jackson v. Cole*, 81 Mich. 440, 45 N. W. 826.

For a Compromise. — *Chapman v. Coates*, 26 Iowa 288; *Albee v. Hayden*, 25 Minn. 267; *Kinsley v. Norris*, 62 N. H. 652; *Coughlin v. New York Cent. & H. R. R. Co.*, 71 N. Y. 443; *Montgomery v. Ellis*, 6 How. Pr. (N. Y.) 326; *Sullivan v. Bruhling*, 70 Wis. 388, 36 N. W. 23.

To Submit to Arbitration or Reference. — *Connett v. Chicago*, 114 Ill. 233, 29 N. E. 280; *Ives v. Ashelby*, 26 Ill. App. 244; *Hearne v. Brown*, 67 Me. 156; *Wells v. Lane*, 15 Wend. (N. Y.) 99; *Rogers v. Playford*, 12 Pa. St. 181; *Horton v. Stanley*, 1 Miles (Pa.) 418.

13. "An attorney who appears only as counsel in a case is not authorized to sign a stipulation for a continuance, even if he be an attorney and counselor of the court in which the suit is pending. The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney." *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. (U. S.) 340.

Farmers' Trust Bank v. Ketchum, 4 McLean (U. S.) 120; *Wadsworth v. First Nat. Bank*, 124 Ala. 440, 27 So. 460; *Baron v. Cohen*, 62 How. Pr. (N. Y.) 367; *Cox v. New York Cent. & H. R. R. Co.*, 63 N. Y. 414; *Devlin v. New York*, 15 Abb. Pr. N. S. (N. Y.) 31; *Walker v. Rogan*, 1 Wis. 597.

14. *England*. — *Young v. Wright*, 1 Camp. 140; *Doe v. Bird*, 7 Car. & P. 6, 32 E. C. L. 415; *Elton v. Larkins*, 1 Mo. & R. 196.

United States. — *Prout v. Starr*, 188 U. S. 537; *In re Reed*, 117 Fed. 358.

Alabama. — *Saltmarsh v. Bower*, 34 Ala. 613.

California. — *Walker v. Felt*, 54 Cal. 386.

Iowa. — *Council Bluffs Loan & Trust Co. v. Jennings*, 81 Iowa 470, 46 N. W. 1006; *Lockwood v. Black Hawk County*, 34 Iowa 235.

Minnesota. — *Bingham v. Board of Supervisors*, 6 Minn. 136.

Mississippi. — *Saffold v. Horne*, 72 Miss. 470, 18 So. 433.

Missouri. — *McDonough v. Daly*, 3 Mo. App. 606.

New York. — *Van Zandt v. Van Zandt*, 23 Abb. N. C. 328, 10 N. Y. Supp. 200; *People v. Stephens*, 52 N. Y. 306.

Rhode Island. — *Wilbur v. Wilbur*, 18 R. I. 654, 30 Atl. 455.

South Carolina. — *Bollmann v. Bollmann*, 6 Rich. 29.

Texas. — *Field v. Fowler*, 62 Tex. 65.

ognize any agreement which tends to impair the substantial rights of the beneficiary.¹⁵

d. *In Criminal Cases*.—Stipulations may be made in criminal cases, even in capital cases, by the accused person or his attorney, and they have the same effect as in civil cases.¹⁶

e. *By the Attorney-General*.—The state is bound by the admissions and agreements of the attorney-general in an action, to the same extent and in the same manner as a private individual would be bound.¹⁷

2. How Made or Proved.—A. SHOULD BE IN WRITING.—In nearly every jurisdiction, the method of making or evidencing stipulations is regulated by statute or rule of court.¹⁸ The common requirement is that every agreement and stipulation be in writing,

"An attorney who is substituted for another in a cause has no greater rights than his predecessor, nor is his client's position in any way changed by such substitution. He steps into the place of his predecessor and stands, with reference to the case, and to the other party, precisely as did his predecessor and can repudiate or be relieved from an agreement made by him only to the same extent and in the same manner as could his predecessor." Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

15. Guardians.—*England*. Wrottesley v. Bendish, 3 P. Wms. 235, 24 Eng. Reprint 1042; Leigh v. Wood, 2 Ventr. 72; Webb v. Smith, 1 Car. & P. 337.

United States.—Kingsbury v. Buckner, 134 U. S. 650.

Arkansas.—McCloy v. Arnett, 47 Ark. 445, 2 S. W. 71.

Colorado.—Rarick v. Vandevier, 11 Colo. App. 116, 52 Pac. 743.

Illinois.—Anderson v. Anderson, 191 Ill. 100, 60 N. E. 810.

Minnesota.—Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933.

Missouri.—McClure v. Farthing, 51 Mo. 109.

North Carolina.—White v. Morris, 107 N. C. 92, 12 S. E. 80.

Texas.—Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426.

Stipulation by a Receiver.—A receiver has power to make only such stipulations as are beneficial to the estate. Van Dyck v. McQuade, 85 N. Y. 616.

16. Alabama.—Rosenbaum v. State, 33 Ala. 354.

Arkansas.—Martin v. State, 40 Ark. 364.

Connecticut.—State v. Tuller, 34 Conn. 280.

Florida.—Steel v. State, 33 Fla. 354, 14 So. 841.

Indiana.—Voght v. State, 145 Ind. 12, 43 N. E. 1049.

Massachusetts.—Com. v. Young, 165 Mass. 396, 43 N. E. 118.

Missouri.—State v. Taylor, 132 Mo. 282, 33 S. W. 1145.

Nebraska.—Palmer v. People, 4 Neb. 68.

New York.—People v. Rathbun, 21 Wend. 509.

Oregon.—Ex parte Kindt, 32 Or. 474, 52 Pac. 187.

Pennsylvania.—Com. v. McMurray, 198 Pa. St. 51, 47 Atl. 952.

Virginia.—Kibler v. Com., 94 Va. 804, 26 S. E. 858.

17. Campbell v. United States, 19 Ct. Cl. 426; Esmond v. People, 18 Ill. App. 114; State v. Fleming, 13 Iowa 443; People v. Stephens, 52 N. Y. 306; Oregon v. Davis, 42 Or. 34, 71 Pac. 68; Camron v. State, 32 Tex. Crim. 180, 22 S. W. 682.

18. The following cases cite and construe their respective statutes or rules:

United States.—Evans v. Bank, 19 Fed. 676; Lee v. Simpson, 42 Fed. 434.

Alabama.—Prestwood v. Watson, 111 Ala. 604, 20 So. 600; Ober & Sons Co. v. Thomason Grocery Co., 138 Ala. 217, 35 So. 127.

California.—Peralta v. Mariea, 3 Cal. 185; Borkheim v. North British Ins. Co., 38 Cal. 623; Merritt v. Wil-

signed by the party against whom it is alleged or his attorney, and filed with the clerk, or made in open court and entered on the minutes

cox, 52 Cal. 238; Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529.

Colorado.—La Junta Canal Co. *v.* Hess, 25 Colo. 513, 55 Pac. 729; Morse *v.* Budlong, 5 Colo. App., 147, 38 Pac. 59.

Connecticut.—Woodruff *v.* Fel-lows, 35 Conn. 105.

Florida.—Palatka & I. R. Co. *v.* State, 23 Fla. 546, 3 So. 158.

Georgia.—Huff *v.* State, 29 Ga. 424; Lee *v.* Atlanta St. R. Co., 91 Ga. 215, 18 S. E. 136; Henderson *v.* Merritt, 38 Ga. 232; Caldwell *v.* McWilliams, 65 Ga. 99.

Indiana.—American Bronze Co. *v.* Clark, 123 Ind. 230, 23 N. E. 855; Goben *v.* Goldsberry, 72 Ind. 44; Barnes *v.* Smith, 34 Ind. 516; Welch *v.* Bennett, 39 Ind. 136.

Iowa.—State *v.* Stewart, 74 Iowa 336, 37 N. W. 400; Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373; Council Bluffs L. and T. Co. *v.* Jennings, 81 Iowa 470, 46 N. W. 1006; Taylor *v.* Chicago, M. & St. P. R. Co., 80 Iowa 431, 46 N. W. 64; Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327; Hardin *v.* Iowa R. Co., 78 Iowa 726, 43 N. W. 543.

Kansas.—Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315.

Louisiana.—Johnston *v.* Yale, 19 La. Ann. 212.

Maine.—Smith *v.* Wadleigh, 17 Me. 353.

Massachusetts.—Nye *v.* Old Colony R. Co., 124 Mass. 241; Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396.

Michigan.—Suydam *v.* Dequindre, Walk. Ch. 23; Sudworth *v.* Morton, 137 Mich. 575, 100 N. W. 769.

Minnesota.—Wells *v.* Penfield, 70 Minn. 66, 72 N. W. 816.

Missouri.—Allmeroth *v.* Bertram Cady Co., 102 Mo. App. 156, 76 S. W. 701.

Montana.—Beach *v.* Spokane Co., 21 Mont. 184, 53 Pac. 493; Rankin *v.* Campbell, 1 Mont. 300.

Nebraska.—Kent *v.* Green, 43 Neb. 673, 62 N. W. 71; German-

American Ins. Co. *v.* Buckstaff, 38 Neb. 135, 56 N. W. 692; Rich *v.* Bank, 7 Neb. 201; Haylen *v.* Mis-souri Pac. R. Co.; 28 Neb. 660, 44 N. W. 873.

Nevada.—Seawell *v.* Cohn, 2 Nev. 308; Stretch *v.* Montezuma Min. Co., 86 Pac. 445; Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098.

New Hampshire.—Olcott *v.* Ban-fill, 7 N. H. 469.

New Jersey.—Union Locomotive & Exp. Co. *v.* Erie R. Co., 37 N. J. L. 23.

New York.—Bradford *v.* Downs, 25 App. Div. 581, 49 N. Y. Supp. 521; Mutual Ins. Co. *v.* O'Donnell, 146 N. Y. 275, 40 N. E., 787; Schles-inger *v.* Keene, 88 N. Y. Supp. 1042; Corning *v.* Cooper, 7 Paige 587; People *v.* Stephens, 52 N. Y. 306; Griswold *v.* Lawrence, 1 Johns. 507; Parker *v.* Root, 7 Johns. 320; Shad-wick *v.* Phillips, 3 Caines 129.

North Carolina.—Roberts *v.* Part-ridge, 118 N. C. 355, 24 S. E. 15; Randlemann Co. *v.* Simmons, 97 N. C. 89, 1 S. E. 923; Le Duc *v.* Moore, 113 N. C. 275, 18 S. E. 70; Hutchison *v.* Rumpfelt, 83 N. C. 441; Adams *v.* Reeves, 74 N. C. 106; Graham *v.* Edwards, 114 N. C. 228, 19 S. E. 150.

Pennsylvania.—Appeal of Ream-er, 18 Pa. St. 510; Dawson *v.* Condry, 7 Serg. & R. 366.

Texas.—Morse *v.* State, 39 Tex. Crim. 566, 50 S. W. 342; Less *v.* Ghio, 92 Tex. 651, 51 S. W. 502; Texas & Pac. R. Co. *v.* Boggs (Tex. Civ. App.), 30 S. W. 1089; Birdwell *v.* Cox, 18 Tex. 535.

Washington.—Livesley *v.* Pier, 9 Wash. 658, 38 Pac. 156.

Wisconsin.—Burnham *v.* Smith, 11 Wis. 258.

Rule of Court Applies, Where.—A rule of court in a district court does not apply in a justice's court. Gulf, C. & S. F. R. Co. *v.* King, 80 Tex. 684, 16 S. W. 641; nor to an agree-ment made before a master. Black *v.* Black, 206 Pa. St. 116, 55 Atl. 847.

of the court.¹⁹ The purpose of these regulations is to prevent misapprehension of the terms of stipulations and consequent disputes and wrangles between counsel.²⁰ Such rules sometimes apply to agreements between the attorneys, only, and do not refer to agreements entered into between the parties;²¹ and a statute or rule which merely requires agreements between attorneys to be in writing, does not apply to agreements made in open court and entered on the minutes;²² but if in such a case, no entry on the minutes follows the original making, the statute is not complied with and the stipula-

19. Statutes Are Remedial.

Such statutes are regarded as remedial and are strictly construed; their provisions are mandatory and not directory. *Merritt v. Wilcox*, 52 Cal. 238; *Hiller v. Landis*, 44 Iowa 223; *Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098.

But see, *contra*, *Faggard v. Williamson*, 4 Tex. Civ. App. 337, 23 S. W. 557; *Williams v. Huling*, 43 Tex. 113.

Application in Criminal Cases.

They apply to criminal cases in the same manner and to the same extent as they do to civil cases. *Steele v. State*, 33 Fla. 354, 14 So. 841; *Huff v. State*, 29 Ga. 424; *Spencer v. State*, 34 Tex. Crim. 238, 30 S. W. 46, 32 S. W. 690; *State v. Stewart*, 74 Iowa 336, 37 N. W. 400; *People v. Haggerty*, 5 Daly (N. Y.) 532; *Fleming v. State*, 28 Tex. App. 234, 12 S. W. 605.

20. *Alabama*.—*Prestwood v. Watson*, 111 Ala. 604, 20 So. 600.

California.—*Merritt v. Wilcox*, 52 Cal. 238; *Borkheim v. North British Ins. Co.*, 38 Cal. 623; *Reese v. Mahoney*, 21 Cal. 305.

Georgia.—*Lee v. Atlanta St. R. Co.*, 91 Ga. 215, 18 S. E. 136.

Nebraska.—*German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692.

New York.—*Mutual Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787; *Flynn v. Hancock*, 46 Hun 368; *Mason Organ Co. v. Pugsley*, 19 Hun 282; *Matter of Keeler*, 23 Abb N. C. 376, 7 N. Y. Supp. 199; *Wager v. Stickle*, 3 Paige 407.

Texas.—*Hancock v. Winans*, 20 Tex. 320.

"Justice may require that the lawful agreements of parties in respect to the prosecution of a cause fairly

entered into should be carried into effect. . . . We think, however, that they should appear in writing that the terms may be clearly understood and that there may be no room for mistake or misapprehension. Where they depend upon parol evidence, witnesses may and often do differ in their recollections. They may be perverted from the frailty and imperfections of memory, as well as from other causes; and there is certainly danger that they may rather embarrass than aid the administration of justice. *Smith v. Wadleigh*, 17 Me. 353.

21. *Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373; *Goben v. Goldsberry*, 72 Ind. 47. But see *Shadwick v. Phillips*, 3 Caines (N. Y.) 129.

22. *Alabama*.—*Prestwood v. Watson*, 111 Ala. 608, 20 So. 600; *Ober & Sons Co. v. Thomason Groc. Co.*, 138 Ala. 217, 35 So. 127.

Nebraska.—*Rich v. Bank*, 7 Neb. 201.

New York.—*Banks v. American Tract Soc.*, 4 Sand. Ch. 438; *Corn-ing v. Cooper*, 7 Paige 587; *Cook v. Allen*, 67 N. Y. 578; *Armstrong v. Loveland*, 99 App. Div. 28, 90 N. Y. Supp. 711.

Pennsylvania.—*Black v. Black*, 206 Pa. St. 116, 55 Atl. 847.

In Savage v. Blanchard, 148 Mass. 348, 19 N. E. 396, the court said: "It has always been the practice to hold parties strictly to their engagements made during the trial and in the face of the court, relating to the conduct of the suit and its proceedings. The rule which requires all agreements between parties and their attorneys to be in writing has no application to that class of stipulations. Such rule was intended to cover arrangements and matters of

tion may be disregarded.²³ No special form of writing is required,²⁴ but the writing must be signed²⁵ in a manner evidencing an intention to assent to the proposed agreement.²⁶ There is a presumption that the signature of an attorney is authentic.²⁷ The writing must show that the parties have arrived at a complete, definite, and mutual agreement²⁸ concerning pending litiga-

agreement made by the parties or their attorneys out of court."

An Oral Agreement to enter into a written agreement to extend the time for filing a statement will not be enforced. *Humes v. Hillman*, 39 Wash. 107, 80 Pac. 1104.

23. *Borkheim v. North British Ins. Co.*, 38 Cal. 623; *Merritt v. Wilcox*, 52 Cal. 238; *Griess v. State Inv. Co.*, 93 Cal. 411, 28 Pac. 1041; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116.

In Colorado a Rule of Court expressly recognizes agreements made in open court. *Morse v. Budlong*, 5 Colo. App. 147, 38 Pac. 59. See also, *Denver & R. G. R. Co. v. Roberts*, 7 Colo. App. 290, 43 Pac. 460; *Rockwell v. Graham*, 9 Colo. 36, 10 Pac. 284.

24. Statements of the Record. These do not constitute such a writing as is contemplated by the statutes. *United States v. Carr*, 61 Fed. 802, 10 C. C. A. 80.

Date.—A date is not necessary. See *Rosenbaum v. State*, 33 Ala. 354.

25. Signing.—Where a writing is required it must be signed. *Citizens' Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24; *Indianapolis R. Co. v. Sands*, 133 Ind. 433, 32 N. E. 722; *Harris v. People*, 148 Ill. 96, 35 N. E. 756; *Vail v. Stone*, 13 Iowa 284.

"We cannot, of course, consider an agreement attached to the brief of counsel which does not even purport to be signed by anyone as counsel for the appellee." *Green v. National Bldg. & L. Assn.*, 23 Ky. L. Rep. 1091, 64 S. W. 751. See *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923.

But on Appeal an unsigned stipulation is binding. *Durrell v. Todd*, 31 Neb. 256, 47 N. W. 862; *Macon Knitting Co. v. Leicester Mills Co.*, 65 N. J. Eq. 138, 55 Atl. 401.

Signed by One Party Only.—A stipulation signed by one party only may be enforced against the party

signing. *High v. Tarver* (Tex. Civ. App.), 25 S. W. 1098.

26. Signature Must Be Unequivocal.—The signature must appear clearly to have been intended as a signature. *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. Supp. 1002; *Citizens' Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24.

Denial of Signature.—One party who signs cannot raise a question as to the authenticity of the signature of another party. *Jones v. Wolverton*, 15 Wash. 590, 47 Pac. 36.

27. "It is objected to the sufficiency of the evidence that there was no proof of the signature of the defendant's counsel to the agreement indorsed on the deed of conveyance. The agreement was signed by the attorneys of record. They were officers of the court and their signatures were judicially known to the court. If, in point of fact, the agreement was not what it purported to be, or the signatures were not genuine, this should have been stated in the application for a new trial; and, if made satisfactorily to appear, the application would doubtless have been granted." *Strippelmann v. Clark*, 11 Tex. 296.

28. *Knowlton v. Mackenzie*, 110 Cal. 183, 42 Pac. 580; *Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551; *Newton v. Pence*, 10 Ind. App. 672, 38 N. E. 484.

In *Bower v. Blessing*, 8 Serg. & R. (Pa.) 243, the defendant in ejectment filed a paper agreeing in case he received a verdict, to submit the question of the amount of the debt he owed the plaintiff to referees. The plaintiff ignored this paper on the trial and the court held that after verdict no notice would be taken of it, because there was no agreement between the parties, but the paper was filed without the consent of the plaintiff and was intended to injure him.

tion;²⁹ but since a stipulation is not a contract, the elements necessary for the validity of a contract need not appear in the writing.³⁰ The stipulation should be filed,³¹ but that the provisions requiring filing are looked upon with less favor than the other provisions of the statutes and are often regarded as directory only, is shown by the

A letter of an attorney proposing terms of settlement is not sufficient evidence of a stipulation. *Matter of Keeler*, 23 Abb. N. C. 376, 7 N. Y. Supp. 199. But a letter from one party to the other promising, on condition, to file a stipulation has been held good as a stipulation. *Campbell v. United States*, 19 Ct. Cl. 426.

29. A Stipulation Must Refer to Pending Litigation.—*Frostburg v. Hitchins*, 99 Md. 617, 59 Atl. 49; *Johnston v. Yale*, 19 La. Ann. 212.

"A question not raised by the pleadings as to the power of a city to sell coal under its streets cannot be raised for adjudication by stipulation of the parties in an action by the city for trespass for removing such coal." *Union Coal Co. v. La Salle*, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326.

But Oral Agreements Entirely Collateral to the litigation are not within the terms of the statutes. *Coopers-town First Nat. Bank v. Tamajo*, 77 N. Y. 476. So it was held in *Wells v. Lane*, 15 Wend. (N. Y.) 99, that an agreement to submit a controversy to arbitration was not within a statute referring to "proceedings in a cause." *Faggard v. Williamson*, 4 Tex. Civ. App. 337, 23 S. W. 557. But see, *contra*, *Everett v. Charlestown*, 12 Allen (Mass.) 93; *Wright v. Evans*, 53 Ala. 103; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692.

In *Reamer's Appeal*, 18 Pa. St. 510, the court held the rule requiring a writing applied to the ordinary routine of practice and did not apply to an agreement by which a sheriff was guided in executing a writ in his hands.

30. Not a Contract.—While a stipulation is an agreement it is not a contract, and the essential elements of a contract need not be present. No consideration is required and it may be altered in the discretion of the court.

England.—*Buck v. Fawcett*, 3 P. Wms. 242, 24 Eng. Reprint 1046.

California.—*Ward v. Clay*, 82 Cal. 502, 23 Pac. 50.

Colorado.—*Welsh v. Noyes*, 10 Colo. 133, 14 Pac. 317.

Georgia.—*May v. State*, 90 Ga. 793, 17 S. E. 108.

Nebraska.—*Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897.

New Jersey.—*Howe v. Lawrence*, 22 N. J. L. 99.

New York.—*Barry v. Mutual Life Ins. Co.*, 53 N. Y. 536; *Casey v. Leslie*, 12 App. Div. 34, 42 N. Y. Supp. 362.

Texas.—*Hancock v. Winans*, 20 Tex. 320; *Paschall v. Penry*, 82 Tex. 673, 18 S. W. 154; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. 1003.

"Agreements of counsel in regard to the trial of an action are not absolute, although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion." *McClure v. Heirs of Sheek*, 68 Tex. 426, 4 S. W. 552.

Courts have sometimes spoken of stipulations as contracts and even treated them as such. See *Meagher v. Gagliardo*, 35 Cal. 602; *Banks v. American Tract Soc.*, 4 Sand. Ch. (N. Y.) 438, 469; *Deene v. Milne*, 113 N. Y. 303, 20 N. E. 861 (where specific performance was decreed); *Read v. French*, 28 N. Y. 285; *Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866; *Southern Bell Tel. & Tele. Co.*, 118 Ga. 506, 45 S. E. 319.

31. *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Steele v. State*, 33 Fla. 354, 14 So. 841; *Seawell v. Cohn*, 2 Nev. 308; *Gulf, C. & S. F. R. Co. v. Frost* (Tex. Civ. App.), 34 S. W. 167.

When Filed.—A paper is deemed to be filed when placed in the custody of the clerk. *Lessing v. Gilbert*, 8 Tex. Civ. App. 174, 27 S. W.

cases which hold that a written stipulation which has been acted upon cannot be repudiated upon the ground that it was not filed,³² and that a filing subsequent to judgment is a compliance with the requirement of the statute,³³ and a few cases have gone so far as to assert that filing was not absolutely necessary.³⁴ But the entry on the minutes of the court of a stipulation made in open court must be made at the time of making, and cannot be done by a *nunc pro tunc* order.³⁵ A stipulation as to a pleading, upon being filed, becomes a part of the record in the case.³⁶

B. ORAL STIPULATIONS. — An oral stipulation, by and of itself, is valid and binding and will be enforced by the court in the absence of any statute or rule of court to the contrary.³⁷ But where

751. See *Lee v. Wharton*, 11 Tex. 61.

A referee's minutes are not records of the court. *Chase v. James*, 16 Hun (N. Y.) 14. *Rust v. Hauselt*, 8 Abb. N. C. (N. Y.) 148.

The Entry Having Been Made, the stipulation is to be construed by the entry and not by the original agreement. *Billington v. Sprague*, 22 Me. 34.

32. If Acted Upon. — If the attorneys have acted upon a written agreement to such an extent that it would be inequitable not to recognize its binding effect, the court will not allow the agreement to be repudiated upon the ground that it was not filed. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529. So an oral agreement made in open court but not entered upon the minutes cannot be repudiated where it would work an injustice. *Himmelman v. Sullivan*, 40 Cal. 125; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116; *People v. Stephens*, 52 N. Y. 306; *Griess v. State Investment Co.*, 93 Cal. 411, 28 Pac. 1041; *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; *Poupion v. Muzio*, 68 Cal. 235, 9 Pac. 97.

33. Subsequent Filing. — A subsequent and delayed filing has been held to be a compliance with the statute, which in this respect is not construed so strictly. *Dougherty v. Friermuth*, 68 Cal. 240, 9 Pac. 98; *Simpson v. Budd*, 91 Cal. 488, 27 Pac. 758; *Schell v. Devlin*, 82 N. Y. 333.

It was held in *Cooper v. Gordon*, 125 Cal. 296, 57 Pac. 1006, that while filing was necessary to bind the party, the agreement when filed, sub-

sequent to judgment, became binding and might then be used to show that a party had violated it and as a basis for relief.

34. Filing Not Necessary. — In a few cases it has been intimated that filing was not necessary. See *Gershenow v. West Chicago St. R. Co.*, 103 Ill. App. 591; *Carroll v. Paul's Admr.*, 19 Mo. 102.

35. A Nunc Pro Tunc Order. The entry on the record of a stipulation made in open court must be made when the oral agreement is made, and it is not allowed after a dispute has arisen as to the agreement. *Hiller v. Landis*, 44 Iowa 223; *Griffin v. Wabash R. Co.*, 110 Mo. App. 221, 85 S. W. 111; *Pipkin v. McArtan*, 122 N. C. 194, 29 S. E. 334; *Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317. *Contra*, *White v. Jones*, 83 Miss. 231, 35 So. 450.

36. Vail v. Stone, 13 Iowa 284. "An agreement when filed in open court and duly signed by the parties, becomes part of the record in the case, and is in effect an answer or pleading and unless for good cause shown, it should be so regarded by the court."

37. California. — *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

Connecticut. — *Woodruff v. Fellowes*, 35 Conn. 105.

Iowa. — *Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373.

Maine. — *Smith v. Wadleigh*, 17 Me. 353.

New Hampshire. — *Alton v. Gilmanton*, 2 N. H. 520.

New York. — *Chamberlin v. Fitch*, 2 Cow. 243.

there is a dispute as to its terms, the enforcement of it becomes discretionary with the court.³⁸ Even where such statutes as have been spoken of exist, some oral stipulations will be enforced.³⁹ An oral stipulation that is admitted is not affected by such regulations and will be enforced,⁴⁰ where there is no dispute as to its terms,⁴¹

South Carolina.—*M'Neil v. Birt-whistle*, 2 Brev. 274.

Texas.—*Gulf, C. & S. F. R. Co. v. King*, 80 Tex. 681, 16 S. W. 641.

"The court, in the absence of all reasonable doubt as to the making of the agreement, was as much bound to carry it into effect as if it had been reduced to writing by the parties." *Toupin v. Gargnier*, 12 Ill. 79. And so oral agreements to dismiss were upheld in *Henchey v. Chicago*, 41 Ill. 136; *Chapman v. Shattuck*, 8 Ill. 49.

38. *Woodruff v. Fellowes*, 35 Conn. 105; *Clark v. Dekker*, 43 Kan. 692, 23 Pac. 956; *Kent v. Green*, 43 Neb. 673, 62 N. W. 71; *Fernald v. Ladd*, 4 N. H. 370; *Shippen v. Bush*, 1 Dall. (Pa.) 251.

39. "Although courts are not required to enforce agreements of counsel not reduced to writing, it does not follow that it is error to enforce a parol agreement. *Williams v. Huling*, 43 Tex. 113; *Jenkins v. Adams*, 71 Tex. 1, 8 S. W. 603.

40. *California.*—*Reese v. Mahoney*, 21 Cal. 305; *Patterson v. Ely*, 19 Cal. 28; *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Johnson v. Sweeny*, 95 Cal. 304, 30 Pac. 540; *McLaughlin v. Clausen*, 116 Cal. 487, 48 Pac. 487; *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074.

Connecticut.—*Woodruff v. Fellowes*, 35 Conn. 105.

Georgia.—*Lee v. Atlanta St. R. Co.*, 91 Ga. 215, 18 S. E. 136.

Iowa.—*Myers v. Funk*, 51 Iowa 92, 50 N. W. 72; *Taylor v. Chicago M. & St. P. R. Co.*, 80 Iowa 431, 46 N. W. 64; *Council Bluffs L. & T. Co. v. Jennings*, 81 Iowa 470, 46 N. W. 1006.

Missouri.—*Allmeroth v. Bertram Cady Co.*, 102 Mo. App. 156, 76 S. W. 701.

Montana.—*Stewart v. Miller*, 1 Mont. 301.

New Jersey.—*Caldwell v. Estell*, 20 N. J. L. 326.

New York.—*Brady v. Martin*, 19 N. Y. Civ. Proc. 134, 11 N. Y. Supp. 424.

North Carolina.—*Smith v. Smith*, 119 N. C. 314, 25 S. E. 878; *Willis v. Atlantic R. Co.*, 119 N. C. 718, 25 S. E. 790; *Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15; *Sondley v. Asheville*, 112 N. C. 694, 17 S. E. 534; *Pipkin v. McCartan*, 122 N. C. 194, 29 S. E. 334.

Texas.—*Field v. Fowler*, 62 Tex. 65; *Findley v. Love*, 2 Tex. App. Civ. Cas., § 736.

Wisconsin.—*Burnham v. Smith*, 11 Wis. 258.

What Amounts to an Admission.

Where an attorney makes no point of the fact that a stipulation is oral, it will be enforced though not of record. *Crane v. Crane*, 121 Cal. 99, 53 Pac. 433. And so a failure to deny the making is regarded as an admission that it was made. *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540; *Robertson v. Williams*, 81 Cal. 268, 22 Pac. 665; *Brady v. Martin*, 19 N. Y. Civ. Proc. 134, 11 N. Y. Supp. 424, 33 N. Y. St. Rep. 425.

A client is estopped from denying an agreement made by his attorney in his presence and not objected to at the time. See *Goben v. Goldsberry*, 72 Ind. 44; *Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373.

41. *Evans v. State Nat. Bank*, 19 Fed. 676; *Hardin & Bro. v. Iowa R. Co.*, 78 Iowa 726, 43 N. W. 543; *Birdwell v. Cox*, 18 Tex. 535.

"A disputed verbal agreement cannot be proved by the testimony of an adverse party or his attorney, but it may be proved by statements of the attorney who made it for the person against whom it is sought to be established." *Council Bluffs L. & T. Co. v. Jennings*, 81 Iowa 470, 46 N. W. 1006. See *Walton v. Pearson*, 82 N. C. 464.

Dispute as to Construction.

or as to the fact of its being made.⁴² And one that has been acted upon will be treated as valid.⁴³ Courts are careful not to allow an advantage to be taken of a party who has acted in good faith and relied upon an oral stipulation, and they will relieve or protect such a party wherever possible.⁴⁴

"Where neither the fact of making nor the terms of the agreement is disputed and the only question is as to its construction and effect, the court will enforce it." Woodruff v. Fellowes, 35 Conn. 105.

42. *Morse v. Budlong*, 5 Colo. App. 147, 38 Pac. 59; *Arnold v. Hall*, 70 Ga. 445; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150; *Le Duc v. Moore*, 113 N. C. 275, 18 S. E. 70; *Hutchison v. Rumpfelt*, 83 N. C. 441; *Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15.

"Where there is a difference of opinion between counsel as to the existence, terms, or meaning of a parol agreement between them, made out of court, the court will not undertake to decide between them." *American Saddle Co. v. Hogg*, Holmes 177, 6 Fish Pat. Cas. 67.

43. *Alabama*.—*Brown v. Jackson*, 42 Ala. 81.

California.—*Coonan v. Lowenthal*, 129 Cal. 197, 61 Pac. 940; *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Griess v. State Inv. Co.* 93 Cal. 411, 28 Pac. 1041; *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116; *King v. Ponton*, 82 Cal. 420, 22 Pac. 1087; *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540.

Colorado.—*Rhoades v. Drummond*, 3 Colo. 374; *Murphy v. Cunningham*, 1 Colo. 467.

Illinois.—*Chicago & N. W. R. Co. v. Hintz*, 132 Ill. 265, 23 N. E. 1032.

Mississippi.—*White v. Jones*, 83 Miss. 231, 35 So. 450.

New York.—*Keator v. Ulster Co.*, 7 How. Pr. 41; *Montgomery v. Ellis*, 6 How. Pr. 326; *People v. Rathbun*, 21 Wend. 509; *Mutual Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787; *Deen v. Milne*, 113 N. Y. 303, 20 N. E. 861; *People v. Stephens*, 52 N. Y. 306.

North Dakota.—*Heald v. Yumis-ko*, 7 N. D. 422, 75 N. W. 806.

Texas.—*Masterson v. Bockel*, 20 Tex. Civ. App. 416, 51 S. W. 39;

Thompson v. Ft. Worth & R. G. R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29.

Wisconsin.—*Burnham v. Smith*, 11 Wis. 258.

"The rule has reference to executory agreements and not to those which have been wholly or in part executed." *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074.

What Amounts to Action Upon Stipulation.—Taking action or refraining from action, which would not otherwise have been done, in furtherance of a party's interests, which there was no legal obligation to perform, will be considered as action upon a stipulation. *Griess v. State Inv. Soc.*, 93 Cal. 411, 28 Pac. 1041; *Merritt v. Wilcox*, 52 Cal. 242; *Auburn Sav. Bank v. Brinkerhoff* 44 Hun (N. Y.) 142; *Owen v. Cawley*, 36 N. Y. 600; *Penniman v. La Grange*, 23 Misc. 653, 52 N. Y. Supp. 27; *Connell v. Stalker*, 21 Misc. 609, 48 N. Y. Supp. 77.

44. *California*.—*Himmelmänn v. Sullivan*, 40 Cal. 125.

Georgia.—*Henderson v. Merritt*, 38 Ga. 232.

New York.—*People v. Stephens*, 52 N. Y. 306; *Griswold v. Lawrence*, 1 Johns. 507; *Stinnard v. New York Fire Ins. Co.*, 1 How. Pr. 169; *Phillips v. Wicks*, 38 N. Y. Super. Ct. 75.

North Carolina.—*Parker v. Wilmington & W. R. Co.*, 84 N. C. 118.

Pennsylvania.—*Reamer's Appeal*, 18 Pa. St. 510, 518.

Texas.—*Williams v. Huling*, 43 Tex. 113; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *Texas & Pac. R. v. Boggs* (Tex. Civ. App.), 30 S. W. 1089.

Wisconsin.—*Burnham v. Smith*, 11 Wis. 258.

So in *Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787, the court said: "While the oral stipulation under the rule is not binding and will not be carried into

3. Subject-Matter.—A. IN GENERAL.—Courts strongly favor the use of stipulations between litigants as a means of facilitating trials, lessening their expense, and reaching just results,⁴⁵ and they will uphold such agreements wherever possible.⁴⁶

Stipulations Infringing Upon Rules of Court.—A court has inherent authority to control the proceedings before it and it may make

effect by the court, still we will not permit a party to be misled, deceived, or defrauded thereby, and in some instances where it has been acted upon by the party making it, he will not be allowed to retract and take advantage of the acts or omissions of his adversary induced thereby." Even the question of whether it was made or not will in such cases be investigated.

In *Allmeroth v. Bertram Cady Co.*, 102 Mo. App. 156, 76 S. W. 701, the court declared that such a rule of the court was not intended to shield a party guilty of a breach of good faith, and had been held not to apply where the opposing party had acted and relied upon an oral stipulation, and in *Himmelmänn v. Sullivan*, 40 Cal. 125, it was held that a party who has acted upon part of an oral stipulation cannot ask relief from the remaining part of it.

And see *Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29, *holding* that an oral stipulation that an action should not abate could not be repudiated since it had been relied upon, and not to enforce it would be unjust and equivalent to a fraud upon the plaintiff.

Opening Defaults.—It has often been held that while a judgment taken by default, where the defaulting party had relied upon an oral stipulation not to proceed, will not be treated as irregular and set aside (*Collier v. Falk*, 66 Ala. 223; *Norman v. Burns*, 67 Ala. 248; *Morse v. Budlong*, 5 Colo. App. 147, 38 Pac. 59; *McLaughlin v. Clausen*, 116 Cal. 487, 48 Pac. 487; *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809; *Barnes v. Ennenga*, 53 Iowa 497, 5 N. W. 597; *Martin v. De Loge*, 15 Mont. 343, 39 Pac. 312; *Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098; *Marsh v. Lasher*, 13 N. J. Eq. 253; *Bryorly v. Clark*, 48 Tex. 345; *Birdwell v. Cox*, 18 Tex. 535), yet, in such a case, no negli-

gence will be presumed and the default will be opened upon application as a matter of course. *Crane v. Crane*, 121 Cal. 99, 53 Pac. 433; *Huart v. Goyeneche*, 56 Cal. 429; *Woodward v. Backus*, 20 Cal. 137; *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540; *Robertson v. Williams*, 81 Cal. 268, 22 Pac. 665; *People v. Mora*, 50 Cal. 468; *Brady v. Martin*, 19 N. Y. Civ. Proc. 134, 11 N. Y. Supp. 424, 33 N. Y. St. 425; *Wager v. Stickle*, 3 Paige (N. Y.) 407; *Oliver v. Metropolitan Nat. Bank*, 3 Penny. (Pa.) 74; *Field v. Fowler*, 62 Tex. 65; *Burnham v. Smith*, 11 Wis. 258.

45. *Schultz v. Phenix Ins. Co.*, 77 Fed. 375; *Welsh v. Noyes*, 10 Colo. 143, 14 Pac. 317; *Yost v. Devault*, 9 Iowa 60; *Lewis v. Sumner*, 13 Met. 269; *Hannah v. Baylor*, 27 Mo. App. 302, 313.

In *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600, speaking of the office of stipulations it was said: "Agreements of this character, intelligently and deliberately made by the parties in person or by their attorneys or solicitors of record, are encouraged and favored. Their purpose, generally, is to save costs and to expedite trials by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or the admission of uncontroverted facts of the existence of which the parties are fully cognizant."

46. See *District of Columbia*. *Strong v. District of Columbia*, 3 MacArthur 499, 512.

Dakota.—*McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

New York.—*Matter of New York R. Co.*, 98 N. Y. 447; *Harlem Bridge Co. v. Westchester*, 143 N. Y. 59, 37 N. E. 634; *In re Cooper*, 93 N. Y. 507; *Smith v. Barnes*, 9 Misc. 368, 29 N. Y. Supp. 692; *Hilton v. Fonda*, 86 N. Y. 339; *Bagley v.*

rules for that purpose; but parties are allowed a large measure of control over their own actions even if in so doing they contravene such rules,⁴⁷ where the due order of business and the convenience of the court is not thereby interfered with.⁴⁸

Stipulations Infringing Upon Statutory and Constitutional Enactments.

A statutory or constitutional provision created for the advantage or protection of individuals may, ordinarily, be waived by stipula-

Jennings, 58 Hun 56, 11 N. Y. Supp. 386; *Hine v. Elevated R. Co.*, 149 N. Y. 154, 43 N. E. 414; *Vose v. Cockcroft*, 44 N. Y. 415.

Wisconsin.—*Clason v. Shepherd*, 10 Wis. 356.

"All stipulations made by parties for the government of their conduct, the control of their rights, or for the guidance of the court in the trial of a cause or the conduct of litigation of any character, not unreasonable or against good morals or public policy, will be enforced by the courts." *In re McCusker*, 23 Misc. 446, 51 N. Y. Supp. 281.

⁴⁷. *Poupion v. Muzio*, 68 Cal. 235, 9 Pac. 97; *La Junta Canal Co. v. Ft. Lyon Co.*, 25 Colo. 515, 55 Pac. 728; *Mutual Bldg. Assn. v. Tascott*, 143 Ill. 395, 32 N. E. 376; *Baker v. Jamison*, 73 Iowa 698, 36 N. W. 647.

"Experience has shown that the smooth and efficient working of the machinery of justice is facilitated by allowing a large latitude to the counsel in charge of the respective interests of their clients. The court has inherent authority . . . to control the proceedings as the equities of the case may require, and when the accommodation asked is of doubtful merit or involves material consequences, the court will pretty certainly be applied to. But it is not necessary to subject the parties or the court to such applications, inexorably, and in all non-essentials it is safe to let parties or counsel fix their own conditions. . . . What-

ever does not effect the jurisdiction or the due order of business and convenience of the court, is capable of arrangement between the parties or their counsel, and an agreement by them will become the law of the case." *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. St. 338, 53 Atl. 158.

⁴⁸. *Alabama*.—*Birmingham R. Co. v. James*, 138 Ala. 594, 36 So.

464; *Cooley v. United States Sav. & Loan Assn.*, 132 Ala. 590, 31 So. 521.

California.—*Reynolds v. Lawrence*, 15 Cal. 359; *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091.

Idaho.—*First Nat. Bank v. Martin*, 6 Idaho 204, 55 Pac. 302.

Illinois.—*Bernhard v. Brown*, 31 Ill. App. 385; *Thomas v. Piper*, 66 Ill. App. 599.

Indiana.—*Manns Bros. Co. v. Templeton*, 149 Ind. 706, 44 N. E. 1108; *Murray v. Williamson*, 79 Ind. 287.

Minnesota.—*Lehigh Coal Co. v. Scallen*, 61 Minn. 63, 63 N. W. 245.

Missouri.—*Woodward v. Hodge*, 24 Mo. App. 677; *Mister v. Corrigan*, 17 Mo. App. 510.

New Mexico.—*Evans v. Baggs*, 4 N. M. 67, 13 Pac. 207.

New York.—*Zelinke v. Krauskopf*, 1 City Ct. 89, 3 Wkly. Dig. 426.

Ohio.—*Gittings v. Baker*, 2 Ohio St. 21.

Texas.—*Galveston, H. & S. A. R. Co. v. Crawford*, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958; *Cunningham v. State*, 74 Tex. 511, 12 S. W. 217.

Virginia.—*Hughes v. Kelly*, 30 S. E. 387; *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858.

Wisconsin.—*Falkenberg v. Gorman*, 71 Wis. 8, 36 N. W. 599.

Inconvenience.—"An agreement of counsel which would work an inconvenience, as to take up causes out of their regular order, the courts would not enforce. These matters of practice the courts must have the power to control according to their own sense of propriety and justice, irrespective of the agreements of counsel." *Hancock v. Winans*, 20 Tex. 326.

And so where the supreme court had already sent a case to a lower court for trial, the parties could not stipulate for trial in the supreme court. *C. & J. Michel Brew. Co.*

tion of the parties,⁴⁹ but a provision which is mandatory and the object of which is to promote public interests, cannot be defeated by any private stipulation.⁵⁰

v. State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911.

Rule of a Higher Court.—The court will not allow the parties to evade the rule of a higher court by any stipulation waiving its effect. *Hubbell's Case*, 6 Ct. Cl. 53.

49. Alabama.—*Wills v. State*, 73 Ala. 362.

Iowa.—*State v. Fooks*, 65 Iowa 452, 71 N. W. 773; *State v. Polson*, 29 Iowa 133.

Maryland.—*Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866; *Caledonian Fire Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782.

New Jersey.—*De Mott v. Taylor*, 51 N. J. L. 307, 17 Atl. 291.

New York.—*Roberts v. Baumgarten*, 126 N. Y. 336, 27 N. E. 470; *In re Cooper*, 93 N. Y. 507; *Lee v. Tillotson*, 24 Wend. 337; *Bagley v. Jennings*, 58 Hun 56, 11 N. Y. Supp. 386; *Beardsley v. Pope*, 88 Hun 560, 34 N. Y. Supp. 846; *Smith v. Barnes*, 9 Misc. 368, 29 N. Y. Supp. 692; *McGuire v. New York Cent. & H. R. R. Co.*, 6 Daly 70; *Matter of McCusker*, 23 Misc. 446, 51 N. Y. Supp. 281; *Real Estate Corp. v. Harper*, 174 N. Y. 123, 66 N. E. 660; *Burt v. Oneida Community*, 59 Hun 234, 12 N. Y. Supp. 806.

North Carolina.—*Smith v. Smith*, 119 N. C. 314, 25 S. E. 878.

Oregon.—*Ex parte Kindt*, 32 Or. 474, 52 Pac. 187.

Utah.—*State v. Mortensen*, 26 Utah 312, 354, 73 Pac. 562, 633.

West Virginia.—*James v. Gott*, 55 W. Va. 223, 47 S. E. 649; *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *State v. Brookover*, 42 W. Va. 292, 26 S. E. 174.

Wisconsin.—*Blomberg v. Stewart*, 67 Wis. 455, 30 N. W. 617.

"A party may waive a rule of law or a statute or even a constitutional provision enacted for his benefit or protection where it is exclusively a matter of private right and no considerations of public policy or morals are involved, and having once done so he cannot subsequently invoke its

protection." *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650.

50. United States.—*Kelsey v. Forsyth*, 21 How. 85; *Hurt v. Hollingworth*, 100 U. S. 100.

California.—*Wilson v. Wilson*, 45 Cal. 399; *People v. Ferguson*, 34 Cal. 309; *People v. Trim*, 37 Cal. 274; *Higgins v. Mahoney*, 50 Cal. 444.

Colorado.—*Murphy v. People*, 3 Colo. 147; *Ross v. Duggan*, 5 Colo. 85; *Marshall Silver Min. Co. v. Kirtley*, 8 Colo. 108, 5 Pac. 649.

Florida.—*Pickett v. Bryan*, 34 Fla. 38, 15 So. 681.

Georgia.—*Augusta So. R. Co. v. Williams*, 99 Ga. 75, 24 S. E. 852.

Idaho.—*Penny v. Nez Perces County*, 1 Idaho 642, 43 Pac. 570.

Illinois.—*Chicago Sash, Door & Blind Mfg. Co. v. Shaw*, 39 Ill. App. 260; *Hatch v. Wegg*, 5 Ill. App. 452; *Everett v. Collinsville Zinc Co.*, 41 Ill. App. 552; *Elgin City R. Co. v. Wilson*, 56 Ill. App. 364.

Indiana.—*Brown v. State*, 16 Ind. 496; *Noble v. Thompson*, 24 Ind. 346.

Maryland.—*Seth v. Chamberlain*, 41 Md. 186, 194.

Missouri.—*Tupper v. Hertung*, 46 Mo. 135; *Woodward v. Hodge*, 24 Mo. App. 677; *Mister v. Corrigan*, 17 Mo. App. 510; *Disse v. Frank*, 52 Mo. 551.

Montana.—*Wilson v. Davis*, 1 Mont. 98; *Daniels v. Andes Ins. Co.*, 2 Mont. 500; *Herman v. Jeffries*, 4 Mont. 513, 1 Pac. 11; *Territory v. O'Brien*, 7 Mont. 38, 14 Pac. 631.

Nebraska.—*Zandt v. Deranliou*, 43 Neb. 422, 61 N. W. 632; *Orr v. Orr*, 2 Neb. 170; *McDonald v. Grabow*, 46 Neb. 406, 64 N. W. 1093; *Tootle v. Shirey*, 52 Neb. 674, 72 N. W. 1045.

Nevada.—*Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600; *April Fool G. M. & M. Co. v. Dula*, 24 Nev. 289, 52 Pac. 648.

New Mexico.—*Evans v. Baggs*, 4 N. M. 67, 13 Pac. 207.

New York.—*Oakley v. Aspinwall*, 3 N. Y. 547, 561; *Hoes v. Edison Gen. Elec. Co.*, 150 N. Y. 87, 44 N.

Stipulations Against Public Policy.—No stipulation which is unreasonable, against good morals, or a sound public policy, will be upheld or enforced.⁵¹

B. AGREED CASE.—a. *In General.*—In most jurisdictions, statutes have provided a means for submitting a controversy without

E. 963; *Bonnefond v. De Russey*, 73 Hun 377, 26 N. Y. Supp. 193; *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772; *Cancemi v. People*, 18 N. Y. 128; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Greer v. Greer*, 58 Hun 251, 12 N. Y. Supp. 778; *Tombs v. Rochester & S. R. Co.*, 18 Barb. 583.

Pennsylvania.—*Muir v. Preferred Acc. Ins. Co.*, 203 Pa. St. 338, 53 Atl. 158.

Tennessee.—*Ballard v. Nashville & K. R. Co.*, 94 Tenn. 205, 28 S. W. 1088.

Texas.—*Bowen v. State* (Tex. Crim. App.), 42 S. W. 994; *Maverick v. Burney* (Tex. Civ. App.), 30 S. W. 566; *Cunningham v. State*, 74 Tex. 511, 12 S. W. 217; *Spencer v. State*, 34 Tex. 238, 30 S. W. 46.

Washington.—*Madigan v. West Coast Fire & M. Ins. Co.*, 3 Wash. 454, 28 Pac. 1027; *Howard v. Ross*, 3 Wash. 292, 28 Pac. 526.

Wisconsin.—*Leonard v. Warriner*, 20 Wis. 41.

"Where the object of a statute is to promote great public interests, liberty or morals, it cannot be defeated by any private stipulation." *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Costs.—Statutory regulation of costs is usually held to preclude any private agreement as to the amount between the parties. *New York Mut. Sav. & Loan Assn. v. Westchester Fire Ins. Co.*, 98 App. Div. 285, 90 N. Y. Supp. 710; *Griggs v. Day*, 135 N. Y. 469, 32 N. E. 238; *Landon v. Walmuth*, 76 Hun 271, 27 N. Y. Supp. 717; *In re Stickney's Will*, 108 Wis. 99, 84 N. W. 23.

^{51.} *England.*—*Owen v. Thomas*, 3 Myl. & K. 353, 3 L. J. Ch. N. S. 205, 40 Eng. Reprint 134.

California.—*Uhlen v. Boyd*, 41 Cal. 60.

Colorado.—*Murphy v. People*, 3 Colo. 147.

Dakota.—*McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

Georgia.—*Augusta & S. R. Co. v. Lark*, 97 Ga. 800, 25 S. E. 175.

Illinois.—*Kohn v. Columbia Nat. Bank*, 165 Ill. 316, 46 N. E. 208.

Kentucky.—*Spaulding v. Hill*, 115 Ky. 1, 72 S. W. 307.

Michigan.—*Harris v. Sweetland*, 48 Mich. 110, 11 N. W. 830.

New Jersey.—*Wilson v. King*, 23 N. J. Eq. 150.

New York.—*Real Estate Corp. v. Harper*, 174 N. Y. 123, 66 N. E. 660; *Hine v. New York Elev. R. Co.*, 149 N. Y. 154, 43 N. E. 414.

Texas.—*Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29; *Morse v. State*, 39 Tex. Crim. 566, 47 S. W. 645.

Utah.—*State v. Mortensen*, 26 Utah 312, 354, 73 Pac. 562, 633.

West Virginia.—*James v. Gott*, 55 W. Va. 223, 47 S. E. 649.

Wisconsin.—*In re Stickney's Will*, 108 Wis. 99, 84 N. W. 23.

The rule was stated in *Matter of Petition of N. Y. L. & W. R. Co.*, 98 N. Y. 447, 453, thus: "All stipulations, not unreasonable, not against good morals or sound public policy have been and will be enforced; and generally all stipulations made by parties for the government of their conduct or the control of their rights in the trial of a cause or the conduct of a litigation are binding."

An Agreement by a Defendant not to oppose a motion for a new trial and by a plaintiff to pay any judgment rendered against him in the new trial, was held void as against public policy, the court saying: "All agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein are void though not open to the actual charge of corrup-

action, in the form of an agreed case.⁵² Under the provisions of these statutes the parties may, by stipulation, agree upon the facts of the case and submit them to the court to obtain a ruling upon the questions of law involved.⁵³

b. *By Whom To Be Made*.—An interested party may either himself or through his attorney submit an agreed case.⁵⁴ But an infant cannot, nor can his guardian for him.⁵⁵ And it has been held that an executor has no power to have an action decided in this manner.⁵⁶

tion." *Thompson v. Buffington*, 7 Ohio N. P. 134.

52. *England*.—Cap. 42, 3 & 4 Wm. IV., § 46; Cap. 76, 15 & 16 Vict.

Alabama.—§ 866 Code.

Arizona.—Rev. St. 1901, Civ. Code Ch. XI, § 1391.

Arkansas.—§§ 5218-20, Dig. of Stat. (ed. 1884).

California.—§ 1138, Code Civ. Proc.

Colorado.—§§ 276-78, Code Civ. Proc.

Connecticut.—§ 1200, General Statutes (1888).

Illinois.—§§ 75-76, Rev. St. (1874).

Indiana.—§§ 553-555, Practice Code.

Iowa.—§§ 3408-3415, Rev. St.

Kentucky.—§ 705, Civ. Code.

Massachusetts.—§ 13 Rev. St., Ch. 11, § 5, Ch. 112, § 64, Ch. 128, Ch. 438 Laws 1, 1883.

Michigan.—§§ 3421, 4346, Compiled Laws.

Maine.—§ 42 Ch. 77, Rev. St. 1883.

Montana.—§ 323, Civ. Code.

New York.—§ 1280, Code Civ. Proc.

Nebraska.—§§ 567, 569, Compiled St.

North Carolina.—§ 567, Code Civ. Proc.

Ohio.—§ 495 of Code.

Oklahoma.—§§ 4419, 541, Art. 21, Ch. 26, Statutes 1893.

Oregon.—§§ 257-259, Hill's Ann. Laws.

Rhode Island.—Cap. 563, § 14, Laws of 1876.

South Carolina.—§ 389, Code Civ. Proc.

Tennessee.—§§ 4229, 4236, 4303, 2924, Code Ch. 97, Act of 1877.

Texas.—Art. 1293, Ch. 11, title 29, Rev. St. 1879.

Washington.—§ 421, Ch. 12, title 7, Code of Procedure.

53. *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Day v. Day*, 100 Ind. 460; *McKethan v. Ray*, 71 N. C. 165; *Fearing v. Irwin*, 55 N. Y. 486; *Newark S. & S. R. Co. v. Perry County*, 30 Ohio St. 120; *Diehl v. Ihrie*, 3 Whart. (Pa.) 143; *Royall v. Eppes*, 2 Munf. (Va.) 479.

54. *Matter of DeLucca*, 146 Cal. 110, 79 Pac. 853; *Dickinson v. Dickey*, 76 N. Y. 602; *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567; *Whitcomb v. Kephart*, 50 Pa. St. 85.

Who Are Interested Parties.—A tax-payer and a tax collector cannot submit a controversy as to the validity of a tax, because the county is an interested party. *Bailey v. Johnson*, 121 Cal. 562, 54 Pac. 80.

Selectmen.—The selectmen of a town may submit an agreed case if all the residents of the town are present by the judgment. *West Hartford v. Commissioners*, 68 Conn. 323, 36 Atl. 786.

55. *Fisher v. Stilson*, 9 Abb. Pr. (N. Y.) 33; *Lathers v. Fish*, 4 Lans. (N. Y.) 213; *Baumgrass v. Breckdell*, 7 N. Y. St. 685.

56. *Henes v. Henes*, 5 Ind. App. 100.

As to a Receiver.—See *Waring v. O'Neill*, 15 Hun 105, *Matter of Smith*, 9 Abb. N. C. (N. Y.) 452.

One Who Claims Through an interested party is bound by the submission of such party. *Wilmington Co. v. Gardner*, 2 Wkly. Notes (Pa.) 486; *Van Biecl v. Shrive*, 17 Phila. Pac. 104. But some of the parties cannot bind other parties by such an agreement. *Hobart College v. Fitz-*

Contents and Form.—Any controversy which might be the subject of a civil action in a court having jurisdiction, may be submitted as an agreed case.⁵⁷ The controversy must be a real one,⁵⁸

hugh, 27 N. Y. 130. *Union Nat. Bank v. Kupper*, 63 N. Y. 617.

An Agent has no implied power to submit an action upon an agreed case, even though he was employed to defend the action. *Salamanca v. Cattaraugus Co.*, 81 Hun 282, 30 N. Y. Supp. 790.

57. California.—*People v. Wallace*, 91 Cal. 535, 27 Pac. 767.

Indiana.—*Henes v. Henes*, 5 Ind. App. 100, 31 N. E. 832.

Massachusetts.—*Colby v. Dillingham*, 7 Mass. 475.

New Hampshire.—*Libbey v. Hodgdon Co.*, 9 N. H. 394; *Morse v. Calley*, 5 N. H. 222.

New York.—*City of Buffalo v. Mackay*, 15 Hun 204; *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682; *Patterson v. Mutual Life Assn.*, 11 N. Y. Supp. 636.

North Carolina.—*Bates v. Lilly*, 65 N. C. 232.

Oklahoma.—*Territory v. Clark*, 2 Okl. 82, 35 Pac. 882.

South Carolina.—*South Carolina Society v. Gurney*, 3 Rich. 51.

Patent Case.—A case under the patent laws of the United States cannot be tried as an agreed case in a state court. *White v. Clark*, 111 Cal. 425, 44 Pac. 164.

Injunctions.—It has been held in New York that where the only question to be decided was the right to an injunction the proposition could not be submitted in the form of an agreed case. *People v. Mutual Endow. & Acc. Assn.*, 92 N. Y. 622; *Cunard S. S. Co. v. Voorhis*, 104 N. Y. 525, 11 N. E. 49; *People v. Binghamton Trust Co.*, 65 Hun 384, 20 N. Y. Supp. 179.

The Jurisdiction of a Justice. Whether a justice of the peace has jurisdiction to issue a search warrant, cannot be decided in an agreed case. *In re De Lucca*, 146 Cal. 110, 79 Pac. 853.

Inchoate Right.—The cause of action must have accrued and not be inchoate or contingent. *Hobart College v. Fitzhugh*, 27 N. Y. 130.

Election Contest.—An election

contest is not such a controversy as can be decided by the court under an agreed case. *Buffalo v. MacKay*, 15 Hun 204; *Kennedy v. New York*, 79 N. Y. 361. *Contra.*—*Frazer v. Miller*, 12 Kan. 459; *Alexander v. McKenzie*, 2 Rich. (S. C.) 81.

A Civil Action.—The purpose of the statute being the submission of controversies without action, it follows that an action itself cannot be submitted. *Van Sickle v. Van Sickle*, 8 How. Pr. (N. Y.) 265.

58. England.—*Wellesley v. Withers*, 4 El. & Bl. 750, 82 E. C. L. 750.

California.—*White v. Clarks*, 111 Cal. 425, 44 Pac. 164; *People ex rel. Tyler v. Pratt*, 30 Cal. 223.

Indiana.—*Witz v. Dale*, 129 Ind. 120, 27 N. E. 498.

Massachusetts.—*Capen v. Washington Life Ins. Co.*, 12 Cush. 517; *Campbell v. Talbot*, 132 Mass. 174; *Smith v. Cudworth*, 24 Pick. 196.

Missouri.—*Blair v. State Bank*, 8 Mo. 313.

Montana.—*Board of Comrs. v. Gilliam*, 17 Mont. 333, 42 Pac. 852.

New Hampshire.—*Scheer v. Bedford*, 62 N. H. 691; *State v. Stevens*, 36 N. H. 59.

New York.—*People v. Mutual Endow & Acc. Assn.* 92 N. Y. 622; *Clapp v. Guy*, 31 App. Div. 535, 52 N. Y. Supp. 33; *Bloomfield v. Ketcham*, 5 Civ. Proc. 407; *Wood v. Squires*, 60 N. Y. 191; *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682; *Troy Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109; *Williams v. Rochester*, 2 Lans. 169.

North Carolina.—*McKethan v. Ray*, 71 N. C. 165.

Ohio.—*Newark S. & S. R. Co. v. Perry County*, 30 Ohio St. 120.

Pennsylvania.—*James v. Fennick*, 21 Pa. Co. Ct. 91; *Berks County v. Jones*, 21 Pa. St. 413; *Com. v. Cleveland P. & A. R. Co.*, 29 Pa. St. 370; *Washburn v. Baldwin*, 10 Phila. 472.

Rhode Island.—*In re Champlin*, 17 R. I. 512, 23 Atl. 25.

Tennessee.—*State v. Wilson*, 2 Lea 204.

and no fictitious case or mere moot question will be decided by the court or recognized in any way.⁵⁹ It must be legally before the court,⁶⁰ and the parties must be interested adversely.⁶¹ All the

Where the Same Attorney prepared the statement of facts and the briefs for both sides, the case was set aside as being open to question. *Wood v. Nesbitt*, 64 Hun 639, 19 N. Y. Supp. 423.

Preliminary Question.—A mere preliminary question leaving the merits of the case unsettled, will not be passed upon. *Austin v. Wilson*, 7 Mass. 205.

59. Fictitious Case.—A case presented to the court merely to get its opinion upon the question of law involved and in which there is no *bona fide* controversy will be dismissed. *Doe v. Duntze*, 6 Man. G. & S. 100, 60 E. C. L. 99; *Sceva v. Truë*, 53 N. H. 627.

Moot Question.—“No agreement of parties can be invoked to call for the decision of what to them, or either of them, is merely a moot question, and courts should not render judgments which cannot be enforced by any process known to the law.” *Johnson v. Malloy*, 74 Cal. 430, 16 Pac. 228.

What Is an Amicable Action. “The suit is spoken of in the affidavits filed in support of it, as an amicable action, and the proceedings defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens that for the purpose of obtaining a decision of the controversy without incurring needless expense and trouble they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms and technicalities and will mutually admit facts which they know to be true and without requiring proof and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense and delay. But there must be an actual controversy and adverse interests. The amity consists in the manner in

which it is brought to issue before the court. And such amicable actions so far from being objects of censure are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. The objection in the case before us is not that the proceedings were amicable, but there is no real conflict of interest between them; that the plaintiff and defendant have the same interest and that interest adverse and in conflict with the interest of third persons whose rights would be seriously affected if the question of law was decided in the manner that both of the parties desire it should be. A judgment entered under such circumstances and for such a purpose is a mere form. The whole proceeding was in contempt of court and highly reprehensible. *Lord v. Veazie*, 8 How. (U. S.) 251.

60. *West Hartford v. Board of Comrs.*, 68 Conn. 323, 36 Atl. 786; *Richardson v. Boston*, 148 Mass. 508, 20 N. E. 166; *McRae v. Locke*, 114 Mass. 96; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202; *Bedford Lodge I. O. O. F. v. Lentz*, 20 Pa. Co. Ct. 269.

Agreement as to Jurisdiction.—If the court has not jurisdiction, consent of the parties cannot give it and the fact that the parties have, by agreement, submitted a controversy to the court does not preclude either party from subsequently raising the objection of the want of jurisdiction. *Beeson, Admr. v. Elliott Exr.*, 1 Del. Ch. 368, 383.

An Action Must Be Pending. Since the parties cannot by mere consent give jurisdiction to a court, the mere submission of agreed facts to a court does not authorize it to proceed. Proceedings must have been regularly started in the manner prescribed by law and the parties may then take advantage of the “agreed case” and dispense with all the succeeding formalities, the agreed case itself working a discontinuance of the action. *Van Sickle v. Van Sickle*, 8 How. Pr. (N. Y.) 265.

61. *Lord v. Veazie*, 8 How. (U.

material facts necessary for a complete determination of the case must be submitted;⁶² the ultimate facts themselves and not mere evidence of the facts must appear;⁶³ they must be undisputed.⁶⁴

S.) 251; *Hodgdon v. Darling*, 61 N. H. 582; *In re Greene*, 17 R. I. 509, 23 Atl. 29; *In re Champlin*, 17 R. I. 512, 23 Atl. 25.

62. *United States*.—*Raimond v. Terrebonne Parish*, 132 U. S. 192.

Indiana.—*Hawks v. Goshen*, 144 Ind. 343, 43 N. E. 304.

Massachusetts.—*Old Colony R. v. Wilder*, 137 Mass. 536; *Phelps v. Phelps*, 145 Mass. 416, 14 N. E. 625.

Maryland.—*Keller v. State*, 12 Md. 322, 71 Am. Dec. 596.

Missouri.—*Ford v. Cameron*, 19 Mo. App. 467; *Carr v. Lewis Coal Co.*, 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328; *Appleman v. American Sporting Goods Co.*, 64 Mo. App. 71; *State v. Hannibal R. Co.*, 34 Mo. App. 591; *Hinkle v. Kerr*, 148 Mo. 43, 49 S. W. 864.

New Hampshire.—*Sargent Invalid Furn. Co. v. Sargent*, 65 N. H. 672, 23 Atl. 630.

New York.—*Troy Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109; *Dickinson v. Dickey*, 76 N. Y. 602; *In re Yerks' Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869.

North Carolina.—*Moore v. Hinnant*, 87 N. C. 505; *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124.

Pennsylvania.—*Rush Twp. v. Schuylkill County*, 100 Pa. St. 356; *Holmes v. Wallace*, 46 Pa. St. 266; *Kinsley v. Coyle*, 58 Pa. St. 461; *Union Sav. Bank v. Fife*, 101 Pa. St. 388.

Washington.—*Levy v. Sheehan*, 3 Wash. 420, 28 Pac. 748.

"Parties who ask for judgment upon facts agreed, should state all the facts bearing upon the point to be decided and material facts should not be left for inference when the fact is susceptible of definite statement." *Knellar v. Lang*, 137 N. Y. 589, 33 N. E. 555. And see *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

Judgment on Less Than All the Facts.—The parties may, by an agreed case, obtain a judgment on one question of law alone, although there are other facts which, if stated,

would have called for decisions upon other points. *Royall v. Eppes*, 2 Munf. (Va.) 479; *Crane v. Whittemore*, 4 Mo. App. 510; *Stockton v. Copeland*, 23 W. Va. 696.

But in any case, a complete cause of action must be shown (*Gregory v. Perdue*, 29 Ind. 66), upon which an effectual judgment can be rendered. *Keith v. Rucker*, 16 Ill. 389; *Williams v. Rochester*, 2 Lans. (N. Y.) 169; *Cunard S. S. Co. v. Voorhis*, 104 N. Y. 525, 11 N. E. 49; *State v. Sias*, 17 N. H. 558; *Whitesides v. Russell*, 8 Watts & S. (Pa.) 44; *Washburn v. Baldwin*, 10 Phila. (Pa.) 472; *Com. v. Howard*, 149 Pa. St. 302, 24 Atl. 308.

Submission on the Pleadings.—A case may be submitted on the facts in evidence by force of the pleadings alone. *McCann v. McLennan*, 3 Neb. 25; *Com. v. Worcester*, etc. R. Co., 124 Mass. 581.

63. *United States*.—*Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 670; *Glenn v. Fant*, 134 U. S. 398.

Indiana.—*Fisher v. Purdue*, 48 Ind. 323.

Maryland.—*Lewis v. Hoblitzell*, 6 Gill. & J. 259.

Massachusetts.—*Powers v. Provident Sav. Inst.* 122 Mass. 443.

Pennsylvania.—*Holmes v. Wallace*, 46 Pa. St. 266; *Diehl v. Ihrie*, 3 Whart. 143; *Kinsley v. Coyle*, 58 Pa. St. 461; *Union Sav. Bank v. Fife*, 101 Pa. St. 388; *Luzerne County v. Glennon*, 109 Pa. St. 564.

Virginia.—*Sawyer v. Corse*, 17 Gratt. 230, 94 Am. Dec. 445; *Ramsey v. McCue*, 21 Gratt. 349.

64. *Pomeroy v. State Bank*, 1 Wall. (U. S.) 592; *Green v. County of Fresno*, 95 Cal. 329, 30 Pac. 544; *Woodman v. Eastman*, 10 N. H. 359; *Clark v. Wise*, 46 N. Y. 612; *Holmes v. Wallace*, 46 Pa. St. 266; *Brewer v. Opie*, 1 Call (Va.) 212.

Findings of Fact.—Findings of fact by the court cannot be required (*McMenomy v. White*, 115 Cal. 339, 47 Pac. 109), and a reference to determine facts is improper. *Phelps v.*

The submission must be unconditional.⁶⁵ The statement should declare that the case agreed upon contains a statement of the facts,⁶⁶ and the parties should be designated as plaintiff and defendant.⁶⁷ The statutory provisions concerning the agreed case are mandatory and must be strictly followed.⁶⁸ An affidavit of reality is a jurisdictional requisite.⁶⁹ The stipulation must be signed and

Phelps, 145 Mass. 416, 14 N. E. 625; Frailey v. Legion of Honor, 132 Pa. St. 578, 20 Atl. 684.

Exceptions.—The right to except cannot be reserved as it is inconsistent with the agreement as to the facts. Bixler v. Kunkle, 17 Serg. & R. (Pa.) 298, 310. See Darlington v. Gray, 5 Whart. (Pa.) 487, 502.

A Lost Statement.—If an agreed case becomes lost, the case will be sent to trial in the ordinary manner, since in such a case a dispute is apt to arise as to its contents. Cook v. Shrauder, 25 Pa. St. 312.

The Rule Stated.—"The statement of facts on which the court will inquire if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself without inferences or comparisons or balancing of testimony or weighing of evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by the court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a case as this court can act upon." Burr v. Des Moines R. & N. Co., 1 Wall. (U. S.) 99.

65. Unconditional.—Where it was agreed that if judgment on the agreed case was for the plaintiff the defendant might then have a trial by jury, the court held the submission should be disregarded. Zar-

kowski v. Schroeder, 60 App. Div. 457, 69 N. Y. Supp. 893; Stockton v. Copeland, 23 W. Va. 696.

66. Begen v. Curtis, 81 App. Div. 91, 80 N. Y. Supp. 929. And see Overman v. Sims, 96 N. C. 451, 2 S. E. 372; Moore v. Hinnant, 87 N. C. 505; Lewis v. Wake County, 74 N. C. 194; Hemphill v. Yerkes, 132 Pa. St. 545, 19 Atl. 342; Piedmont R. Co. v. Reidsville, 101 N. C. 404, 8 S. E. 124.

67. *In re Yerk's Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869. "In a submission of this kind one of the parties should be designated as the plaintiff and the other as the defendant, and the claim of each, in the nature of a prayer for judgment should be set out. Otherwise the provision of the code declaring that the controversy becomes an action after the filing of the submission and that each provision of law relating to an action becomes applicable, can not possibly be carried out." And see Frazer v. Miller, 12 Kan. 459.

68. White v. Clarke, 111 Cal. 425, 44 Pac. 164; Reddick v. Board of Comrs., 14 Ind. App. 598, 41 N. E. 834, 43 N. E. 238; Odell v. Cromwell, 10 N. Y. Wkly. Dig. 273; Reeder v. Workman, 37 S. C. 413, 16 S. E. 187.

69. *California.*—White v. Clarke, 111 Cal. 425, 44 Pac. 164.

Colorado.—Molandick v. Colorado Cent. R. Co., 3 Colo. 173.

Indiana.—Shelbyville v. Phillips, 149 Ind. 552, 48 N. E. 626; Myers v. Lawyer, 99 Ind. 237; Sharpe v. Sharpe, 27 Ind. 507; Witz v. Dale, 129 Ind. 120, 27 N. E. 498; Manchester v. Dodge, 57 Ind. 584; Godfrey v. Wilson, 70 Ind. 50; Slessman v. Crozier, 80 Ind. 487; Downey v. Washburn, 79 Ind. 242; Western Union Tele. Co. v. Frank, 85 Ind. 480.

filed,⁷⁰ and the judgment or relief sought must be expressly asked for.⁷¹

d. *Effect*.—The submission of a controversy as an agreed case, by stipulation, is equivalent to a finding of the facts by the court or the special verdict of a jury.⁷² Facts stated are taken as true

Iowa.—Keeline *v.* Council Bluffs, 62 Iowa 450, 17 N. W. 668.

Kentucky.—Bank *v.* Hopkins, 2 Dana 395; Jones *v.* Hoffman, 18 B. Mon. 656.

New York.—Troy Mfg. Co. *v.* Harrison, 73 Hun 528, 26 N. Y. Supp. 109; People *v.* Mutual Endowment Assn., 92 N. Y. 622.

North Carolina.—McCarson *v.* Richardson, 18 N. C. (1 Dev. & B.) 561; Grant *v.* Newsom, 81 N. C. 36; Aycock *v.* Harrison, 65 N. C. 8; Wilmington *v.* Atkinson, 88 N. C. 54; Hervey *v.* Edmunds, 68 N. C. 243; Arnold *v.* Porter, 119 N. C. 123, 25 S. E. 785; Grandy *v.* Gulley, 120 N. C. 176, 26 S. E. 779.

Oklahoma.—Johnson *v.* Cameron, 2 Okla. 266, 37 Pac. 1055.

South Carolina.—Reeder *v.* Workman, 37 S. C. 413, 16 S. E. 187; Town of Plainfield *v.* Plainfield, 67 Wis. 525, 30 N. W. 673.

Form.—"The affidavit is insufficient to authorize the court to entertain the proceeding. Instead of showing that the controversy is real its language is that 'the statement of the case is a real controversy' and instead of showing that the proceedings are in good faith, it states that the 'contention' is in good faith." White *v.* Clarke, 111 Cal. 425, 44 Pac. 164.

Maker.—The affidavit must be made by the party and not by the attorney. See Bloomfield *v.* Ketchem, 95 N. Y. 657; but if signed by only one of the parties it is good. Booth *v.* Cottingham, 126 Ind. 431, 26 N. E. 84; Jones *v.* Hoffman, 18 B. Mon. (Ky.) 656; Canady *v.* Hopkins, 7 Bush (Ky.) 108.

An Agreement that there is an affidavit is not enough and will not take the place of the affidavit itself. Mellois *v.* Chaine, 20 Cal. 679.

70. Farwell *v.* Sturgess, 58 Ill. App. 462; Booth *v.* Cottingham, 126

Ind. 431, 26 N. E. 84; Farrand *v.* Bentley, 6 Mich. 280; Reeder *v.* Workman, 37 S. C. 413, 16 S. E. 187; Bradford *v.* Buchanan, 39 S. C. 237, 17 S. E. 501.

71. *Maryland*.—Tyson *v.* West Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161; Marine Bank *v.* Merchant's Bank, 12 Gill & J. 498.

Missouri.—Stanberry *v.* Jordan, 145 Mo. 371, 46 S. W. 1093.

New York.—Marshall *v.* Hayward, 67 App. Div. 137, 73 N. Y. Supp. 592; Williams *v.* Rochester, 2 Lans. 169.

Pennsylvania.—Berks County *v.* Pile, 18 Pa. St. 493; Berks County *v.* Jones, 21 Pa. St. 413; Morgan *v.* Mercer County, 8 Pa. Super. Ct. 96. But compare, Williams *v.* Iredell County, 132 N. C. 300, 43 S. E. 896.

"If parties waive process and pleading, and come before the court on a naked statement of facts, there is nothing in the record to show what relief is desired unless it is expressed in the agreement itself. The court acquires jurisdiction of the parties and of the subject-matter in such case by force of the agreement, and if nothing is expressed as to the judgment or decree to be rendered upon the facts stated, the court is not empowered to do anything whatever in the premises." Central City Water Co. *v.* Kimber, 1 Colo. 475.

Nominal Damages.—If the damages are not fixed and settled in the statement submitted, only nominal damages will be awarded. McAneaney *v.* Jewett, 92 Mass. 151.

72. *Indiana*.—Fisher *v.* Purdue, 48 Ind. 323.

Maryland.—Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596; Brinkley *v.* Hambleton, 67 Md. 169, 8 Atl. 904.

Michigan.—Goodrich *v.* Detroit, 12 Mich. 279.

Missouri.—Crane *v.* Whittemore, 4 Mo. App. 510; Barden *v.* St. Louis Mut. Life Ins. Co., 3 Mo. App. 248.

and the parties may not thereafter deny or question them.⁷³ The court is limited to a consideration of the facts presented to it and is not allowed, ordinarily, to infer other facts from those stated,⁷⁴ but matters of law may be inferred, as well as such inferences as

Montana.—Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

Virginia.—James *v.* M'Williams, 6 Munf. 301.

73. *England*.—Van Wart *v.* Wolley, 4 Ry. & M. 4, 21 E. C. L. 366.

Alabama.—Wilcox *v.* San Jose Fruit Co., 113 Ala. 519, 21 So. 376; *Ex parte* Hayes, 92 Ala. 120, 9 So. 156.

Indiana.—Day *v.* Day, 100 Ind. 460; Booth *v.* Cottingham, 126 Ind. 431, 26 N. E. 84.

Iowa.—Huff *v.* Cook, 44 Iowa 639.

Maine.—Alden *v.* Goddard, 73 Me. 345.

Massachusetts.—Austin *v.* Wilson, 7 Mass. 205; Jennison *v.* Roxbury, 9 Gray 32; Com. *v.* Greene, 13 Allen 251.

Maryland.—Swatara R. Co. *v.* Brune, 6 Gill 41.

Missouri.—Hinkle *v.* Kerr, 148 Mo. 43, 49 S. W. 864; Sutton *v.* Dameron, 100 Mo. 141, 13 S. W. 497; Robidoux *v.* Casseleggi, 81 Mo. 459.

New Hampshire.—Manning *v.* Cogan, 49 N. H. 331; Page *v.* Brewsters, 54 N. H. 184.

New York.—Lathers *v.* Fish, 4 Lans. 213; Chicago & E. I. R. Co. *v.* Central Trust Co., 41 App. Div. 495, 58 N. Y. 809.

Pennsylvania.—Luzerne Co. *v.* Glennon, 109 Pa. St. 564.

Virginia.—Mooberry *v.* Marye, 2 Munf. 453.

Washington.—Levy *v.* Sheehan, 3 Wash. 420, 28 Pac. 748.

"The effect of the admission is to conclude the parties. This admission belongs to that class of solemn judicial admissions which are made as a substitute for proof of the fact admitted.

They dispense with proof as to such fact, and although there may appear in the case evidence casting doubt on the truth of such matters admitted, it is to be presumed that there is other evidence not produced or other reasons which induce the admissions. If the admissions were improvidently made, the injured party

has his remedy by motion to strike out or amend the admission but while it exists in the case it would appear to be conclusive." Fearing *v.* Irwin, 4 Daly (N. Y.) 385, 396.

74. *United States*.—Burnham *v.* North Chicago St. R. Co., 78 Fed. 101, 23 C. C. A. 677; Binney *v.* Chesapeake Canal Co., 8 Pet. 216.

Alabama.—Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223.

California.—Green *v.* Fresno County, 95 Cal. 329, 30 Pac. 544; Crandall *v.* Amador Co., 20 Cal. 72.

Indiana.—Day *v.* Day, 100 Ind. 460; Fisher *v.* Purdue, 48 Ind. 323.

Kansas.—Gray *v.* Crockett, 30 Kan. 138, 1 Pac. 50; Brown *v.* Evans, 15 Kan. 88.

Kentucky.—Frazier *v.* Spear, 2 Bibb 385.

Maine.—Trafton *v.* Hill, 80 Me. 503, 15 Atl. 64.

Massachusetts.—Gallagher *v.* Hathaway Mfg. Corp., 169 Mass. 578, 48 N. E. 844.

Michigan.—Goodrich *v.* Detroit, 12 Mich. 279.

Missouri.—Barden *v.* St. Louis Mutual Life Ins. Assn., 3 Mo. App. 248; White *v.* Walker, 22 Mo. 433; Ford *v.* Cameron, 19 Mo. App. 467; Henri *v.* Grand Lodge, 59 Mo. 581.

New Hampshire.—Pray *v.* Burbank, 11 N. H. 290; Henniker *v.* Hopkinton, 18 N. H. 98; Howard *v.* Farr, 18 N. H. 457.

New York.—Beer *v.* Simpson, 22 Civ. Proc. 351, 19 N. Y. Supp. 578; American Box Mach. Co. *v.* Zentgraf, 45 App. Div. 522, 61 N. Y. Supp. 417; Clark *v.* Wise, 46 N. Y. 612; Fearing *v.* Irwin, 55 N. Y. 486; Tanenbaum *v.* Simon, 75 N. Y. Supp. 922.

Pennsylvania.—Kinsley *v.* Coyle, 58 Pa. St. 461; Hazelbaker *v.* Coal Co., 158 Pa. St. 393, 27 Atl. 1051; Seiple *v.* Seiple, 133 Pa. St. 460, 19 Atl. 406.

Texas.—Rogers *v.* Gould, 20 Tex. 437.

are the necessary consequence of the facts stated;⁷⁵ and the parties may, by express agreement, give to the court the power to make all proper inferences that the facts in evidence may justify.⁷⁶ The decision of the court must be upon the questions put in issue by the agreed case,⁷⁷ and it cannot go beyond these questions and decide others, no matter how beneficial and equitable such a decision would be.⁷⁸ Additional facts cannot be introduced in evidence.⁷⁹ All defects in the pleadings are waived and pleadings themselves

Virginia.—*Sawyer v. Corse*, 17 Gratt. 230, 94 Am. Dec. 445; *Royall v. Eppes*, 2 Munf. 479; *Ramsey's Adm. v. McCue*, 21 Gratt. 349.

75. *Maine.*—*Spring v. Davis*, 36 Me. 399.

Maryland.—*McColgan v. Hopkins*, 17 Md. 395; *Hysinger v. Baltzell*, 3 Gill & J. 158, 45 Am. Dec. 126; *Vansant v. Roberts*, 3 Md. 119.

Massachusetts.—*Mayhew v. Durfee*, 138 Mass. 584; *Hovey v. Chisolm*, 56 Hun 328, 9 N. Y. Supp. 671; *Kneller v. Lang*, 137 N. Y. 589, 33 N. E. 555.

Virginia.—*Sawyer v. Corse*, 17 Gratt. 230, 94 Am. Dec. 445.

In *Maryland* it is now provided by statute that a court may draw all proper inferences. *City of Baltimore v. Consolidated Gas Co.*, 99 Md. 540, 58 Atl. 216.

76. *Tyson v. Western Nat. Bank*, 77 Md. 412, 26 Atl. 520; *Crane v. Whittemore*, 4 Mo. App. 510; *Doe v. Crisp*, 1 P. & D. (Eng.) 37, 8 A. & E. 779, 8 L. J. Q. B. 41; *Latter v. White*, 5 H. L. Cas. (Eng.) 578, 41 L. J. Q. B. 342. *Contra.*—*Pray v. Burbank*, 11 N. H. 290. And see, *Rand v. Hansom*, 154 Mass. 87, 28 N. E. 6.

77. *Matters Not in Issue.*—The court may not consider questions which the agreed case did not put in issue. *Arapahoe Co. v. Hall*, 9 Colo. App. 538, 49 Pac. 370; *Missouri, Etc. R. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309.

78. *Decision of the Court.*—The decision of the court must be upon the case as presented to it and it can not go beyond the point presented to it for its decision. *De Armond v. Whitaker*, 99 Ala. 252, 13 So. 613;

Barden v. St. Louis Life Ins. Co., 3 Mo. App. 248; *Missouri Etc. R. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309; *Frailey v. Legion of Honor*, 132 Pa. St. 578, 20 Atl. 684; *Philadelphia & R. R. Co. v. Waterman*, 54 Pa. St. 337; *Southern R. Co. v. City Council*, 49 S. C. 449, 27 S. E. 652.

But in *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9, it was held that in a case where public rights were involved a decision would be rendered although the facts did not warrant a judgment as between the parties.

Costs.—Where no decision is reached and the case is dismissed, the costs will be divided. *Frazer v. Miller*, 12 Kan. 459; *People v. Mutual End. Assn.*, 92 N. Y. 622.

Ordinarily any agreement between the parties as to the costs will be carried out by the court. *McDonald v. Ross-Lewin*, 29 Hun 87; *People v. Fitchburg R. Co.*, 18 N. Y. Supp. 269, 44 N. Y. St. 229.

Where there is no provision made for the costs, the court has a discretion as to the manner of awarding them. *Richards v. James*, 16 I. T. N. S. 174; *Kingsland v. New York*, 52 Hun 98, 4 N. Y. Supp. 685; *Landon v. Walmuth*, 76 Hun 271, 27 N. Y. Supp. 717. But compare *Herkimer County Light Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924.

79. The agreed case, from its nature as a special finding of facts or the special verdict of a jury, necessarily shuts out the presentation of any further evidence by professing to be, itself, all the evidence in the case. See *Kellerman v. Kansas City R. Co.*, 68 Mo. App. 255, 266.

are unnecessary, and if present, will be disregarded;⁸⁰ but the parties may expressly reserve the right to make objections to the pleadings.⁸¹ The court will relieve a party from an agreed case where it becomes necessary for the furtherance of justice,⁸² and will dis-

80. *California*.—Hess v. Bolinger, 48 Cal. 349.

Indiana.—Pennsylvania Co. v. Niblack, 99 Ind. 149; Day v. Day, 100 Ind. 460; Sharpe v. Sharpe, 27 Ind. 507; Manchester v. Dodge, 57 Ind. 584.

Iowa.—Donald v. St. Louis, K. C. & N. R. Co., 52 Iowa 411, 3 N. W. 462; Perry & Murray, 55 Iowa 416, 7 N. W. 46, 680.

Kansas.—Reynolds v. Reynolds, 30 Kan. 91.

Maine.—Knight v. Ft. Fairfield, 70 Me. 500; Machias Hotel Co. v. Fisher, 56 Me. 321; Pillsbury v. Brown, 82 Me. 450, 19 Atl. 858.

Maryland.—American Coal Co. v. Alleghany Co., 59 Md. 185.

Massachusetts.—Cleveland v. Boston Savings Bank, 129 Mass. 27; Merrill v. Bullock, 105 Mass. 486; Boxford v. Harriman, 125 Mass. 321.

North Carolina.—McKethan v. Ray, 71 N. C. 165.

Pennsylvania.—Bixler v. Kunkle, 17 Serg. & R. 298.

Texas.—Chappell v. McIntyre, 9 Tex. 161; Parker v. Portis, 14 Tex. 166.

Virginia.—Sawyer v. Corse, 17 Gratt. 230, 94 Am. Dec. 445.

Contra.—Marion County v. Harvey County, 26 Kan. 181, 202.

"By submitting the case upon agreed facts, the parties waived all questions of pleading and the cause is to be determined on its merits, upon the facts agreed, as if the questions relating to them had been presented upon proper pleadings." Fay v. Duggan, 135 Mass. 243.

And in Warrick Building & Loan Association v. Houghland, 90 Ind. 117, the rule was thus stated: "The proceeding was an agreed case. In such a case no pleadings are contemplated by the statute. It is intended that the agreed statement of facts shall serve the purpose of all the pleadings used in an ordinary action to evolve an issue for trial. It is to be considered as showing the

facts of the controversy though they should constitute a different cause of action from that contemplated by the complaint.

81. **Express Reservation.**—An objection to the form of the pleadings may be expressly reserved by a party and in such a case he is entitled to take advantage of the defects. Hamilton v. Cook County, 5 Ill. 519; Esty v. Currier, 98 Mass. 500; Fay v. Duggan, 135 Mass. 242; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Bixler v. Kunkle, 17 Serg. & R. (Pa.) 298.

82. *Illinois*.—Keith v. Rucker, 16 Ill. 389.

Indiana.—State v. Porter, 86 Ind. 404.

Massachusetts.—Gregory v. Pierce, 4 Met. 478.

New Hampshire.—Page v. Brewsters, 54 N. H. 184; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491, 526.

New York.—Fearing v. Irwin, 55 N. Y. 486.

Ohio.—Ish v. Crane, 13 Ohio St. 574; Wiswell v. First Cong. Church, 14 Ohio St. 31.

Washington.—Levy v. Sheehan, 3 Wash. 420, 28 Pac. 748.

And see *infra*, III.

When the Court Will Set Aside.

"In order to justify us in interfering by discharging the case, it must appear that the agreement has been entered into under some misapprehension of the facts, or that new facts have been discovered since the agreement, material to the party's case, and due care and caution exercised in entering into the agreement. If under such circumstances it appears that the rights of the party will be concluded and sacrificed should he be held bound by the agreement, and that injustice would thus be done, the court may order the case to be discharged on such terms as may appear reasonable for the indemnity of his adversary. Bell v. Twilight, 17 N. H. 528.

Amendment.—An amendment of the case will, ordinarily, not be al-

miss the case if all the requirements of the statute have not been complied with.⁸³

e. The Stipulation on Appeal.—The agreed case being before the appellate court by bill of exceptions,⁸⁴ that court will regard it as an original case, and will not indulge any presumption as to the correctness of the decision of the lower court. All the facts having been agreed upon, it is in as good a position to judge of their legal

lowed, but the relief will be given by discharging the entire case.

England.—*Commissioners v. Jones*, 8 C. B. N. S. 114, 98 E. C. L. 114; *Hills v. Hunt*, 15 C. B. 1, 80 E. C. L. 1.

Indiana.—*State v. Porter*, 86 Ind. 404.

Montana.—*Montana Milling Co. v. Jefferis*, 16 Mont. 559, 41 Pac. 712.

New Hampshire.—*Bell v. Twilight*, 17 N. H. 528.

New York.—*Fearing v. Irwin*, 4 Daly 385; *Kingsland v. City of New York*, 42 Hun 599.

North Carolina.—*Hervey v. Edmunds*, 68 N. C. 243; *Grant v. Newsum*, 81 N. C. 36.

Ohio.—*Wiswell v. First Cong. Church*, 14 Ohio St. 31.

Code Provision.—In New York a code section provides for the amendment of agreed cases. See *In re Yerks' Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869.

83. If no Real Controversy is involved the court will dismiss the case. *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Williams v. Rochester*, 2 Lans. (N. Y.) 169.

If Necessary Facts Are Omitted. If facts which would be necessary for a complete and equitable judgment have been omitted, the case will be dismissed.

Kansas.—*Frazer v. Miller*, 12 Kan. 459.

Massachusetts.—*Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Merrill v. Suffolk Mut. Fire Ins. Co.*, 46 N. E. 123.

Missouri.—*Gage v. Gates*, 62 Mo. 412; *Hughes v. Moore*, 17 Mo. App. 148; *Field v. Chicago R. I. & P. R. Co.*, 21 Mo. App. 600.

New Hampshire.—*Henniker v. Hopkinton*, 18 N. H. 98.

New York.—*Zarkowski v. Schroeder*, 60 App. Div. 547, 69 N. Y. Supp. 893; *Cunard S. S. Co. v. Voorhis*, 104 N. Y. 525, 11 N. E. 49;

Patterson v. Mutual Life. Assn. 19 Civ. Proc. 262, 11 N. Y. Supp. 636.

Pennsylvania.—*Whitesides v. Russell*, 8 Watts & S. 44; *Holmes v. Wallace*, 46 Pa. St. 266; *Union Sav. Bank v. Fife*, 101 Pa. St. 388; *Kinsley v. Coyle*, 58 Pa. St. 461.

A Defect of Parties.—The court will not consider a case submitted as an agreed case where all of the parties interested in the case as parties did not join in submitting it. *Hodgdon v. Darling*, 61 N. H. 582; *Kennedy v. New York*, 79 N. Y. 361; *Wayle v. Tuttle*, 11 N. Y. Wkly. Dig. 186; *Berlin Iron Bridge Co. v. Wagner*, 56 Hun 648, 10 N. Y. Supp. 215; *Bates v. Lilly*, 65 N. C. 232.

Facts Omitted or Inserted by Fraud.—If facts have been omitted or inserted by fraud or mistake, the court will relieve the party prejudiced and dismiss the case.

England.—*Wheldon v. Matthews*, 2 Chitty 399, 18 E. C. L. 378.

Massachusetts.—*Gregory v. Pierce*, 4 Met. 478; *Platt v. Supervisors Ct.*, 124 Mass. 353; *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Com. v. Scott*, 123 Mass. 418.

New Hampshire.—*Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491, 526; *Heywood v. Wingate*, 14 N. H. 73; *Bell v. Twilight*, 17 N. H. 528.

New York.—*Matter of Smith*, 9 Abb. N. C. 452; *Odell v. Cromwell*, 10 N. Y. Wkly. Dig. 273.

Pennsylvania.—*Cook v. Shrauder*, 25 Pa. St. 312; *Com. v. Howard*, 149 Pa. St. 302, 24 Atl. 308.

84. Burr v. Des Moines R. & N. Co., 1 Wall. (U. S.) 99; *Boyd v. Carroll*, 30 Ark. 527; *Lofton v. Moore*, 83 Ind. 112; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Day v. Day*, 100 Ind. 460; *Berkey v. Hascall*, 123 Ind. 502, 24 N. E. 336, 8 L.

effect as was the lower court, and if, in its opinion, no cause of action exists, the case will be dismissed.⁸⁵

f. *Use in Other or Subsequent Trials.* — An agreed case, unless expressly limited to the particular trial, may be used as evidence between the parties upon any subsequent trial or proceeding,⁸⁶ but it cannot be used in another action.⁸⁷

C. AGREED STATEMENT OF FACTS. — a. *In General.* — By an agreement as to the facts of the case the parties may dispense with all other evidence tending to prove the facts. The agreed statement becomes evidence of the facts, but unlike the "agreed case," it is not itself the "case."⁸⁸

R. A. 65; *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6.

85. *Isbell v. Stone*, 14 N. C. (3 Dev. L.) 410. And see, *infra*, notes 97, 98 under I, 3, C, d.

Contra. — *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708.

No Appeal Lies from the judgment of a lower court dismissing an agreed case and directing a trial according to the regular procedure. *West v. Platt*, 124 Mass. 353; *Board of Comrs. v. Gilliam*, 17 Mont. 333, 42 Pac. 852.

Entire Case Must Be in the Record. — The whole of the agreed case must appear in the record on appeal. *Upper Appomattox County v. Bufaloe*, 121 N. C. 37, 27 S. E. 999.

86. "The agreement in question was entered into for the purposes of the suit and not merely for the case that was transferred. An agreement entered into for the purpose of the suit must mean not only for determining the questions of law raised by the case, but for any and all proceedings, subsequently, to the close of the suit. There was no provision inserted that the facts should be considered for the purpose of that case, or that they should not be used as evidence before the jury, as is usual where such is the intention of the parties." *Page v. Brewsters*, 54 N. H. 184.

And see *infra*, notes 99, 1, under I, 3, C, e.

87. *Frye v. Gragg*, 35 Me. 29; *Harrison's Devises v. Baker*, 5 Litt. (Ky.) 250.

"The agreement of the parties as to the facts stated in the agreed case was that they were agreed 'for the purposes of this suit.' The admissibility of the agreed case as evidence in this action of review must depend upon the point whether it is the original suit or a new action." *Page v. Brewsters*, 58 N. H. 126.

88. *Citizens' Ins. Co. v. Harris*, 108 Ind. 392, 9 N. E. 299; *Oppenheim v. Pittsburg R. Co.*, 85 Ind. 471; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Downey v. Washburn*, 79 Ind. 242; *Martin v. Martin*, 74 Ind. 207; *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Dearing v. Rucker*, 18 Gratt. (Va.) 426.

"An agreed statement of facts is simply the result of an agreement of the parties as to what the evidence in the case will prove. Many cases recognize and enforce the difference between an agreed case and a case where the evidence is embodied in an agreement as to the facts. Where there is simply an agreed state of facts, a motion for a new trial and the like is necessary, but it is otherwise where there is an agreed case. Where there is an agreed case under the statute an affidavit is required to show that there is an actual controversy, for courts will not hear or determine speculative questions, nor will they take cognizance of any legal controversies except those involving actual disputes between real parties. . . . Where, as here, the proceeding on its face appears to be an actual adversary proceeding, and there is nothing to indicate that it is a feigned action, the agreement as to

b. *Contents and Form.* — The statement must be certain and definite so as to enable the court to enter a judgment which will be in accord with facts as stated.⁸⁹ It is subject to the general rules regulating the form of stipulations.⁹⁰

c. *Effect.* — Each party is absolutely bound and concluded by the agreed statement and can in no way deny the facts as thus admitted.⁹¹ Other and additional evidence may, however, be given,⁹² unless it is inconsistent with the facts already admitted and in evi-

the evidence will not change the character of the case nor will it overturn the presumption that there is an actual controversy." *Witz. Admr. v. Dale*, 129 Ind. 120, 27 N. E. 498.

The Court Makes a Finding of the Facts. — "The record in the case before us, which was commenced before a justice of the peace and was for the recovery of the possession of real property, shows the waiver of the jury and submission by agreement of the parties to the court for trial, the use of the agreed statement as evidence, the offer of other evidence by each of the parties; and the court instead of stating a conclusion of law as in an agreed case, made a finding, upon which judgment was given for the defendant. A motion for a new trial was, therefore, not only proper but necessary, to bring to this court the question whether the decision was according to the law and the evidence." *Slessman v. Crozier*, 80 Ind. 487.

The Statement, Itself, Is Not a Special Finding of the Facts. "When parties merely agree on the facts, they do nothing more than obviate the necessity of making proof, and such facts do not constitute a special finding of facts, and an exception to a conclusion of law based on such facts, presents no question on appeal. It is mere evidence and nothing more." *Reddick v. Board of Comrs.*, 14 Ind. App. 598, 41 N. E. 834, 43 N. E. 238.

^{89.} *Blankinship v. Power Co.*, 4 Okl. 242, 43 Pac. 1088; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

"For the purpose of the trial of this case, it is agreed by the plaintiff and defendant that the facts in

this case are as follows." This followed by the statement and an affidavit of reality was held not to be an agreed case under the statute. *Pennsylvania Co. v. Niblack*, 99 Ind. 149. It was a trial upon an agreed statement of facts used merely as evidence.

⁹⁰ *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600.

^{91.} *Adams v. Eichenberger*. (Ark.), 18 S. W. 853; *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600; *Catlin v. Trader's Ins. Co.*, 83 Ill. App. 40; *Ish v. Crane*, 13 Ohio St. 574; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103; *Morgan v. Davenport*, 60 Tex. 230.

"When parties to a case agree to submit the same for decision upon an agreed statement of facts and nothing is said to the contrary, each party is absolutely bound and concluded by the statement of fact thus agreed to, so far as the trial in which this stipulation is made is concerned." *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46.

Nature of the Statement. — "The facts were agreed to by the parties and filed in the case. The agreement was not qualified or limited, but was absolute and unlimited. It belongs to that class of evidence known as 'Judicial Admissions.' Solemn or judicial admissions, made for the express purpose of dispensing with the proof of some fact at the trial in the form of express stipulations, on being filed and becoming a part of the record, are generally conclusive of all the facts involved, and may be given in evidence on any subsequent trial." *Consolidated Steel & Wire Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654.

^{92.} *Doe v. Bird*, 7 Car. & P. 6, 32 E. C. L. 415; *Burnham v. North Chicago St. R. Co.*, 88 Fed. 627, 32 C. C. A. 64; *Kansas City, F. S. &*

dence, or is expressly excluded by a declaration that the statement includes all the facts of the case.⁹³ The court has no authority to infer facts not expressly agreed to and admitted in the statement, unless such facts are necessarily to be inferred as a matter of law.⁹⁴ In case of mistake or fraud or in other cases where it would be inequitable to allow the statement to stand, the court may, in its discretion, relieve a party from a statement entered into.⁹⁵ All ques-

G. R. Co. v. Hines, 29 Kan. 695; Dillon v. Cockcroft, 90 N. Y. 649; Blankinship v. Power Co., 4 Okl. 242, 43 Pac. 1088.

"In cases where the facts are all agreed upon they stand in lieu of a special verdict and no declarations of law are necessary. The court applies the law arising upon such undisputed facts and renders the judgment of the law. But the rule is otherwise where the parties agree to a certain state of facts while they controvert others which one or the other of the parties must introduce in evidence to support their side of the cause; in such a case the agreed statement is used before the jury or the court sitting as a jury, as evidence concluding the parties so far as they have agreed, but in that case the judgment will be upon the finding of facts and not upon an agreed case." *Kellerman & Sons v. Kansas City R. Co.*, 68 Mo. App. 255, 266.

93. See *Wilcox v. San Jose Fruit Co.*, 113 Ala. 519, 21 So. 376, where the court says: "The conclusive presumption is that the defendant would not have consented to the submission of the cause for decision by the court upon any other than the agreed statement of facts. . . . Where parties go to trial, relying upon such evidence as is present, knowing at the time there is additional evidence, and lose, they are not entitled to another hearing without some showing other than the mere proof of the existence of such other evidence."

94. *Morse v. Fraternal Accident Assn.*, 190 Mass. 417, 77 N. E. 491; *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327; *Mayhew v. Durfee*, 138 Mass. 584; *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

"It is insisted that the facts agreed upon would warrant the inference. It is a sufficient answer to this to say that where the facts are agreed

upon and the questions of law alone are submitted to the court for its judgment, we can only respond to the questions of law arising upon the admitted facts. The inference of one fact from another is a question of fact and not of law and this inference must be drawn by a jury; and it would be traveling out of the province of the court as well as of the agreement in this case, if the court was to infer another fact and pronounce the law arising thereon." *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

95. *Burnham v. North Chicago St. R. Co.*, 88 Fed. 627, 32 C. C. A. 64; *Ex parte Hayes*, 92 Ala. 120, 9 So. 156; *Ish v. Crane*, 13 Ohio St. 574; *Morgan v. Davenport*, 60 Tex. 230; *Levy v. Sheehan*, 3 Wash. 420, 28 Pac. 748.

And see *infra*, III, "When stipulations will be set aside."

When Relief Will Be Granted.

"Nor do we perceive any impropriety in the ruling permitting the plaintiffs to withdraw from the written stipulation. As the defendant would not consent to amend the agreed statement of facts so as to embrace the additional matters which plaintiffs desired to incorporate therein, and as the court had not rendered its decision in pursuance of the stipulation, it was proper to permit the plaintiff to withdraw from the stipulation in order that the case might take its regular course before a jury and the parties thereby have an opportunity to present all pertinent facts. The defendant was not deprived of any substantial right by the order, it had not been misled to its disadvantage, nor put to any trouble or inconvenience between the date of the submission and the plaintiff's motion to withdraw. The mere fact that the plaintiffs might have discovered the new matter by the exercise of proper diligence be-

tions as to the sufficiency and nature of the pleadings are waived by a submission under an agreed statement.⁹⁶

d. *The Stipulation on Appeal*. — On appeal, the facts as agreed upon in the court below, cannot be disputed, unless they were expressly limited to the trial in the lower court.⁹⁷ The court will render the same verdict that the lower court should have rendered, and will reach its decision independently of any presumption that the judgment of the lower court was correct.⁹⁸

fore they agreed to the submission, does not as a matter of law deprive them of the privilege of withdrawing from the submission, for the case had not been decided by the court and therefore the strict rule of diligence applicable to new trials for newly discovered evidence does not apply. The court had power to make the order, the matter rested in its discretion, and no abuse of discretion is shown." *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62, 67 L. R. A. 518.

96. *United States*. — *Willard v. Wood*, 135 U. S. 309; *Bond v. Dustin*, 112 U. S. 604.

Maine. — *Machias Hotel Co. v. Fisher*, 56 Me. 321; *Moore v. Philbrick*, 32 Me. 102, 52 Am. Dec. 642.

Massachusetts. — *Inhabitants of West Roxbury v. Minot*, 114 Mass. 546; *Ellsworth v. Brewer*, 11 Pick. 316; *Brettun v. Fox*, 100 Mass. 234; *Merrill v. Bullock*, 105 Mass. 486.

"The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived and the want of an answer was immaterial." *Saltonstall v. Russell*, 152 U. S. 628.

The Reason of the Rule. — "By making a statement of the facts and asking the judgment of this court thereon, the parties are understood to waive all objections to the pleadings unless those questions are, in direct terms, reserved. For obvious reasons this ought to be so, as the opportunities for amendment of the pleadings would be much greater and they could be more conveniently allowed in the earlier stages of the case." *Scudder v. Worster*, 11 Cush. (Mass.) 573.

97. In *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62, the court, in applying this principle, said: "To comply with appellant's desire would be to now permit the introduction of evidence here, directly contradicting the agreed statement of facts upon which the case was tried, and to thereby make another and wholly different case and to introduce new parties."

98. *Indiana*. — *Day v. Day*, 100 Ind. 460; *Indianapolis R. v. Kinney*, 8 Ind. 402; *Hannum v. State*, 38 Ind. 32; *Warrick Bldg. Assn. v. Houghland*, 90 Ind. 115.

Kansas. — *Brown v. Evans*, 15 Kan. 88.

New Jersey. — *Sullivan v. Visconti*, 68 N. J. L. 543, 53 Atl. 598; *National Bank v. Berrall*, 70 N. J. L. 757, 58 Atl. 189.

Oklahoma. — *Consolidated Steel & Wire Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654.

Contra. — *Arkansas*. — *Robson v. Tomlinson*, 54 Ark. 229, 15 S. W. 456; *Riggin v. Wolf*, 53 Ark. 537, 14 S. W. 922.

Illinois. — *Tillotson v. Mitchell*, 111 Ill. 518.

Maine. — *State v. Woodbury*, 76 Me. 457.

Massachusetts. — *Charlton v. Donnell*, 100 Mass. 229; *West v. Platt*, 120 Mass. 421.

Missouri. — *Henri v. Grand Lodge*, 59 Mo. 581.

"Remarks made in other cases that this court will not weigh evidence and reverse judgments because the preponderance seems to us to be against the verdict, because we have not the same opportunities to observe the bearing of witnesses and scrutinize the manner of giving their testimony to the jury, have no application to this case. Here the facts are agreed, not controverted. They are

e. *Use in Other or Subsequent Trials.*—Unless expressly limited, the stipulation submitting an agreed statement of facts may be used in a subsequent trial as evidence,⁹⁹ but it cannot be used in the trial of another case, nor where there has been a change of parties.¹

not testimony to be weighed but facts to be considered; and this court can do that as well as the court below. It may be true that when in great doubt in such a case, the court will give proper weight to the judgment of the court below, but it certainly will not allow that judgment to control the positive opinions they may form." *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308.

No New Trial will be ordered where the judgment of the lower court is reversed, but judgment will be ordered entered as the appellate court thinks proper. *City of Eureka v. McKay & Co.*, 123 Cal. 666, 56 Pac. 439.

^{99.} *England.*—*Wetherell v. Boyd*, 7 Car. & P. 6.

United States.—*Burnham v. North Chicago R. Co.*, 88 Fed. 627, 32 C. C. A. 64.

Alabama.—*Prestwood v. Watson*, 111 Ala. 604, 20 So. 600; *Ex parte Hayes*, 92 Ala. 120, 9 So. 156.

Connecticut.—*Perry v. Simpson Mfg. Co.*, 40 Conn. 313.

Maine.—*Holley v. Young*, 68 Me. 215; *Woodcock v. Calais*, 68 Me. 244.

Maryland.—*Elwood v. Lannon's Lessee*, 27 Md. 200; *Woodruff v. Munroe*, 33 Md. 146.

Oklahoma.—*Consolidated Steel & Wire Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654.

In the case of *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600, the question whether an agreed statement of facts made and used in one trial of a case could be used in a subsequent and new trial of the same case was directly before the court and was thoroughly discussed by them. In holding that such a use was proper, the court said: "When made in open court and reduced to writing, intended to be used, and used as an instrument of evidence, when it is without limitation as to time and occasion, it cannot be withdrawn or retracted at the mere will of either party. The presence of witnesses to prove the facts stated

is waived. If the witnesses had been produced and testified and they died or became insane or removed without the jurisdiction of the court, on a subsequent trial evidence of their testimony would be admissible. The admission of the facts dispensing with evidence, if it could be disregarded by either party on any subsequent trial, in the event of inability to produce witnesses to establish them, would often convert such admissions into instruments of fraud and injury. When they are made deliberately and intelligently, in the presence of the court and are reduced to writing they are the best species of evidence, and parties cannot be permitted to retract them as they are not permitted to retract admissions of fact made in any form."

Express Limitation.—The use of the stipulation may be expressly limited to the one trial. *Rogers v. Alexander*, 2 G. Gr. (Iowa) 443; *Crockett v. Gray*, 31 Kan. 346, 2 Pac. 809.

Question of Fact for the Jury. Whether a stipulation was expressly limited to the particular trial or not, has been held to be a question of fact for the jury to determine. *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394. But compare, *Blankinship v. Power Co.*, 4 Okl. 242, 43 Pac. 1088.

1. *Frye v. Gragg*, 35 Me. 29.

Reason for the Rule.—"In the trial of the old action of *Sutliff v. Board*, the attorneys for the respective parties made a written stipulation of the amount of the debts of Lake county on July 1, 1881, and of the assessed valuation of the county in the years 1879-1881, the first clause of which read: 'It is hereby stipulated and agreed that in the trial of this case a jury is waived and the same shall be submitted to the court upon the following agreed statement of facts.' The Commissioners offered this stipulation in

D. CASE STATED.—In a few jurisdictions, a “case stated” is used as a means of dispensing with the formalities of a trial. It is a statement of the facts in the case to procure a decision upon them by the court. A case stated is a substitute for a verdict, its purpose being not to make evidence for a jury, but to supersede the action of a jury. It may be waived by consent or abandonment and it is not evidence in a subsequent proceeding.²

evidence, and it is insisted that it was erroneously rejected. It is said that the stipulation was not limited to the case in which it was entitled or to the trial to which it referred, and that it was made between the assignor of the defendant in error and the county, and that it is therefore binding in this case. The argument is unsound because the major premise is not founded in fact and because the conclusion is not the logical result of the premises. The stipulation was expressly limited by its very terms to the case in which it was filed. It reads: ‘It is hereby stipulated and agreed that in the trial of this case a jury is waived,’ etc. But if it was not so limited, it could not have the effect claimed for it by the plaintiff in error. A stipulation made by an attorney in one action will not bind his client in another, unless the latter expressly acquiesces in it in the second suit. Much less will it estop his assignee. The reason for this rule is obvious. An attorney employed to conduct and try a single action has no power to bind his client in subsequent suits, upon other causes of action, respecting which he has neither retainer, employment, nor authority.” *Board of Comrs. v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167.

And see *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95, where the court, while admitting that the stipulation may be used in a subsequent trial, declares that it is not conclusive when so used, but is open to explanation. “Where the agreement is not expressly limited to use in the trial in which it is made it is admissible in evidence as an admission in any other trial or litigation between the same parties,

where the same issues are involved, but it is not absolutely binding and conclusive upon the parties. When it is used against such party in another trial of the same case or in any other case either party has the right to attack any statement made therein either by disproving or rebutting the same or explaining it away.

Secondary Evidence of a Lost Stipulation.—Where an agreed statement has been lost, secondary evidence of its contents may be given and it may be thus established. *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600.

2. *Wheeler v. Ruckman*, 35 How. Pr. (N. Y.) 350; *Neilson v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 301; *Hart's Appeal*, 8 Pa. St. 32.

In *M'Lughan v. Bovard*, 4 Watts (Pa.) 308, the reasons for confining its use to the trial in which it was made were stated as follows: “It is supposed to have acquired a degree of credit from the bare statement of the case as an admission of the facts. For what purpose and on what conditions was that admission? Exclusively to have the judgment of the court on the facts submitted and not to give them effect for any other purpose. Each may have been willing to put the law upon the circumstances without intending to admit or even without believing them to be an accurate representation of the truth, and without consenting to be bound by them in any subsequent proceeding. A counsel confident that the law of the case depends entirely on a particular fact which if found would be decisive for him, might be willing to say to his antagonist: ‘Give me that fact and make the rest of the case as you please,’ yet a

E. SPECIFIC STIPULATIONS. — While it would be out of place in this article to make an exhaustive examination to determine what matters of controversy may be made the subject-matter of stipulations, still it seems best to classify, in a general way, such agreements as are commonly, and as a matter of general practice, made the subject-matter of stipulations, with the view of showing the extent to which evidence is supplied by such agreements and the tendency of the courts to broaden their scope and enlarge their use, as a favored means of dispensing with mere formal proof of facts as to which there is no real controversy, or the waiving of mere technical procedure.

a. Relating to the Cause of Action. — The subject-matter of the action is often affected and regulated by stipulations of various kinds. Thus the cause of action may be submitted to arbitration, with a provision that the court shall have power to declare and enforce a judgment in accordance with the award, or it may be submitted to a reference in the same way.³ A stipulation that a pending case or a case in which an appeal was to be taken, shall abide the judgment in another case then on trial, will be enforced.⁴ Stipulations compromising pending actions are favorably regarded by the

statement immaterial in point of legal effect, which could well be risked before a court, might expose the party to the most inveterate prejudice of a jury, and if the consequences of admissions thus made were to follow him on subsequent occasions into an inquiry by another tribunal, there would be an end to agreements to settle facts by consent."

3. *Neale Gordon Lennox*, 71 L. J. K. B. 939, 1902 A. C. 467; *Heslep v. San Francisco*, 4 Cal. 1; *Wade v. Powell*, 31 Ga. 1; *Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317; *Wells v. Lane*, 15 Wend. (N. Y.) 99; *Keator v. Ulster Road Co.* 7 How. Pr. (N. Y.) 41; *Heald v. Yumisko*, 7 N. D. 422, 75 N. W. 806.

Authority of the Arbitrators. The arbitrators have only such authority as is expressly given them, and any act in excess of such authority is void. *Ives v. Ashelby*, 26 Ill. App. 244.

Is Not a Discontinuance. — While a mere submission to arbitration operates as a discontinuance of an action (*Hearne v. Browne*, 67 Me. 158), where it is provided that the court is to enter up judgment there is no discontinuance. *Green v. Patchin*, 13 Wend. (N. Y.) 293; *Lary*

v. Goodnow, 48 N. H. 170; *Nettleton v. Gridley*, 21 Conn. 531.

Conditions Binding on the Court. Where a stipulation was to the effect that certain named commissioners should determine the value of land, the right of appeal being reserved, it was held that the court on appeal could order a new appraisal but could not change the commissioners. *Matter of Petition of New York, L. & W. R.*, 98 N. Y. 447.

4. *United States.* — *McNeill v. Andes*, 40 Fed. 45; *Prout v. Starr*, 188 U. S. 537; *McCafferty v. Celluloid Co.*, 104 Fed. 305, 43 C. C. A. 540; *Pacific R. v. Ketchum*, 101 U. S. 289.

Alabama. — *Jaffray v. Smith*, 106 Ala. 112, 17 So. 218.

California. — *Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634; *Gilmore v. American Cent. Ins. Co.*, 67 Cal. 366, 7 Pac. 781; *Himmelmänn v. Sullivan*, 40 Cal. 125; *Borkheim v. North British Ins. Co.*, 38 Cal. 623; *Pacific Pav. Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352.

Connecticut. — *Woodruff v. Fellows*, 35 Conn. 105.

Georgia. — *People's Bank v. Merchants Bank*, 116 Ga. 279, 42 S. E. 490.

Illinois. — *McKinley v. Wilmington*

courts as being the speediest, and oftentimes the best, method of

Star Mining Co., 7 Ill. App. 386; Dilworth v. Curtis, 139 Ill. 508, 29 N. E. 861.

Iowa.—Lockwood v. Black Hawk County, 34 Iowa 235.

Kansas.—Southern Kansas R. Co. v. Pavey, 57 Kan. 521, 46 Pac. 969.

Maine.—Cummings v. Smith, 50 Me. 568.

Minnesota.—Abbott v. Anheuser-Busch Brew. Co., 60 Minn. 266, 62 N. W. 286.

Mississippi.—Hooker v. Levy, 18 So. 385.

Missouri.—State v. Hannibal & St. Joseph R. Co., 34 Mo. App. 591; Camp v. Schuster, 51 Mo. App. 403; Galbreath v. Rogers, 45 Mo. App. 324.

New York.—Riggs v. Commercial Mut. Ins. Co. 125 N. Y. 7, 25 N. E. 1058; Brown v. Sprague, 5 Denio 545; Honlahan v. Sackett's Harbor, etc., R., 24 How. Pr. 155; Townsend v. Masterson, 15 N. Y. 587; Otis v. Conway, 114 N. Y. 13, 20 N. E. 628; Keogh v. Main, 52 N. Y. Super. Ct. 160; Magnolia Metal Co. v. Pound, 60 App. Div. 318, 70 N. Y. Supp. 230.

Ohio.—Swisher v. McWhinney, 64 Ohio St. 571, 61 N. E. 1149.

Pennsylvania.—Long's Appeal, 92 Pa. St. 171.

Texas.—Watrous v. McKie, 54 Tex. 65; Willis v. Sims (Tex. Civ. App.), 47 S. W. 55.

Vermont.—Sawyer v. Child, 68 Vt. 360, 35 Atl. 84.

Cases Not Entirely Similar. "The plaintiff is entitled to judgment on the whole cause of action even though the case by the decision of which the parties agreed to abide did not cover some of the issues involved in the other case. Abbott v. Lane (Neb.), 95 N. W. 599; City of St. Joseph v. Hax, 55 Mo. App. 293.

"Where a party voluntarily consents to abide by the judgment in another case he is bound whatever the result may be or however erroneously or through whatever misfortune it may have been reached." Jarrett v. McLaughlin, 123 Ga. 256, 51 S. E. 329.

The Issues Must Have Some Similarity.—It must appear that there was some connection in principle be-

tween the two actions, otherwise the court might be required by its judgment to draw a conclusion that was not legal or natural. Gittings v. Baker, 2 Ohio St. 23.

Where No Decree Is Rendered.

If no decree is rendered in the first case, the stipulation will be abrogated. Moore v. Martin (Miss.), 18 So. 119; Watrous v. McKie, 54 Tex. 65.

Effect of Such a Stipulation.

The stipulation "being filed in the case and made part of the record, it was not merely an independent, outside, and executory agreement, for a breach of which full compensation might be made in damages, but it operated presently to affect the status of the case itself and invest the plaintiff with a right in respect to its conduct which he would not otherwise have had, and which neither the opposite party nor the court could lawfully divest or disregard." McKinley v. Wilmington Star Min. Co., 7 Ill. App. 386.

Enforcing.—Upon notice to the other party, the court will enter judgment in favor of the party successful in the suit tried. State v. Hannibal & St. J. R. Co., 34 Mo. App. 591; Schaeffer v. Siegel, 7 Mo. App. 542, 9 Mo. App. 594.

Control of the Court.—In such cases the court retains control and may enforce the stipulation at a later term. Campbell v. United States, 19 Ct. Cl. 426; Riggs v. Commercial Ins. Co. 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684. But see Thompson v. Buffington, 7 Ohio, N. P. 134.

Final Verdict Meant.—In these cases the decision that is referred to is the final decision in the case. A verdict can not be regarded as final as long as either party has the right to have it reviewed by writ of error. Peoples Bank v. Merchants' Bank, 116 Ga. 279, 42 S. E. 490; Gillmore v. American Cent. Ins. Co., 65 Cal. 63, 2 Pac. 882; Dean v. Marschall, 90 Hun 335, 35 N. Y. Supp. 724; Laney v. Rochester R. Co., 81 Hun 346, 30 N. Y. Supp. 893; Herman v. Michel, 36 App. Div. 127, 55 N. Y. Supp. 359; Hodges v. Pingree, 108 Mass. 585.

settling the controversy.⁵ A stipulation for the dismissal of an action will ordinarily be recognized and enforced, if the provisions of statutes and rules of court regulating the procedure in such matters are followed.⁶ Such a stipulation does not generally bar another action upon the same facts. Upon approval by the court, a stipulation for a continuance will be enforced and the rights of the parties preserved;⁷ and a party may stipulate not to remove a particular suit to another court, but any general agreement not to remove causes is void.⁸ A stipulation that a cause of action shall not abate

5. See *Preston v. Hill*, 50 Cal. 43; *Kinsley v. Norris*, 62 N. H. 652; *North Whitehall Twp. v. Keller*, 100 Pa. St. 105.

The attitude of the courts towards such stipulations is well shown in the case of *Horton v. Baptist Church*, 34 Vt. 309: "In a question of controverted right of such a character as this, we think it would be difficult to find a precedent in the adjudged cases or to suggest a reason based on any recognized principle that would stand in the way of the real parties in interest and title, legal or equitable, from entering into a compromise instead of pushing the controversy through a course of sharp, persistent, and expensive litigation—each subject to the hazard of final defeat in their respective claims of right and both certain of being subjected to inconvenience, if not ruinous expense."

6. *McLeran v. McNamara*, 55 Cal. 508; *Rolfe v. Burlington C. R. & N. R. Co.*, 39 Minn. 398, 40 N. W. 267; *Deen v. Milne*, 113 N. Y. 303, 20 N. E. 861.

Enforcing.—The stipulation will be enforced by an order of the court or if judgment has been given in disregard of the stipulation, it will be vacated. *Martin v. McConnell*, 99 Ga. 314, 25 S. E. 699; *Blanchard v. Ferdinand*, 132 Mass. 389; *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469; *Rogers v. Rogers*, 4 Paige, (N. Y.) 516; *Deen v. Milne*, 113 N. Y. 303, 20 N. E. 861.

7. *District of Columbia*.—*Strong v. District of Columbia*, 3 MacArthur, 499.

Colorado.—*Denver, etc., R. Co. v. Roberts*, 7 Colo. App. 290, 43 Pac. 460.

Montana.—*Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887.

New Jersey.—*Butler v. Kitchen*, 41 N. J. L. 229.

New York.—*Stinnard v. New York Fire Ins. Co.*, 1 How. Pr. 169.

Texas.—*Travelers Ins. Co. v. Arant* (Tex. Civ. App.), 40 S. W. 853; *McBride v. Settles* (Tex. App.), 16 S. W. 422.

Vermont.—*Standard Granite Co. v. Aikey*, 67 Vt. 116, 30 Atl. 806.

Must Not Work Inconvenience.

A stipulation for a continuance and similar stipulations must be reasonable and for the best interests of the court as well as the litigants. Thus, the court in *Hancock v. Winans*, 20 Tex. 320, said: "An agreement of counsel which would work an inconvenience, as to take up causes out of their regular order, the court would not enforce. These matters of practice the court must have the power to control according to its own sense of justice and propriety, irrespective of the agreements of counsel."

8. *Insurance Co. v. Morse*, 20 Wall. (U. S.) 445; *Barron v. Burnside*, 121 U. S. 186; *Caledonian Fire Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782.

Agreement as to a Particular Case.

"In the waiver of the right to resort to the courts of the United States in a particular case, only the private right of the individual is involved. Its waiver touches no question of public policy." *Hanover Nat. Bank v. Smith*, 13 Blatch. (U. S.) 224.

But a Condition not to remove causes imposed in return for special privileges granted, is valid. *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

A Stipulation Made Before Removal may be enforced after removal as though the case had remained in the original court. *Phelps v. Canada Cent. R. Co.*, 19 Fed. 801.

upon the death of a party, made as a condition for the granting of a continuance, is valid.⁹

b. *As to Jurisdiction.* — Parties cannot, by stipulation, grant jurisdiction of the subject-matter to a court otherwise lacking it.¹⁰ But

9. The stipulation is regarded as the waiver of a rule of law which exists for the benefit of the individual and has been expressly declared not to be against public policy. *McGuire v. New York Cent. & H. R. R.*, 6 Daly (N. Y.) 70; *Cox v. New York Cent. R. R. Co.*, 63 N. Y. 414.

Stipulations Made as Conditions. The fact that a stipulation was made only because the court or the party imposed it as a condition for granting certain relief or privileges, does not invalidate it, and it is as binding and proper as any other stipulation. *Thompson v. Ft. Worth, etc., R. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29; *State v. Olds*, 106 Iowa 110, 76 N. W. 644; *Hine v. New York Elev. R. Co.*, 149 N. Y. 154, 43 N. E. 414; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *McNeill v. Andes*, 40 Fed. 45.

10. *United States.* — *Peoples Bank v. Calhoun*, 102 U. S. 256; *Goodyear Shoe Mach. Co. v. Dancel*, 119 Fed. 692, 56 C. C. A. 300; *Lee v. Simpson*, 42 Fed. 434.

California. — *Bates v. Gage*, 40 Cal. 183; *Wicks v. Ludwig*, 9 Cal. 173.

Colorado. — *Haverly Min. Co. v. Howcutt*, 6 Colo. 574.

Georgia. — *Huff v. State*, 29 Ga. 424.

Illinois. — *Richards v. Lake Shore & M. S. R. Co.*, 124 Ill. 516, 16 N. E. 909; *Peak v. People*, 71 Ill. 278; *Robertson v. Wheeler*, 162 Ill. 566, 44 N. E. 870.

Iowa. — *State v. Carman*, 63 Iowa 130, 18 N. W. 691.

Kentucky. — *Blight v. Banks*, 6 T. B. Mon. 192, 221, 17 Am. Dec. 445.

Minnesota. — *Bingham v. Board of Supervisors*, 6 Minn. 136.

Missouri. — *State v. Buck*, 108 Mo. 622, 18 S. W. 1113.

Nebraska. — *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252.

New York. — *Barber v. Lane*, 60 App. Div. 87, 69 N. Y. Supp. 739; *Matter of Keeler*, 23 Abb. N. C. 376, 7 N. Y. Supp. 199.

Oregon. — *Small v. Lutz*, 34 Or. 131, 58 Pac. 79.

Wisconsin. — *Dykeman v. Budd*, 3 Wis. 640.

And see *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, 96 Am. Dec. 472; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174 and note in 8 Am. St. Rep. 921.

Mode of Trial. — A pending suit may be tried by the judge at Chambers with the same effect as before the court without a jury, if the parties so stipulate. *Beach v. Beckwith*, 13 Wis. 21. And see *Welch v. Bennett*, 39 Ind. 136; *Fisher v. Knight*, 61 Fed. 491, 9 C. C. A. 582; *Bedford v. Ruby*, 17 Neb. 97, 22 N. W. 76.

Situs. — In *Sententis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, the objection that the real property in controversy was not situated within the court's jurisdiction was waived.

Appellate Jurisdiction, being conferred by the law alone, can only be acquired in the manner prescribed by the law.

United States. — *Kelsey v. Forsyth*, 21 How. 85; *Tire & Springs Wks. Co. v. Spaulding*, 116 U. S. 541.

California. — *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143.

Colorado. — *Arapahoe County v. McIntire*, 23 Colo. 137, 46 Pac. 638; *Lyon v. Washburn*, 3 Colo. 201.

Connecticut. — *Chipman v. Waterbury*, 59 Conn. 496, 22 Atl. 289.

Illinois. — *John F. Alles Plumb. Co. v. Alles*, 67 Ill. App. 252.

Iowa. — *Whiton v. Fuller*, 77 Iowa 599, 42 N. W. 500.

Missouri. — *Union Nat. Bank v. Barker*, 145 Mo. 356, 46 S. W. 1096.

New Jersey. — *Staten Chemical Co. v. Miller*, 29 Atl. 316.

New York. — *People v. Dewey*, 128 N. Y. 606, 27 N. E. 1017.

Utah. — *Klimmer v. Schnorf*, 3 Utah 442, 24 Pac. 909.

Wisconsin. — *Hyde v. German Nat. Bank*, 96 Wis. 406, 71 N. W. 659.

Revival of an Abandoned Action. "A subsequent stipulation cannot have the effect of reviving or con-

jurisdiction of the person may generally be conferred by consent.¹¹

c. *As to the Law.* — A stipulation as to what the law is that governs the case is valid and effective where private rights only are involved;¹² but such a stipulation will be entirely disregarded where public rights are involved or affected.¹³ A stipulation regulating a question of law, as distinguished from a question of fact, is nugatory and may be disregarded by the court, as it is an invasion of matters which are entirely within the court's jurisdiction and control.¹⁴ So stipulations admitting or denying the validity or constitutionality of a law are of no binding effect.¹⁵

tinuing a proceeding that has been discontinued. It must be treated as an original proceeding entirely disconnected from those which preceded it." *Gardiner v. Peterson*, 14 How. Pr. (N. Y.) 513.

11. *Walker v. Rogan*, 1 Wis. 597; *Damp v. Dane*, 29 Wis. 419; *Cofrode v. Circuit Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

12. *Arkansas.* — *Blackburn v. Morton*, 18 Ark. 384.

Illinois. — *Union Drainage Dist. v. No. 1 v. O'Reilly*, 34 Ill. App. 298.

Maryland. — *Sittig v. Birkenstack*, 35 Md. 273; *Baltimore & O. R. Co. v. Resley*, 14 Md. 424.

Massachusetts. — *Aldrich v. Carpenter*, 160 Mass. 166, 35 N. E. 456.

New York. — *Matter of McCusker*, 23 Misc. 446, 51 N. Y. Supp. 281; *McGuire v. New York Cent. & H. R. R. Co.*, 6 Daly 70; *Matter of New York, L. & W. R. Co.*, 98 N. Y. 447; *In re Cullinan*, 99 N. Y. Supp. 374.

Pennsylvania. — *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. St. 338, 53 Atl. 158.

Sole Question of Law. — But that counsel cannot control the court by a stipulation as to the sole question of law to be determined, see *San Francisco Lumb. Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864.

As to What Evidences the Law. In *Hall v. Western Union Tel. Co.*, 139 N. C. 369, 52 S. E. 50, an agreement between counsel that a certain copy of the laws of Virginia was authentic and that a certain case was the law of the state upon all points treated therein, was upheld and enforced.

13. *Graves v. Alsap*, 1 Ariz. 274, 25 Pac. 836; *American Ins. Co. v. Reed*, 40 Mich. 622; *Detroit v. Beck-*

man, 34 Mich. 125, 22 Am. Rep. 507; *Wells v. Covenant Mut. Assn.*, 126 Mo. 630, 29 S. W. 607.

14. *City of Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Prescott v. Brooks* (N. D.), 94 N. W. 88.

Whether land was sufficiently described in an instrument to satisfy the statute of frauds, is a question of law and an erroneous agreement as to it by counsel was disregarded. *Holms v. Johnston*, 12 Heisk. (Tenn.) 155.

Interpretation of Instruments. The erroneous interpretation of the legal effect of a contract arrived at by an agreement of the parties should be disregarded. *Owen v. Herzikoff* (Cal.), 84 Pac. 274.

15. *Arizona.* — *Graves v. Alsap*, 1 Ariz. 274, 25 Pac. 836.

Colorado. — *Mouat Lumb. Co. v. Freeman*, 7 Colo. App. 152, 42 Pac. 1040.

Illinois. — *Happel v. Brethauer*, 70 Ill. 166.

Mississippi. — *Jones v. Madison Co.*, 72 Miss. 777, 18 So. 87.

Missouri. — *State v. Aloe*, 152 Mo. 466, 54 S. W. 494.

New Jersey. — *Passaic Co. v. Stevenson*, 46 N. J. L. 173.

North Carolina. — *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16; *Gatlin v. Town of Tarboro*, 78 N. C. 119.

In *Wade v. Atlantic Lumb. Co.* (Fla.), 41 So. 72, the court declared that any concession made by counsel as to irregularity in the passage of a law would not be allowed to influence the court in determining its constitutionality.

Courts Take Judicial Notice of legislative journals and do not allow

d. *As to the Evidence.* — Stipulations as to the evidence naturally cover a very large range of subjects. Objections to the evidence may be waived and thus facts otherwise inadmissible may be brought into the case.¹⁶ A bill of exceptions may, by agreement, be read in evidence,¹⁷ or the statements of a deceased person as to the nature and extent of his injuries.¹⁸ The competency of witnesses may be admitted,¹⁹ or the number of witnesses limited.²⁰ Testimony taken in a former trial may be admitted in evidence,²¹ or testimony given in the trial of another case,²² or testimony of an absent witness,²³ or of a witness on a former trial.²⁴ A newspaper may be made evidence of market values at a given date,²⁵ copies of papers may be read instead of originals.²⁶ A case may be submitted on the pleadings and without further evidence.²⁷

parties to stipulate that a statute was not constitutionally passed by the legislature. *Attorney-General v. Rice*, 64 Mich. 385, 31 N. W. 203. But see *contra*,—*Norman v. Kentucky Board*, 93 Ky. 537, 20 S. W. 901; *Crumley v. Kansas City, C. & S. R. Co.*, 32 Mo. App. 505; *Mouat Lumb. Co. v. Freeman*, 7 Colo. App. 152, 42 Pac. 1040; *State v. Parkinson*, 5 Nev. 17, 23.

16. *Bradley Mfg. Co. v. Eagle Co.*, 57 Fed. 980, 6 C. C. A. 661; *Crowther v. Rowlandson*, 27 Cal. 376; *Robinson v. Placerville Min. Co.*, 65 Cal. 263, 3 Pac. 878; *Erwin v. English*, 57 Conn. 562, 19 Atl. 238; *Baker v. Jamison*, 73 Iowa 698, 36 N. W. 647; *Schroeder v. Frey*, 60 Hun 58, 14 N. Y. Supp. 71; *Findley v. Love*, 2 Tex. App. Civ. Cas. § 736.

"Parties may by agreement . . . accept oral evidence instead of the presumption ordinarily arising from written evidence. They have a right to make a rule of evidence for their own case . . . they may waive the rules established by the courts to govern the admission of evidence." *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547.

17. But this will not allow a copy to be read instead of the original. *Thomas v. Star & Crescent Mill. Co.*, 104 Ill. App. 110.

18. *Thompson v. Ft. Worth, Etc., R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29.

19. A stipulation that a witness was competent to testify on the value of property did not prevent cross-

examination on that point. *Chankalian v. Powers*, 89 App. Div. 395, 85 N. Y. Supp. 753.

20. *Taber v. New York Elev. R. Co.*, 11 N. Y. Supp. 584.

21. *Ryan v. New York*, 154 N. Y. 328, 48 N. E. 512. The effect of a stipulation that the evidence used on a former trial should be the evidence in the second trial is to waive all objections to the admission or exclusion of the evidence. *Chapin v. Du Shane*, 32 Ind. App. 1, 69 N. E. 174.

22. *Prout v. Starr*, 188 U. S. 537; *Saffold v. Horne*, 72 Miss. 470, 18 So. 433; *Pacific R. v. Ketchum*, 101 U. S. 289.

23. *State v. Fooks*, 65 Iowa 452, 21 N. W. 773.

24. *Iowa*.—*State v. Olds*, 106 Iowa 110, 76 N. W. 644; *State v. Polson*, 29 Iowa 133; *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277.

Wisconsin.—*Hinckley v. Beckwith*, 23 Wis. 328; *United States Ex. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957.

25. *Parker v. Atlantic C. L. R. Co.*, 133 N. C. 335, 45 S. E. 658.

26. *Georgia*.—*Central R. Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287.

Illinois.—*Mosher v. Scofield*, 55 Ill. App. 271.

Massachusetts.—*Boardman v. Kibbee*, 10 Cush. 545.

Texas.—*Hall v. Haywood*, 77 Tex. 4, 13 S. W. 612; *Mackey v. Armstrong*, 84 Tex. 159, 19 S. W. 463.

27. Where a case is submitted on

e. *As to the Pleadings.*—The pleadings in an action are frequently the subject-matter of stipulations. Defects of form are commonly waived in this manner,²⁸ as well as misjoinder or non-joinder of parties.²⁹ The time within which various steps in the proceedings must be taken may be extended by stipulation,³⁰ and various other matters in connection with the pleadings may be controlled and regulated.³¹

the pleadings, the court must decide it on the facts appearing in the record, alone. *Blackgrove v. Flaherty*, 92 N. Y. Supp. 257; *Ingram v. Gill*, 145 Ala. 666, 39 So. 736.

28. California.—*Donner v. Palmer*, 51 Cal. 629.

Georgia.—*West v. Berry*, 98 Ga. 402, 25 S. E. 508.

Illinois.—*Miller v. McManis*, 57 Ill. 126.

Iowa.—*Goodenow v. Foster*, 108 Iowa 508, 79 N. W. 288.

Montana.—*Allport v. Kelley*, 2 Mont. 343.

New Jersey.—*Baughart v. Flummerfelt*, 43 N. J. L. 28.

New York.—*Fletcher v. Massachusetts Ben. Assn.*, 78 Hun 311, 29 N. Y. Supp. 173; *Schlüssel v. Willett*, 34 Barb. 615.

29. Hughes v. Watson, 10 Ohio 127; *Punchard v. Delk*, 55 Tex. 304.

30. Stipulation To Extend Time for Filing Affidavit of Defense. *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. St. 338, 53 Atl. 158.

To Extend Time for Taking Exceptions.—Such a stipulation is binding to the extent of extending the time for any period not beyond the entry of judgment. *Weber v. Snohomish Shingle Co.*, 37 Wash. 576, 79 Pac. 1126.

To Extend Time for Settling Exceptions.—*People ex rel. Hunt v. Kalamazoo Judge*, 39 Mich. 123.

To Extend Time To Amend. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37.

To Extend Time for Moving for a New Trial.—*Simpson v. Budd*, 91 Cal. 488, 27 Pac. 758.

To Extend Time in Which To Plead.—*Crane v. Crane*, 121 Cal. 99, 53 Pac. 433; *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540; *Tecumseh Nat. Bank v. Harmon*, 48 Neb. 222, 66 N. W. 1128; *Pattison v. O'Connor*, 23

Hun (N. Y.) 307; *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155; *Steele v. Moss*, 69 Wis. 496, 34 N. W. 237.

31. United States.—*Mutual Life Ins. Co. v. Harris*, 97 U. S. 331.

Arkansas.—*Roy v. O'Connor*, 5 Ark. 252.

California.—*Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48; *Alto Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *Crane v. Crane*, 121 Cal. 99, 53 Pac. 433.

Florida.—*Broward v. Roche*, 21 Fla. 465.

Idaho.—*Grete v. Knott*, 2 Idaho 18, 3 Pac. 25.

Illinois.—*Murto v. McKnight*, 28 Ill. App. 238.

Indiana.—*Hartlep v. Cole*, 101 Ind. 458.

Maine.—*Gray v. Kimball*, 42 Me. 299.

Minnesota.—*Tuttle v. Wilson*, 42 Minn. 233, 44 N. W. 10.

Missouri.—*Franklin v. National Ins. Co.*, 43 Mo. 491.

Nebraska.—*Tecumseh Nat. Bank v. Harmon*, 48 Neb. 222, 66 N. W. 1128.

New Jersey.—*Welsh v. Blackwell*, 14 N. J. L. 344.

New York.—*Deyo v. Morss*, 144 N. Y. 216, 39 N. E. 81; *Devlin v. New York*, 15 Abb. Pr. N. S. 31; *Cook v. Allen*, 67 N. Y. 578; *People v. Boyd*, 2 Edw. Ch. 516.

New Mexico.—*Coler v. Santa Fe County*, 6 N. M. 88, 27 Pac. 619.

North Carolina.—*Greenlee v. McDowell*, 39 N. C. (4 Ired. Eq.) 481.

Pennsylvania.—*Woddrop v. Thacher*, 117 Pa. St. 340, 11 Atl. 621.

Washington.—*Yakima Water Co. v. Hathaway*, 18 Wash. 377, 51 Pac. 471.

The Issues To Be Tried may be determined, modified or limited by stipulation. *Scarf v. Aldrich*, 97 Cal. 360, 32 Pac. 324.

f. *As to Rights at the Trial.*—Except where the regulations of statutes or rules of court are mandatory, the method of conducting the trial is open to a large amount of control by the parties in each case.³² They may stipulate that a jury trial shall be waived;³³ that trial shall be before a jury, where that would not be the ordinary method of procedure;³⁴ that jurors need not be present when a sealed verdict is opened;³⁵ that causes shall be consolidated;³⁶ that two causes be tried by one jury at the same time;³⁷ that only part of the issues be tried;³⁸ that the time for trial be accelerated;³⁹ that the case be submitted to the jury without instructions,⁴⁰ or that the proposed instructions are correct as a matter of law;⁴¹ that certain rights shall accrue to the successful party;⁴² and as to many other similar matters.⁴³

Colorado.—Kendall v. San Juan Co., 9 Colo. 349, 12 Pac. 198.

Illinois.—Wolf v. Illinois Nat. Bank, 178 Ill. 85, 52 N. E. 896; Miller v. McManis, 57 Ill. 126.

Indiana.—Peoples Mut. Ben. Assn. v. McKay, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910; Bloomfield R. Co. v. Van Slike, 107 Ind. 480, 8 N. E. 269.

Missouri.—Adler v. Wagner, 47 Mo. App. 25.

Montanc.—Johnson v. Curtis, 21 Mont. 199, 53 Pac. 541.

New York.—Bleakley v. Sullivan, 140 N. Y. 175, 35 N. E. 433.

South Dakota.—Randall v. Burk, 4 S. D. 337, 57 N. W. 4.

Texas.—White v. McFarlin, 77 Tex. 596, 14 S. W. 200.

Accepting Service of Process.

An attorney has no implied power to accept the service of original process (Stone v. Bank of Commerce, 174 U. S. 412; Bradley v. Welch, 100 Mo. 258, 12 S. W. 911), but having the power to accept the service of other process he may stipulate to waive it. McDonald v. Penniston, 1 Neb. 324; Smith v. Cunningham, 59 Kan. 552, 53 Pac. 760; Northern Cent. R. Co. v. Rider, 45 Md. 24.

32. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Roberts v. Baumgarten, 126 N. Y. 336, 27 N. E. 470.

33. Stackpole v. Northern Pac. R. Co., 121 Fed. 389; Platt v. Havens, 119 Cal. 244, 51 Pac. 342; Town of Carthage v. Buckner, 8 Ill. App. 152; Thompson v. King, 173 Mass. 439, 53 N. E. 910.

In Goodyear Shoe Mach. Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300, it was held that waiving a jury trial did not waive the right to insist that a party had no cause of action at law.

34. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39.

35. But a mere agreement for a sealed verdict does not have that effect. See St. Louis, Vandalia & Terre Haute R. Co. v. Faitz, 19 Ill. App. 85; Bond v. Wood, 69 Ill. 282; Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

36. Triest v. Enslen, 106 Ala. 180, 17 So. 356.

37. Goldsmith v. St. Louis Candy Co., 85 Mo. App. 595.

38. "Separate trials of the issues are not common, but it is sometimes a convenient practice and is certainly permissible where the parties consent." Mealey v. Finnegan, 46 Minn. 507, 49 N. W. 207. See Franks v. Matson, 211 Ill. 338, 71 N. E. 1011; Mills v. Garrison, 3 Keyes (N. Y.) 40.

39. Schultz v. Phenix Ins. Co., 77 Fed. 375.

40. Claunch v. Osborn (Tex. Civ. App.), 23 S. W. 937.

41. Sittig v. Birkenstack, 35 Md. 273.

42. A stipulation that the rents of property, which was the matter in dispute, should be paid to the successful party in an ejectment action, was upheld in Dix v. Lohman, 105 Mo. App. 619, 80 S. W. 51.

43. Colorado.—Haverly Min. Co. v. Howcutt, 6 Colo. 574

g. *As to Judgment and Appeal.*—The requirements of statutes and rules of court are more strict in regard to agreements between the parties regulating the proceedings after judgment and on appeal than in other cases. No agreement can waive the necessity of having a bill of exceptions,⁴⁴ or a writ of error,⁴⁵ but a stipulation that a particular judgment shall be rendered,⁴⁶ or that a judgment be set aside and a new trial had,⁴⁷ or as to the manner of enforcing a judgment,⁴⁸ or a stipulation modifying an injunction,⁴⁹ or waiving the right to appeal,⁵⁰ or dismissing an appeal,⁵¹ is valid and binding.

F. CONSTRUCTION.—The general rules of construction which regulate the interpretation of other agreements and instruments made between parties, apply with equal force to stipulations.⁵² So

Minnesota.—*Chezick v. Minneapolis, Etc., Co.*, 66 Minn. 300, 68 N. W. 1093.

Missouri.—*Boernstein v. Heinrichs*, 24 Mo. 27.

Nebraska.—*Palmer v. People*, 4 Neb. 68.

New York.—*People v. Rathbun*, 21 Wend. 509; *Mertens v. Roche*, 39 App. Div. 398, 57 N. Y. Supp. 349.

Ohio.—*Conner v. Drake*, 1 Ohio St. 166.

Wisconsin.—*Walker v. Rogan*, 1 Wis. 597; *Beach v. Beckwith*, 13 Wis. 21.

44. *People v. Coultas*, 9 Ill. App. 39; *Mangels v. Mangels*, 8 Mo. App. 603; *McCathron v. McCathron*, 15 Neb. 144, 17 N. W. 265; *Robbins v. Vanderbeck*, 55 N. J. L. 364, 26 Atl. 919; *Umatilla Irr. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Kimery v. Taylor*, 29 Or. 233, 45 Pac. 771; *McDowell v. Fowler*, 80 Tex. 587, 16 S. W. 431.

45. *Washington Co. v. Durant*, 74 U. S. 694; *South Carolina v. Wesley*, 155 U. S. 542; *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173; *Krippendorf-Dittman Co. v. Trenoweth*, 35 Colo. 481, 84 Pac. 805; *Vance v. Goudy*, *Wright (Ohio)* 307; *Brownell v. Skinner*, *Wright (Ohio)* 682.

46. *Harding v. Harding*, 180 Ill. 481, 54 N. E. 587; *Goodenow v. Foster*, 108 Iowa 508, 79 N. W. 288. See *Osborn v. Rogers*, 112 N. Y. 573, 20 N. E. 365.

47. *Keys v. Warner*, 45 Cal. 60; *Kidd v. McMillan*, 21 Ala. 325.

The Court May Act at a subse-

quent term. *Gage v. Chicago*, 141 Ill. 642, 31 N. E. 163.

But See *Contra*, on the ground that consent cannot confer jurisdiction. *Mayor of Little Rock v. Bullock*, 6 Ark. 282; *Anderson v. Thompson*, 7 Lea (Tenn.) 259; *Pratt v. Wilcox Mfg. Co.*, 64 Fed. 589.

48. *Buell v. San Francisco Sav. Union*, 65 Cal. 292, 4 Pac. 14; *Ross v. Ferris*, 18 Hun (N. Y.) 210.

49. *Brackebush v. Dorsett*, 138 Ill. 167, 27 N. E. 934; *Howard v. Durond*, 36 Ga. 346.

50. *Saleski v. Boyd*, 32 Ark. 74, 85; *Lundon v. Waddick*, 98 Iowa 478, 67 N. W. 388; *Matter of N. Y. L. & W. R. Co.*, 98 N. Y. 447; *People v. Stephens*, 52 N. Y. 306; *Shisler v. Keavy*, 75 Pa. St. 79; *Johnson v. Halley*, 8 Tex. Civ. App. 137, 27 S. W. 750.

"Ordinarily an appellate court does not enforce stipulations made in a lower court, but the duty of hearing appeals involves the jurisdiction to determine whether a particular case is properly before the court on appeal and to determine if it is brought in violation of the agreement of the parties." *Townsend v. Masterson*, 15 N. Y. 587. See *contra*, *Runnion v. Ramsay*, 93 N. C. 411.

51. *Ward v. Hollins*, 14 Md. 158; *South Bend Land Co. v. Denio*, 7 Wash. 303, 35 Pac. 64.

52. *Hannah v. Baylor*, 27 Mo. App. 302; *Sweeney v. Great Falls & C. R. Co.*, 11 Mont. 523, 29 Pac. 15; *Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410.

And in *Dick Co. v. Sherwood Let-*

the construction to be given a written stipulation is a matter for the court, exclusively.⁵³ In general, stipulations are to be construed liberally and with the idea that they were made fairly and in good faith.⁵⁴ Where a stipulation is expressed in plain and unambiguous terms, parol evidence to show what the parties meant or intended is inadmissible,⁵⁵ but any ambiguity may be explained by parol evidence if the language of the instrument is not thereby contradicted.⁵⁶ A construction should be given which carries out the intention of the parties as nearly as it can be determined from the language used,⁵⁷ and to this end the purpose of the stipulation

ter File Co., 157 Ill. 325, 42 N. E. 440, the court said: "The same general rules are applicable to the construction of the stipulation made between the parties as to other agreements."

53. *Blankinship v. Power Co.*, 4 Okla. 242, 43 Pac. 1088; *State v. Lefavre*, 53 Mo. 470; *Brickman v. Railroad Co.*, 74 S. C. 306, 54 S. E. 553.

And see, *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394.

54. *United States*.—*United States v. Wong Hong*, 71 Fed. 283; *Mutual Life Ins. Co. v. Harris*, 97 U. S. 331, 338; *King v. Elkhorn, Etc., Co.*, 80 Fed. 333, 25 C. C. A. 449; *Citizens' Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24.

Alabama.—*Ex parte Hayes*, 92 Ala. 120, 9 So. 156.

California.—*Rapp v. Spring Val. Gold Co.*, 74 Cal. 532, 16 Pac. 325; *Donner v. Palmer*, 51 Cal. 629.

Colorado.—*Keator v. Colo. Coal Co.*, 3 Colo. App. 188, 32 Pac. 857.

Iowa.—*Borland v. Chicago M. & St. P. R. Co.*, 78 Iowa 94, 42 N. W. 590.

Minnesota.—*Pioneer Sav. Co. v. St. Paul F. & M. Ins. Co.*, 68 Minn. 170, 70 N. W. 979.

Missouri.—*Hall v. Goodnight*, 138 Mo. 576, 37 N. W. 916.

Montana.—*Kleinschmidt v. Morse*, 1 Mont. 100.

Nevada.—*O'Neale v. Cleaveland*, 3 Nev. 485.

New Jersey.—*Welsh v. Blackwell*, 14 N. J. L. 344.

New York.—*Heller v. Peterson*, 3 N. Y. Supp. 257; *Brewster v. Manning*, 6 Hun 530; *Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537; *Valentine v. Central Nat. Bank*,

10 Abb. N. C. 188; *Woodbury v. Morton*, 44 How. Pr. 56.

South Carolina.—*State v. Pacific Guano Co.*, 28 S. C. 63, 5 S. E. 167.

Texas.—*White v. McFarlin*, 77 Tex. 596, 14 S. W. 200; *Cox v. Giddings*, 9 Tex. 44.

Vermont.—*Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

Wisconsin.—*Vandyke v. Weil*, 18 Wis. 277.

55. *Ex Parte Hayes*, 92 Ala. 120, 9 So. 156; *State v. Lafavre*, 53 Mo. 470; *Hannah v. Baylor*, 27 Mo. App. 302, 312; *Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410; *Watrous v. McKie*, 54 Tex. 65; *Mussey v. Bates*, 60 Vt. 271, 14 Atl. 457.

56. *Mutual Loan & B. Assn. v. Price*, 19 Fla. 127; *Bonney v. Morrill*, 57 Me. 368; *Letcher v. Letcher*, 50 Mo. 137; *Vandyke v. Weil*, 18 Wis. 277.

57. *Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410; *Little v. Jacks*, 68 Cal. 343, 11 Pac. 128.

In *Watrous v. McKie*, 54 Tex. 65, the court used this language: "Surrounding circumstances may be looked at to arrive at the true meaning and intention of parties expressed in words used in a written agreement, but as the writing is the only outward and visible expression of their meaning no other words can be added or substituted; the inquiry must be limited to the meaning of the words used. The construction cannot depend upon the motives, purposes or expectations of one of the parties as distinguished from the plain import of the words used."

Grammatical Construction will not be allowed to override the manifest intent of the parties (*Saffold v. Horne*, 72 Miss. 470, 18 So. 433).

may be considered,⁵⁸ and the surrounding circumstances,⁵⁹ as well as the context of the agreement.⁶⁰ In every case, the construction

holding that a word used in the past tense was intended to apply to the present tense also. And see, *Texas, Etc., R. Co. v. Taylor*, 31 Tex. Civ. App. 617, 73 S. W. 1081.

Words and phrases are to be given their ordinary meaning, unless used in a technical sense. *Seale v. Ford*, 29 Cal. 104; *Wilkins v. Hukill*, 115 Mich. 594, 73 N. W. 898; *Welsh v. Blackwell*, 14 N. J. L. 344; *Matter of McCusker*, 23 Misc. 446, 51 N. Y. Supp. 281; *Valentine v. Central Nat. Bank*, 10 Abb. N. C. (N. Y.) 188; *Haubert v. Haworth*, 78 Pa. St. 78, *Steele v. Moss*, 69 Wis. 496, 34 N. W. 237.

58. *Ex parte Lawrence*, 34 Ala. 446; *Hannah v. Baylor*, 27 Mo. App. 302; *Dean v. Marschall*, 90 Hun 335, 35 N. Y. Supp. 724; *Matter of City of Rochester*, 136 N. Y. 83, 32 N. E. 702; *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

59. *United States*.—*Dickerson v. Matheson*, 57 Fed. 524, 6 C. C. A. 466. *Connecticut*.—*Cumnor v. Sedgwick*, 67 Conn. 66, 34 Atl. 763.

Idaho.—*Nez Perce County v. Latah County*, 2 Idaho 1131, 31 Pac. 800.

Illinois.—*Lake Shore, Etc., R. Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905; *Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325, 42 N. E. 440; *Harding v. Harding*, 180 Ill. 481, 54 N. E. 587, 604.

Indiana.—*Wheat v. Ragsdale*, 27 Ind. 191.

Minnesota.—*Rolfe v. Burlington, Etc., R. Co.*, 39 Minn. 398, 40 N. W. 267.

Missouri.—*Camp v. Schuster*, 51 Mo. App. 403; *Hannah v. Baylor*, 27 Mo. App. 302, 315; *Hall v. Goodnight*, 138 Mo. 576, 37 S. W. 916; *Christy v. Chicago, Etc., R. Co.*, 70 Mo. App. 43; *State v. Hannibal R. Co.*, 34 Mo. App. 591.

Nebraska.—*Abbott v. Lane*, 95 N. W. 599.

New York.—*Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537; *Matter of City of Rochester*, 136 N. Y. 83, 32 N. E. 702; *Riggs v. Commercial Ins. Co.*, 125 N. Y. 7,

25 N. E. 1058; *Hine v. New York Elevated R. Co.*, 149 N. Y. 154, 43 N. E. 414; *Carr v. Hills Co.*, 12 Daly 332; *Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410, 60 Hun 58, 14 N. Y. Supp. 71; *Deyo v. Morss*, 144 N. Y. 216, 39 N. E. 81.

Oregon.—*Small v. Lutz*, 34 Or. 131, 58 Pac. 79.

Pennsylvania.—*Chase v. Miller*, 41 Pa. St. 403.

Texas.—*Yaws v. Jones*, 19 S. W. 443.

Vermont.—*Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Standard Granite Co. v. Aikey*, 67 Vt. 116, 30 Atl. 806.

Washington.—*Canada Settlers Co. v. Murray*, 20 Wash. 656, 56 Pac. 368.

Wisconsin.—*Wakeley v. Delaplaine*, 15 Wis. 554.

"Evidence of the surrounding circumstances so far as they indicate the nature of the subject, is in the language of the text books (1 Greenleaf on Evidence 13th ed. § 286) a just medium of interpretation of the language and meaning of the parties in relation to it. So also, where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms." *Mutual Loan & B. Assn. v. Price*, 19 Fla. 127, 138.

60. *City of San Jose v. Uridias*, 37 Cal. 339; *Moulton v. Ellmaker*, 30 Cal. 527; *Stark v. Real Estate Co.*, 97 Mo. 449, 10 S. W. 877; *Welsh v. Blackwell*, 14 N. J. L. 344; *Matter of City of Rochester*, 136 N. Y. 83, 32 N. E. 702; *Haubert v. Haworth*, 78 Pa. St. 78.

"When such an agreement or admission is presented for judicial construction it behooves the court to endeavor to effectuate the intention of the parties, as that intention is ascertainable in the light of the surrounding circumstances by the application of the rules governing the construction of such instruments. On the one hand, every consideration of good faith demands that a party

should be fair and reasonable.⁶¹ The stipulation as a whole is to be considered,⁶² and the preference given to a construction which renders it operative rather than to one which defeats it entirely,⁶³ or leaves a part inoperative.⁶⁴ But agreements waiving constitu-

be held to the full legal scope of an admission voluntarily made by him. If he has negligently stipulated or admitted to his prejudice, not being induced to do so by the fraud or other wrong of his adversary, the court is not warranted for that reason to disregard the act. On the other hand, the court should be careful not to 'stick to the bark' and strain the language of an admission so as to lead to a construction which bears the impress of improbability or unreasonableness. *Hannah v. Baylor*, 27 Mo. App. 302.

61. *United States*.—Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

California.—Reclamation Dist. No. 535 v. Hamilton, 112 Cal. 603, 44 Pac. 1074; Seale v. Ford, 29 Cal. 104.

Georgia.—Patterson v. Collier, 75 Ga. 419; Dixon v. Hawkins, 100 Ga. 5, 27 S. E. 188.

Illinois.—Dowden v. Wilson, 108 Ill. 257; Lake Shore, Etc., R. Co. v. Hessions, 150 Ill. 546, 37 N. E. 905; Whitehouse v. Halstead, 90 Ill. 95.

Maine.—Hatch v. Dennis, 10 Me. 244.

Massachusetts.—Hodges v. Pingree, 108 Mass. 585.

Missouri.—State v. Hannibal, Etc., R. Co., 34 Mo. App. 596; Hannah v. Baylor, 27 Mo. App. 302; Christy v. Chicago, Etc., R. Co., 70 Mo. App. 43; Hall v. Goodnight, 138 Mo. 576, 37 S. W. 916.

Nebraska.—Johnson v. English, 53 Neb. 530, 74 N. W. 47.

New Jersey.—Hale v. Lawrence, 22 N. J. L. 72.

New York.—Laney v. Rochester Co., 81 Hun 346, 30 N. Y. Supp. 893; Cox v. New York Cent. & H. R. R. Co., 63 N. Y. 414; Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Van Wormer v. Van Wormer, 57 Hun 496, 11 N. Y. Supp. 247; Herman v. Michel, 36 App. Div. 127, 55 N. Y. Supp. 359; Woodruff v. Bush, 8 How. Pr. 117.

Oklahoma.—Chicago Live Stock Assn. v. Fix, 15 Okla. 37, 78 Pac. 316.

Pennsylvania.—Nesbitt v. Turner, 155 Pa. St. 429, 26 Atl. 750.

South Carolina.—Cooke v. Pennington, 7 Rich. 385.

South Dakota.—Carter Co. v. Dennett, 11 S. Dak. 486, 78 N. W. 956.

Tennessee.—Jones v. Kimbro, 6 Humph. 319.

Wisconsin.—McNaughton v. Thayer, 17 Wis. 290.

62. *United States*.—Bank v. Huron, 80 Fed. 660; United States v. Wong Hong, 71 Fed. 283.

California.—San Francisco v. Fulde, 37 Cal. 349; Bank of Healdsburg v. Hitchcock, 76 Cal. 489, 18 Pac. 648; San Jose v. Uridias, 37 Cal. 339.

Illinois.—Dick Co. v. Sherwood Co., 157 Ill. 325, 42 N. E. 440; Johnson v. Estabrook, 84 Ill. 75.

Iowa.—Bond v. Home for Aged Women, 94 Iowa 458, 62 N. W. 838.

Minnesota.—Christianson v. Nelson, 76 Minn. 36, 78 N. W. 875.

New York.—Matter of Met. E. R. Co., 136 N. Y. 500, 32 N. E. 1043; Lewis v. Yagel, 77 Hun 337, 28 N. Y. Supp. 833; People v. Stephens, 51 How. Pr. 227; Herman v. Michel, 36 App. Div. 127, 55 N. Y. Supp. 359; Dean v. Marschall, 90 Hun 335, 35 N. Y. Supp. 724.

Texas.—Taylor v. Brown, 8 Tex. Civ. App. 261, 27 S. W. 911.

West Virginia.—State v. Larue, 37 W. Va. 828, 17 S. E. 397.

63. McElwaine v. Hosey, 135 Ind. 481, 35 N. E. 272; Burroughs v. Garrison, 15 Abb. Pr. N. S. (N. Y.) 144; VanAernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Cable v. Jackson, 16 Tex. Civ. App. 579, 42 S. W. 136; Maxwell v. Jarvis, 14 Wis. 506; McNaughton v. Thayer, 17 Wis. 290.

64. *Ex parte* Lawrence, 34 Ala. 446; Ronlahan v. Sackett's Harbor & S. R. Co., 24 How. Pr. (N. Y.) 155; Yaws v. Jones (Tex.), 19 S. W. 443; Clason v. Shepherd, 10 Wis. 356.

tional rights are strictly construed,⁶⁵ and no stipulation should be extended by implication.⁶⁶

II. EFFECT OF STIPULATIONS AS EVIDENCE.

1. **In General.**—A stipulation is a judicial admission,⁶⁷ and is absolutely conclusive upon the parties agreeing to it,⁶⁸ prohibiting

65. *Burnham v. North Chi. St. R. Co.*, 88 Fed. 627, 32 C. C. A. 64; *Town of Carthage v. Buckner*, 8 Ill. App. 152; *State v. Touchet*, 33 La. Ann. 1154; *Ryan v. Donley*, 69 Neb. 623, 96 N. W. 234; *Brown v. Chenoworth*, 51 Tex. 469; *Dean v. Sweeney*, 51 Tex. 242.

66. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866; *Dennis & Rush v. Executors*, 15 Md. 138; *Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410; *Roper Lumb. Co. v. Elizabeth City Co.*, 137 N. C. 431, 49 S. E. 946; *Hammontree v. Huber*, 39 Mo. App. 326.

67. *Wigmore on Evidence*, Vol. 4, §§ 2588-2592; *Greenleaf on Evidence*, § 339.

68. *England*.—*Doe v. Bird*, 7 Car. & P. 6, 32 E. C. L. 415; *Langley v. Oxford*, 1 Mees. & Welsb. 508.

United States.—*Oscanyon v. Arms Co.*, 103 U. S. 261; *Seattle, Etc., R. Co. v. Union Trust Co.*, 79 Fed. 179, 24 C. C. A. 512; *Second Ward Sav. Bank v. Huron*, 80 Fed. 660.

Alabama.—*Saltmarsh v. Bower*, 34 Ala. 613; *Thompson v. Thompson*, 91 Ala. 591, 8 So. 419; *Starks v. Kenan*, 11 Ala. 818; *Montgomery v. Givhan*, 24 Ala. 568.

Arkansas.—*Martin v. Hawkins*, 20 Ark. 150.

California.—*Lawrence v. Ballou*, 50 Cal. 258; *Carpentier v. Small*, 35 Cal. 346; *Richardson v. Musser*, 54 Cal. 196; *Seale v. Ford*, 29 Cal. 104; *Donner v. Palmer*, 51 Cal. 629.

Colorado.—*Rockwell v. Graham*, 9 Colo. 36, 10 Pac. 284; *Denver R. Co. v. Richards*, 2 Colo. App. 87, 29 Pac. 1010.

Georgia.—*Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758.

Illinois.—*Telluride Power Trans. Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319; *Town of Carthage v. Buck-*

ner, 8 Ill. App. 152; *Chicago v. English*, 180 Ill. 476, 54 N. E. 609; *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660; *Catlin v. Trader's Ins. Co.*, 83 Ill. App. 40.

Indiana.—*Hays v. Hynds*, 28 Ind. 531; *People's Mut. Ben. Assn. v. McKay*, 141 Ind. 415, 39 N. E. 231.

Iowa.—*Hefferman v. Burt*, 7 Iowa 320, 71 Am. Dec. 445; *Van Horn v. Burlington, C. R. & N. R. Co.*, 69 Iowa 239, 28 N. W. 547.

Kansas.—*Coppedge v. Goetz Brew. Co.*, 67 Kan. 851, 73 Pac. 908; *Lindley v. Atchison, T. & S. F. R.*, 47 Kan. 432, 28 Pac. 201; *Noble v. Harter*, 6 Kan. App. 823, 49 Pac. 794.

Maryland.—*Merchants Bank v. Marine Bank*, 3 Gill 96; *Salfner v. State*, 84 Md. 299, 35 Atl. 885; *Woodruff v. Munroe*, 33 Md. 146.

Massachusetts.—*Leonard v. White*, 5 Allen 177; *Com. v. Young*, 165 Mass. 396, 43 N. E. 118; *Blake v. Sawin*, 10 Allen 340.

Michigan.—*Alexander v. Rice*, 52 Mich. 451, 18 N. W. 214.

Minnesota.—*Bingham v. Board of Supervisors*, 6 Minn. 136.

Mississippi.—*Newman v. Greenville Bank*, 67 Miss. 770, 7 So. 403.

Missouri.—*Hannah v. Baylor*, 27 Mo. App. 302; *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028; *State v. Brooks*, 99 Mo. 137, 12 S. W. 633; *Adler v. Wagner*, 47 Mo. App. 25.

Nebraska.—*Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; *City of Lincoln v. Lincoln St. R.*, 67 Neb. 469, 93 N. W. 766.

Nevada.—*In re Foley*, 24 Nev. 197, 52 Pac. 649.

New Hampshire.—*Burbank v. Rockingham Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300; *Page v. Brewsters*, 54 N. H. 184.

"The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But, to this end, they

any further dispute of the fact admitted or waived, and any use of evidence to disprove or contradict it, or inconsistent with it.⁶⁹ It becomes evidence in the case,⁷⁰ but it does not, ordinarily, exclude evidence of other facts material to the issue, and offered subsequently.⁷¹ While no further proof of the fact is necessary, the party benefiting by it may introduce further evidence in corroboration, if he so desire.⁷²

must be distinct, and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases, they are in general conclusive, and may be given in evidence even upon a new trial." Greenleaf on Evidence, Vol. I, p. 186.

New Jersey.—Union Locomotive & Exp. Co. v. Erie R. Co., 37 N. J. L. 23; Potter v. Hollister, 45 N. J. Eq. 508, 18 Atl. 204.

New York.—Rowe v. Brooklyn Hts. R. Co., 71 App. Div. 474, 75 N. Y. Supp. 893; People v. Cannon, 139 N. Y. 648, 34 N. E. 1098; Auburn Sav. Bank v. Brinkerhoff, 44 Hun 142; Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537.

North Dakota.—Mooney v. Williams, 9 N. D. 329, 83 N. W. 237.

Pennsylvania.—Long v. Girdwood, 150 Pa. St. 413, 24 Atl. 711; Long's Appeal, 92 Pa. St. 171.

South Carolina.—Brown v. Peckman, 55 S. C. 555, 33 S. E. 732; Daniel v. Ray, 1 Hill 32; Cooke v. Pennington, 7 Rich. 385.

South Dakota.—Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699.

Texas.—Davidson v. Chandler, 27 Tex. Civ. App. 418, 65 S. W. 1080; Dupree v. Duke, 30 Tex. Civ. App. 360, 70 S. W. 561; Delk v. Punchard, 64 Tex. 360; Porter v. Holt, 73 Tex. 447, 11 S. W. 494; State v. Connor, 86 Tex. 133, 23 S. W. 1103; Morgan v. Davenport, 60 Tex. 230.

Vermont.—Commercial Bank v. Clark, 28 Vt. 325.

Virginia.—Mutual Res. F. L. Assn. v. Taylor, 99 Va. 208, 37 S. E. 854.

Wisconsin.—Lally v. Rossman, 82 Wis. 147, 51 N. W. 1132.

⁶⁹. *Colorado.*—Edwards v. Smith, 16 Colo. 529, 27 Pac. 809.

Georgia.—Insurance Co. v. Leader, 121 Ga. 260, 48 S. E. 972.

New York.—Driscoll v. Brooklyn Union El. R. Co., 95 App. Div. 146, 88 N. Y. Supp. 745; People ex rel. Corkran v. Hyatt, 172 N. Y. 176, 64 N. E. 825.

South Dakota.—Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699.

Texas.—Dupree v. Duke, 30 Tex. Civ. App. 70, 70 S. W. 560; Pinkston v. West (Tex. Civ. App.), 85 S. W. 1014.

Wyoming.—Grand Rapids Furn. Co. v. Grand Hotel Co., 11 Wyo. 128, 70 Pac. 838, 72 Pac. 687.

A Judgment entered by stipulation cannot be reviewed even if both parties consent thereto. Gridley v. Daggett, 6 How. Pr. (N. Y.) 280; Meerholz v. Sessions, 9 Cal. 277.

Ultimate Facts may be set out in a stipulation. Hackfeld & Co. v. United States, 197 U. S. 442.

⁷⁰. Prestwood v. Watson, 111 Ala. 604, 20 So. 600; General Elec. Co. v. Wagner Elec. Co., 123 Fed. 101. "Admissions made in the course of judicial proceedings are substitutes for and dispense with the actual proof of facts." Com. v. Desmond, 5 Gray (Mass.) 80.

⁷¹. Additional Evidence. — Evidence to prove other facts not inconsistent with those stipulated may be admitted where the stipulation does not pretend to include all the facts in the controversy. Schaller v. Chicago & N. W. R. Co., 97 Wis. 31, 71 N. W. 1042; Taffinder v. Merrill (Tex. Civ. App.), 61 S. W. 936; National Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63; McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076; Rosenberger v. Gibson, 165 Mo. 16, 65 S. W. 237. See Hunt v. Van Buren (Neb.), 106 N. W. 329.

⁷². "It does not lie within the power of one party to prevent the introduction of relevant evidence if the

2. On Persons Not Parties. — Persons not parties to a stipulation are not bound by it.⁷³ And a party who does not agree to it,⁷⁴ or one who becomes a party subsequently to its making, is not bound.⁷⁵ Neither is an intervenor bound,⁷⁶ but one whose claim is through an interested party is also concluded.⁷⁷ That the court is not bound by a stipulation, if it is not valid, is evident.⁷⁸

3. On Appeal. — Where a case is appealed, the construction given a stipulation by the trial court will not be altered if it is fairly susceptible of the construction given.⁷⁹ Relief from a stipulation will be given by the trial court and not on appeal.⁸⁰ No objection can

presiding justice, in his discretion, deems it proper to receive it. Parties as a general rule are entitled to present to the jury a picture of the events relied on to prove the essential facts. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." *Dunning v. Maine Cent. R. Co.*, 91 Me. 87, 39 Atl. 352. And see, *Com. v. Miller*, 3 Cush. (Mass.) 243; *Com. v. Costello*, 120 Mass. 358; *In re Stetson's Will* (Mass.), 44 N. E. 1085; *Davis v. Emmons*, 32 Or. 389, 51 Pac. 652, *State v. Valsin*, 47 La. Ann. 115, 16 So. 768; *Com. v. Spink*, 137 Pa. St. 255, 20 Atl. 680.

Contra. — *Dean v. State*, 89 Ala. 46, 8 So. 38.

73. *Central Trust Co. v. Worcester Cycle Co.*, 128 Fed. 483; *Heirs of Holman v. Bank*, 12 Ala. 369; *Wilkins v. Stidger*, 22 Cal. 231; *Grant v. Hill* (Tex. Civ. App.), 30 S. W. 952; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

74. *United States.* — *Bonnifield v. Thorp*, 71 Fed. 924.

Alabama. — *Trimble v. Fariss*, 78 Ala. 260, 273.

California. — *Matter of Medbury*, 48 Cal. 83; *Hobbs v. Duff*, 43 Cal. 485.

Illinois. — *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823.

Indiana. — *Midland Co. v. Island Coal Co.*, 126 Ind. 384, 26 N. E. 68.

Louisiana. — *Sojourner v. Charpontier*, 10 La. 210.

Michigan. — *Fowler v. Hosmer*, 105 Mich. 90, 62 N. W. 1028; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509.

Minnesota. — *State v. Merchants' Bank*, 74 Minn. 175, 77 N. W. 31.

Missouri. — *Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922.

Nebraska. — *Gregory v. Edgerly*, 17 Neb. 374, 22 N. W. 703.

New York. — *Woodhaven Co. v. Solly*, 148 N. Y. 42, 42 N. E. 404.

Where a stenographer was employed according to a stipulation of some of the parties, only those so agreeing were held responsible for the expense. *In re Meehan*, 29 Misc. 167, 60 N. Y. Supp. 1003.

In *Richardson v. Chicago Packing Co.*, 131 Cal. xviii, 63 Pac. 74, the attorney making the stipulation was also attorney for another party, but this was held to make no difference and the other party was not bound.

75. See *Bixby v. Carskaddon*, 63 Iowa 164, 18 N. W. 875, holding that since the party who subsequently became a defendant was not bound, the plaintiff himself was at liberty to disaffirm the stipulation.

76. *Clapp v. Sohmer*, 55 Iowa 273, 7 N. W. 639; *Kneeland v. Luce*, 141 U. S. 437.

77. In *Delk v. Punchard*, 64 Tex. 360, an agreement waiving a misjoinder of parties plaintiff was held to be binding not only upon the original parties, but also upon those who had purchased from the original defendant pending the suit. And see, *Temple v. Alexander*, 53 Cal. 3; *Chisholm v. Clitherall*, 12 Minn. 375.

78. *Kidd v. McMillan*, 21 Ala. 325; *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143; *Ford v. Holmes*, 61 Ga. 419; *Masonic Building Assn. v. Brownell*, 164 Mass. 306, 41 N. E. 306; *State v. McArthur*, 23 Wis. 427.

79. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

80. *Warren v. Gt. Northern R. Co.*, 64 Minn. 239, 66 N. W. 984; *Congdon v. Nashua*, 72 N. H. 468,

be raised to the admissibility of stipulated facts,⁸¹ and they are to be treated as the findings of the court.⁸² An order setting aside a stipulation or refusing to set it aside is reviewable,⁸³ but such order being within the discretion of the trial court, it will not be disturbed except where so clearly wrong as to evidence an abuse of discretion.⁸⁴

57 Atl. 686; *Wilbur v. Wilbur*, 18 R. I. 654, 30 Atl. 455; *Hancock v. Winans*, 20 Tex. 320.

The following extract is from *Bonds v. Hickman*, 29 Cal. 460: "If the stipulation was entered into by the respondent under a mistake of fact, as he alleges in his affidavit, and its operation was injurious to him, doubtless it was competent for the court below, upon a proper application, to relieve him from it (*Becker v. Lamont*, 13 How. Pr. (N. Y.) 23), as this court might do, if a stipulation were entered into here under a mistake of fact; but this court is powerless in the premises, and can not amend the documents constituting the transcript, nor indirectly accomplish the same result by accepting as true a statement not found in the transcript.

81. *Conway v. Supreme Council C. K. of Am.*, 137 Cal. 384, 70 Pac. 223.

82. In *Conway v. Supreme Council C. K. of Am.*, 137 Cal. 384, 70 Pac. 223, it was declared that when findings were waived because counsel stipulated as to the facts, the facts thus stipulated became a part of the judgment roll and the findings of the court on which its judgment rested. And see *Muller v. Rowell*, 110 Cal. 318, 42 Pac. 804; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109; *Brewster v. Hartley*, 37 Cal. 15; *Denison v. Burrell*, 119 Cal. 180, 51 Pac. 1.

83. *Ex parte Hayes*, 92 Ala. 120, 9 So. 156; *Sperb v. Metropolitan El. R. Co.*, 10 N. Y. Supp. 865; *Milbank v. Jones*, 60 N. Y. Supr. Ct. 259, 17 N. Y. Supp. 464; *McBride v. Settles* (Tex. App.), 16 S. W. 422; *Wells v. American Ex. Co.*, 49 Wis. 224, 5 N. W. 333.

84. *Alabama*. — *Saltmarsh v. Bower*, 34 Ala. 613; *Harvey v. Thorpe*, 28 Ala. 250.

California. — *Ward v. Clay*, 82 Cal.

502, 23 Pac. 50; *Richardson v. Musser*, 54 Cal. 196; *Ferreira v. Chabot*, 121 Cal. 233, 53 Pac. 689, 1092.

Georgia. — *Branch v. Planters' Loan Bank*, 75 Ga. 342; *Anderson v. Nixon*, 100 Ga. 90, 26 S. E. 23.

Illinois. — *McKinley v. Wilmington Star Min. Co.*, 7 Ill. App. 386; *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774.

Minnesota. — *Rogers v. Greenwood*, 14 Minn. 333; *Ramsland v. Roste*, 66 Minn. 129, 68 N. W. 847; *Wells v. Penfield*, 70 Minn. 66, 72 N. W. 816; *Gerdtsen v. Cockrell*, 52 Minn. 501, 55 N. W. 58.

Missouri. — *Franklin v. National Ins. Co.*, 43 Mo. 491.

Nebraska. — *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897; *State Ins. Co. v. Farmers' Mut. Ins. Co.*, 65 Neb. 34, 90 N. W. 997; *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 93 N. W. 766.

New Hampshire. — *Page v. Brewsters*, 54 N. H. 184.

New York. — *Barry v. Mutual Life Ins. Co.*, 53 N. Y. 536; *Chase v. Defendorf*, 128 N. Y. 652, 28 N. E. 516; *Penniman v. La Grange*, 23 Misc. 653, 52 N. Y. Supp. 27; *Casey v. Leslie*, 12 App. Div. 34, 42 N. Y. Supp. 362; *Keogh v. Main*, 52 N. Y. Supr. Ct. 160.

Ohio. — *Ish v. Crane*, 13 Ohio St. 574; *Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256.

Pennsylvania. — *Nesbitt v. Turner*, 155 Pa. St. 429, 26 Atl. 750.

"While there is no doubt of the authority invoked herein by the appellant that this court can reverse on appeal the discretionary power exercised by the circuit court in refusing to set aside its judgment of dismissal and reinstate a cause for further hearing, if it appeared that great injustice has been done or that the court had arbitrarily exercised its discretion, we are unwilling to say

4. Use in a Subsequent Trial.—A stipulation made during or in preparation for trial may ordinarily be used in any subsequent trial or proceeding in the case, since it may be fairly inferred that the intention of the parties was not to limit it to the pending trial in case the rights of the parties were not conclusively established at that time.⁸⁵ The parties may, however, expressly limit it to the

that we would not have acted as did the circuit court under the circumstances of the case." *Robinson v. Bobb*, 139 Mo. 346, 40 S. W. 938.

No Appeal Lies from a stipulation waiving any and all objections to the evidence and giving a justice power to decide the entitled cause on the whole evidence and render any judgment that he saw fit. *Lipps v. Markowitz*, 84 N. Y. Supp. 172.

Judgment Entered by Consent. No appeal lies from a judgment entered by consent. *Mecham v. McKay*, 37 Cal. 154; *Brotherton v. Hart*, 11 Cal. 406. But where, by stipulation, a judgment is entered only *pro forma*, for the purpose of facilitating an appeal, and not as an abandonment of the right to contest, an appeal will be allowed. *Harvey v. Bunker Hill Min. Co.*, 2 Idaho 732, 24 Pac. 30.

85. England.—*Doe v. Bird*, 7 Car. & P. 6, 32 E. C. L. 415; *Elton v. Larkins*, 5 Car. & P. 385, 24 E. C. L. 372; *Langley v. Oxford*, 1 Mees. & Welsb. 508.

Canada.—*McDonald v. Murray*, 5 Ont. 559.

United States.—*Scaife v. Land Co.*, 90 Fed. 238, 33 C. C. A. 47; *Vattier v. Hinde*, 32 U. S. 252.

Alabama.—*Prestwood v. Watson*, 111 Ala. 604, 20 So. 600; *Ex parte Hayes*, 92 Ala. 120, 9 So. 156.

California.—*Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739.

Colorado.—*Magnes v. Sioux City Nursery Co.*, 14 Colo. 219, 59 Pac. 879.

Florida.—*Mugge v. Jackson*, 50 Fla. 235, 39 So. 157.

Kansas.—*Central Branch Union Pac. R. v. Shoup*, 28 Kan. 394.

Kentucky.—*Blight's Heirs v. Banks Exrs.*, 6 T. B. Mon. 192, 17 Am. Dec. 445.

Maine.—*Holley v. Young*, 68 Me. 215; *Woodcock v. Calais*, 68 Me. 244.

Maryland.—*Farmers' Bank v.*

Sprigg, 11 Md. 389; *Merchants' Bank v. Marine Bank*, 3 Gill 96; *Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866. **Massachusetts.**—*Central Bridge Co. v. Lowell*, 15 Gray 106.

Missouri.—*Carroll v. Paul*, 19 Mo. 102; *Hammontree v. Huber*, 39 Mo. App. 326.

New Hampshire.—*Page v. Brewsters*, 58 N. H. 126, s. c. 54 N. H. 184.

New Jersey.—*Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582.

New York.—*Clason v. Baldwin*, 152 N. Y. 204, 46 N. E. 322; *Hine v. New York El. R. Co.*, 149 N. Y. 154, 43 N. E. 414; *Owen v. Cawley*, 36 N. Y. 600; *Herbst v. Vacuum Oil Co.*, 68 Hun 222, 22 N. Y. Supp. 807; *Whiting v. Edmunds*, 94 N. Y. 309; *Converse v. Sickles*, 16 App. Div. 49, 44 N. Y. Supp. 1080; *In re New York L. & W. R. Co.*, 98 N. Y. 447.

North Carolina.—*Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689.

Oklahoma.—*Consolidated Steel & Wire Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654; *Blankinship v. Power Co.*, 4 Okl. 242, 43 Pac. 1088.

Pennsylvania.—*Acme Mfg. Co. v. Reed*, 197 Pa. St. 359, 47 Atl. 205.

South Carolina.—*Brown v. Pechman*, 55 S. C. 555, 33 S. E. 732.

Texas.—*Lee v. Wharton*, 11 Tex. 61; *Imhoff v. Whittle* (Tex. Civ. App.), 84 S. W. 243.

Vermont.—*Pearl v. Allen*, 1 Tyler 4.

West Virginia.—*Hast v. Piedmont, Etc.*, R. Co., 52 W. Va. 396, 44 S. E. 155.

Wisconsin.—*United States Ex. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957; *Hinckley v. Beckwith*, 23 Wis. 328.

"Whether a judicial admission continues to have effect for a subsequent part of the same proceeding, including a new trial, has been the subject of some opposition of ruling, although the orthodox English practice plainly answers in the affirmative. It is true

pending trial,⁸⁶ or the court may, itself, in view of special circumstances appearing in the case, properly infer that the stipulation was intended to be used in the original trial only, and in such a case it will not be allowed to be used as evidence in a subsequent proceeding.⁸⁷

5. Use in Other Actions.—A stipulation made by an attorney for use in an action is incompetent and may not be used as evidence in any other action between the same or other parties and concerning the same or a different subject-matter.⁸⁸ A party is in nowise

that the pleadings of the parties continue to be binding, subject only to the usual rules of amendment; but the very distinction between pleadings and judicial admissions is that the latter are not subject to the fixed requirements of the former. On the other hand, a regard for fairness of practice indicates the opposite result; for after the case of the party benefiting by the admission has been exposed at the first trial, the party making the admission may discover that the proof of the fact would have been difficult or onerous, and by withdrawing the admission he may thus gain a fictitious advantage, which the law hardly contemplates as the result of a new trial. Moreover the ignorance which may have led to an ill-advised admission is no more a cause for revoking it at the second trial than at the first; and in any event the Judge's discretion may grant relief in the one case as well as in the other. It would seem, having regard to the voluntary and contractual nature of the act, that the duration of its effect, no less than its scope, depends after all on the intent of the parties; that this implied intent may vary with the circumstances; and that when no special circumstances indicate the contrary, the intention should be implied to extend the effect of the admission to all subsequent parts of substantially the same litigation between the same parties. Such seems to be the general trend of the rulings." *Wigmore on Evidence*, Vol. 4, § 2593.

Not Conclusive.—A few cases have held that while a stipulation was admissible in subsequent proceedings it was no longer conclusive, that it took on the character of an ordinary admission, and that a

party could deny it, explain it away, or contradict it. See *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46; *King v. Shepard*, 105 Ga. 473, 30 S. E. 634; *Perry v. Simpson Mfg. Co.*, 40 Conn. 313.

86. *Board of Comrs. v. Sutliff*, 97 Fed. 270, 28 C. C. A. 167; *Mills v. Bills*, 97 Iowa 684, 66 N. W. 881.

87. *Illinois*.—*Thomas v. Adams*, 59 Ill. 1203.

Indiana.—*Hays v. Hynds*, 28 Ind. 531; *Wheat v. Ragsdale*, 27 Ind. 191.

Iowa.—*Hudson v. Applegate*, 87 Iowa 605, 54 N. W. 462.

North Carolina.—*Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689.

Ohio.—*State v. Buchanan*, Wright 233.

Washington.—*Edmunds v. Black*, 13 Wash. 490, 43 Pac. 330.

Wisconsin.—*Weisbrod v. Chicago & N. W. R. Co.*, 20 Wis. 419.

A Question of Fact.—In *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, the determination of the question of what was the implied intention of the parties was held to be for the jury. But see, *contra*, *Blankinship v. Power Co.*, 4 Okla. 242, 43 Pac. 1088.

88. See *Elting v. Scott*, 2 Johns. (N. Y.) 157; *Weisbrod v. Chicago & N. W. R. Co.*, 20 Wis. 419.

In a recent case which follows the general rule, it was said: "It appears that upon the trial of this case, a stipulation of facts that had been made and used in the trial of the former case between the same parties, but which had been finally determined, was admitted in evidence in the case at bar on the offer of the appellee and over the objection of the appellant. This was improper and if the evidence was of such character that it could be said

bound or affected thereby unless he has acquiesced therein or adopted the stipulation, in which case it is to be regarded as his own admission and is subject to the general rules regulating admissions by parties.⁸⁹

III. WHEN STIPULATIONS WILL BE SET ASIDE.

1. When the Parties May Withdraw. — A stipulation may be

that the appellant was injured thereby the case should be reversed." *City of Alton v. Foster*, 207 Ill. 150, 69 N. E. 783.

The Rule Stated. — "As the representatives of their clients, counsel have doubtless power to admit the existence of the facts; but such admission, as proof of the existence of the fact, is available only in that particular case. It would be a most alarming doctrine that an admission made by counsel in the progress of a cause, was proof of the fact so admitted through all future time. The authority of counsel is confined to the case in which he is employed; he has no power to bind his client beyond the effect of the admission in the particular case in which it was made." *Heirs of Holman v. Bank*, 12 Ala. 369, 408.

The Reason of the Rule. — The rule is based upon the well recognized principle that an attorney's power is special and not general. "The attorney's power is not general but special, confined to the particular case in which he is employed and hence his admissions cannot be received outside of said case, unless the client has made the admissions his own by acquiescing in them." *Nichols, Shepard & Co. v. Jones*, 32 Mo. App. 657.

"It has also been a question whether the admission of counsel upon one trial would be evidence against the client in another. . . . But he (the counsel) has no such general power (as the overseer) and hence it has been held that his admissions cannot be received out of the cause (*Harrison's Devises v. Baker*, 5 Litt. [Ky.] 250), and that a bill of exceptions is not evidence in or out of the particular cause (*Baylor v. Smithers*, 1 Mon. 6, 7). Nor is a case made for a new trial

evidence in another suit, though both suits relate to the same subject-matter, and such cases ought not perhaps, to be received in any case as evidence unless the admission of some fact contained in them be made the condition of a new trial." *I. Philipps on Evidence*, 2nd ed. p. 388.

89. See Vol. I, article "ADMISSIONS," p. 348.

"Proof was also admitted that during the trial before the arbitrators, and in the presence of the defendant, his attorney admitted the correctness of the bill and insisted on its being included for the full amount in the award of damages against the stage company and the defendant did not deny it or contradict his attorney. The plaintiff also insists it is evidence of an admission by the defendant and that his silence at that time is to be deemed an acquiescence on his part." After deciding that there was no acquiescence on the part of the defendant the court said: "Whether these admissions of the attorney as to the correctness of the bill were made during the hearing of the evidence or upon his argument, does not appear, nor do we conceive that it can make a great amount of difference. Admissions of fact by counsel in one suit are not to prejudice the party against whom they are made in another. (*Harrison's Devises v. Baker*, 5 Littell [Ky.] 250; *Elting v. Scott*, 2 Johns. [N. Y.] 157.) Admissions must, in all cases, be brought home to the party in the suit against whom they are used, or to some person who is identified in interest with him. It is clear that admissions made by an attorney during the trial of a cause bind the party in that action . . . but that rule has no application in this case." *Wilkins v. Stidger*, 22 Cal. 231.

withdrawn from a case if both parties consent to such action,⁹⁰ but neither party will be allowed to repudiate it to the injury or detriment of the other or against his objection.⁹¹ A more liberal rule has been developed in a few cases and a party has been allowed to withdraw from a stipulation, upon notice to the other party, where the conditions would have justified the setting aside of the stipulation by the court.⁹²

2. When the Court Will Grant Relief. — **A. IN GENERAL.** — A stipulation is an integral part of the court proceedings and over these proceedings the court has a very extensive control and it will see

"One party cannot use as evidence his own deposition in another action, though it was taken at the request of the other party to the action; for it cannot be inferred from his procuring it, that he admits the statements it contained, though it was intended to be used and was filed by the other party in the former suit. (*Hovey v. Hovey*, 9 Mass. 216.) Nor would it be evidence against him, though he had used it in the other suit. (*Martin v. Root*, 17 Mass. 222.)" *Phillipps on Ev.*, Cowen's & Hill's Notes, n. 239, p. 404.

90. United States. — *Muller v. Dows*, 94 U. S. 277; *Aurrecoechea v. Bangs*, 110 U. S. 217; *General Electric Co. v. Wagner Elec. Co.*, 123 Fed. 101.

California. — *People v. Holden*, 28 Cal. 123.

Georgia. — *Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758; *Johnson v. Wright*, 19 Ga. 509.

Maine. — *Hutchins v. Buck*, 32 Me. 277.

North Carolina. — *Stevenson v. Felton*, 99 N. C. 58, 5 S. E. 399; *State v. McLean*, 121 N. C. 589, 28 S. E. 140.

Pennsylvania. — *Crumley v. Lutz*, 196 Pa. St. 559, 46 Atl. 901.

South Carolina. — *Brown v. Peckman*, 55 S. C. 555, 33 S. E. 732.

91. England. — *Davies v. Burton*, 4 Car. & P. 166, 19 E. C. L. 324.

Alabama. — *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600; *Montgomery v. Givhan*, 24 Ala. 568; *Harvey v. Thorpe*, 28 Ala. 250.

California. — *Raymond v. McMullen*, 90 Cal. 122, 27 Pac. 21.

Connecticut. — *Perry v. Simpson Mfg. Co.*, 40 Conn. 313.

Georgia. — *Harris v. McArthur*, 90

Ga. 216, 15 S. E. 758; *Johnson v. Wright*, 19 Ga. 509.

Illinois. — *Richards v. Lake Shore & M. S. R. Co.*, 25 Ill. App. 344.

Indiana. — *Hays v. Hynds*, 28 Ind. 531.

New York. — *Herbst v. Vacuum Oil Co.*, 68 Hun 222, 22 N. Y. Supp. 807; *People v. Rathbun*, 21 Wend. 509.

North Carolina. — *Willis v. Atlantic & D. R. Co.*, 119 N. C. 718, 25 S. E. 790.

Ohio. — *Ish v. Crane*, 13 Ohio St. 574.

Pennsylvania. — *Shisler v. Keavy*, 75 Pa. St. 79.

South Carolina. — *Brown v. Peckman*, 55 S. C. 555, 33 S. E. 732.

Texas. — *Beaumont Pasture Co. v. Preston*, 65 Tex. 448; *Wootters v. Kauffman*, 67 Tex. 488, 3 S. W. 465; *Lee v. Wharton*, 11 Tex. 61.

Vermont. — *Commercial Bank v. Clark*, 28 Vt. 325.

But see *Southern Bell Tel. & Tel. Co. v. Earle*, 118 Ga. 506, 45 S. E. 319, holding that a stipulation was revocable at will where no consideration had been paid.

If Conditions Become Impossible of performance, the stipulation will be disregarded. *Southern Cal. Water Co. v. Cameron*, 141 Cal. 283, 74 Pac. 838.

A Stipulation Ignored. — A stipulation which has been virtually disregarded and ignored by both parties will not be enforced. *People v. Holden*, 28 Cal. 123.

92. In Powell v. Turner, 139 Mass. 97, 28 N. E. 453, a party was allowed to treat an agreement obtained by fraud as void from the beginning.

In *Wallace v. Matthews*, 39 Ga.

that they are conducted with absolute fairness.⁹³ Upon an application by the aggrieved party, by motion,⁹⁴ the court will, in its discretion,⁹⁵ set aside or vacate a stipulation upon such terms as

617, 99 Am. Dec. 473, it was held that a party might withdraw from a stipulation entered into under a mistake of fact, if he gave sufficient notice to the other party. And see, *Johnson v. Wright*, 19 Ga. 509; *Carnegie Steel Co. v. Cambria Iron Works*, 185 U. S. 403.

93. *Georgia*.—*May v. State*, 90 Ga. 793, 17 S. E. 108.

Massachusetts.—*Blanchard v. Ferdinand*, 132 Mass. 389.

Minnesota.—*Gerdtsen v. Cockrell*, 52 Minn. 501, 55 N. W. 58.

Missouri.—*Galbreath v. Rogers*, 30 Mo. App. 401.

Nebraska.—*State Ins. Co. v. Farmers' Mut. Ins. Co.*, 65 Neb. 34, 90 N. W. 997.

South Carolina.—*Brown v. Peckman*, 55 S. C. 555, 33 S. E. 732.

Vermont.—*Fayston v. Richmond*, 25 Vt. 446.

West Virginia.—*Seiler v. Union Mfg. Co.*, 50 W. Va. 208, 40 S. E. 547.

94. *England*.—*Elton v. Larkins*, 5 Car. P. 385, 24 E. C. L. 372.

United States.—*McNeill v. Andes*, 40 Fed. 45; *Uhle v. Burnham*, 44 Fed. 729.

Alabama.—*Saltmarsh v. Bower*, 34 Ala. 613.

California.—*Ward v. Clay*, 82 Cal. 502, 23 Pac. 50; *Ferreira v. Chabot*, 121 Cal. 233, 53 Pac. 689.

Colorado.—*Welsh v. Noyes*, 10 Colo. 133, 14 Pac. 317.

Iowa.—*Chapman v. Coats*, 26 Iowa 288.

Massachusetts.—*Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N. E. 261.

Minnesota.—*Bingham v. Board of Supervisors*, 6 Minn. 136.

Nebraska.—*Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897.

New Hampshire.—*Alton v. Gilmanton*, 2 N. H. 520.

New Jersey.—*Read v. Patterson*, 44 N. J. Eq. 211, 14 Atl. 490.

New York.—*Milbank v. Jones*, 60 N. Y. Super. Ct. 259, 17 N. Y. Supp. 464.

Ohio.—*Garrett v. Hanshew*, 53 Ohio St. 482, 42 N. E. 256.

Rhode Island.—*Wilbur v. Wilbur*, 18 R. I. 654, 30 Atl. 455.

South Dakota.—*Randall v. Burk Township*, 11 S. D. 40, 75 N. W. 276.

Texas.—*Botts v. Martin*, 44 Tex. 91; *Paschall v. Penry*, 82 Tex. 673, 18 S. W. 154.

Washington.—*Levy v. Sheehan*, 3 Wash. 420, 28 Pac. 748.

Wisconsin.—*Brown v. Cohn*, 88 Wis. 627, 60 N. W. 826; *Sullivan v. Bruhling*, 70 Wis. 388, 36 N. W. 23.

"This stipulation pertains merely to the case and is, in fact, a proceeding in the particular suit and is no part of the issue to be tried. It presents a matter which cannot, from the nature of the case, be tried in the usual manner in which issues are tried. It is a proper case therefore, for relief on motion." *Becker v. Lamont*, 13 How. Pr. (N. Y.) 23.

95. *United States*.—*Burnham v. North Chicago St. R. Co.*, 88 Fed. 627, 32 C. C. A. 64.

Alabama.—*Harvey v. Thorpe*, 28 Ala. 250.

California.—*Richardson v. Musser*, 54 Cal. 196; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50.

Colorado.—*Welsh v. Noyes*, 10 Colo. 133, 14 Pac. 317.

Illinois.—*Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482.

Minnesota.—*Wells v. Penfield*, 70 Minn. 66, 72 N. W. 816.

Nebraska.—*Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897.

New York.—*Tauziede v. Jumel*, 138 N. Y. 431, 34 N. E. 274.

Pennsylvania.—*Nesbitt v. Turner*, 155 Pa. St. 429, 26 Atl. 750.

Texas.—*Hancock v. Winans*, 20 Tex. 320; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. 1003.

Wisconsin.—*Wells v. American Ex. Co.*, 49 Wis. 224, 5 N. W. 333.

Becomes a Matter of Right.—The court in *Porter v. Holt*, 73 Tex. 447, 11 S. W. 494, declared that in some instances relief must be granted as a matter of right: "Where the agreement involves something more than a mere matter of practice and affects the substance of the cause of

the circumstances warrant and the facts of the case call for.⁹⁶

B. FOR MISTAKE OR FRAUD. — A stipulation entered into through a mistake as to the facts, or induced by the misrepresentation or fraud of the other party, will be set aside.⁹⁷ But the mistake must appear clearly,⁹⁸ be material,⁹⁹ and not be one which could have been avoided by the exercise of reasonable care and diligence.¹ The obvious consequences of an agreement will not be avoided.²

action or the character of the defense and it appears that it has been entered into by counsel without a knowledge of the facts and that its withdrawal will not operate to prejudice the other party, the motion to set aside ceases to be a mere matter of discretion and should be granted by the court."

96. *Earhart v. United States*, 30 Ct. Cl. 343; *Harvey v. Thorpe*, 28 Ala. 250; *Welsh v. Noyes*, 10 Colo. 133, 14 Pac. 317; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *Howe v. Lawrence*, 22 N. J. L. 99; *Randall v. Burk Township*, 11 S. D. 40, 75 N. W. 276; *Brown v. Cohn*, 88 Wis. 627, 60 N. W. 826.

97. *England*. — *Furnival v. Bogle*, 4 Russ. 142, 38 Eng. Reprint 758.

United States. — *The Hiram*, 1 Wheat. 440.

Alabama. — *Ex parte Hayes*, 92 Ala. 120, 9 So. 156; *Harvey v. Thorpe*, 28 Ala. 250.

California. — *Richardson v. Musser*, 54 Cal. 106; *Bond v. Hickman*, 29 Cal. 460; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50.

Colorado. — *Welsh v. Noyes*, 10 Colo. 143, 14 Pac. 317.

Kansas. — *Southern Kan. R. Co. v. Pavay*, 57 Kan. 521, 46 Pac. 969.

Louisiana. — *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 247.

Massachusetts. — *Gregory v. Pierce*, 4 Met. 478; *Powell v. Turner*, 139 Mass. 97, 28 N. E. 453.

Minnesota. — *Wells v. Penfield*, 70 Minn. 66, 72 N. W. 816.

Nebraska. — *German Nat. Bank v. Atherton*, 64 Neb. 610, 90 N. W. 550.

New Hampshire. — *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *Goodrich v. Eastern R. Co.*, 38 N. H. 390.

New Jersey. — *Smock v. Jones*, 39 N. J. Eq. 16.

New York. — *Becker v. Lamont*,

13 How. Pr. 23; *Magnolia Metal Co. v. Pound*, 60 App. Div. 318, 70 N. Y. Supp. 230; *Kley v. Healy*, 149 N. Y. 346, 44 N. E. 150.

North Carolina. — *Sanders v. Ellington*, 77 N. C. 255.

Ohio. — *Ish v. Crane*, 13 Ohio St. 579; *Garrett v. Hanshue*, 53 Ohio St., 482, 42 N. E. 256.

Rhode Island. — *Wilbur v. Wilbur*, 18 R. I. 654, 30 Atl. 455.

South Carolina. — *Alexander v. Muirhead's Exrs.*, 2 Desaus 162.

Texas. — *Porter v. Holt*, 73 Tex. 447, 11 S. W. 494; *Paschall v. Penry*, 82 Tex. 673, 18 S. W. 154; *Beaumont Pasture Co. v. Preston*, 65 Tex. 448.

Vermont. — *Commercial Bank v. Clark*, 28 Vt. 325.

Washington. — *Levy v. Sheehan*, 3 Wash. 420, 28 Pac. 748.

Wisconsin. — *Wells v. American Ex. Co.*, 49 Wis. 224, 5 N. W. 333.

98. **A Disputed Mistake.** — If there is a dispute as to the mistake and it does not clearly appear, the court will take no action. *Charles v. Miller*, 36 Ala. 141; *Green v. Green*, 61 Ga. 141; *Keogh v. Main*, 20 Jones & S. (N. Y.) 160; *Robinson v. Bobb*, 139 Mo. 346, 40 S. W. 938.

99. **Materiality.** — If the rights of the parties have not been affected and the applicant can show no prejudice or harm, the stipulation will be allowed to stand. *Lee v. Winans*, 90 N. Y. Supp. 960; *Chapman v. Coats*, 26 Iowa 288.

1. *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863; *Van Horn v. Burlington, C. R. & N. R. Co.*, 69 Iowa 239; 28 N. W. 547; *Rogers v. Greenwood*, 14 Minn. 333; *Mutual Ins. Co. v. Drummond*, 3 Code Rep. (N. Y.) 143; *Morgan v. Davenport*, 60 Tex. 230.

2. *Keys v. Warner*, 45 Cal. 60; *Rowell v. Lewis*, 95 Me. 83, 49 Atl.

The courts in their desire to encourage the practice of entering into stipulations, by counsel, will often relieve from stipulations made through improvidence, or inadvertently, where it appears that to refuse relief would be inequitable, and where the opposing party would not be prejudiced and could be placed *in statu quo*.³ Gross

423; Conner *v.* Belden, 8 Daly (N. Y.) 257.

3. *England*.—Furnival *v.* Bogle, 4 Russ. 142, 38 Eng. Reprint 758.

United States.—Burnham *v.* North Chicago St. R. Co., 88 Fed. 627, 32 C. C. A. 64; Hurt *v.* Hollingsworth, 100 U. S. 100.

Alabama.—McClellan *v.* State, 121 Ala. 18, 25 So. 725.

Arkansas.—Saleski *v.* Boyd, 32 Ark. 74.

California.—People *v.* Burns, 78 Cal. 645, 21 Pac. 540; Rapp *v.* Spring Val. Gold Co., 74 Cal. 532, 16 Pac. 325; Ferrea *v.* Chabot, 121 Cal. 233, 53 Pac. 689.

Illinois.—Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482.

Iowa.—Mains *v.* Des Moines Bank, 113 Iowa 395, 85 N. W. 758.

Louisiana.—Harvin *v.* Blackman, 108 La. 426, 32 So. 452.

Minnesota.—Wells *v.* Penfield, 70 Minn. 66, 72 N. W. 816.

Nebraska.—Lincoln *v.* Lincoln St. R. Co., 67 Neb. 469, 93 N. W. 766; Butler *v.* Chamberlain, 66 Neb. 174, 92 N. W. 154; Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897.

New Jersey.—Howe *v.* Lawrence, 22 N. J. L. 99.

New York.—Keogh *v.* Main, 20 Jones & S. 160; Barry *v.* Mutual Life Ins. Co., 53 N. Y. 536; Dryer *v.* Brown, 24 Abb. N. C. 59, 10 N. Y. Supp. 53; Magnolia Met. Co. *v.* Pound, 60 App. Div. 318, 70 N. Y. Supp. 230.

Pennsylvania.—Nesbitt *v.* Turner, 155 Pa. St. 429, 26 Atl. 750.

South Dakota.—Randall *v.* Burk Township, 11 S. D. 40, 75 N. W. 276; Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863.

Tennessee.—Gates *v.* Brinkley, 4 Lea 710.

Texas.—McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552; Paschall *v.* Penry, 82 Tex. 673, 18 S. W. 154; Day *v.* Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426.

Washington.—Levy *v.* Sheehan, 3 Wash. 420, 28 Pac. 748.

Wisconsin.—Lynch *v.* State, 15 Wis. 38; Brown *v.* Cohn, 88 Wis. 627, 60 N. W. 826.

The Rule Stated.—"Agreements of this kind are unlike ordinary contracts between parties not in court. In a stipulation by counsel for convenience or expedition in the trial of a case, if counsel inadvertently admit or state a fact not in accord with the premises, entirely against the manifest purpose and intention of the controversy and to the irreparable injury of the client they represent, the court wherein such cause is pending has the power and rightfully exercises it, to relieve the party from such stipulation." Welsh *v.* Noyes, 10 Colo. 143, 14 Pac. 317..

And see Sperr *v.* Met. El. R. Co., 123 N. Y. 659, 26 N. E. 749, where the court said: "The right of the appellant to be relieved from this situation does not depend upon the strict rules of law. But in view of the fact that the defendant has lost nothing by reason of the stipulation being given, the court could relieve the plaintiff from the stipulation even after it has been given by his own act, if it was given inadvisedly and it would be inequitable to hold him to its terms."

Grounds Necessary for Setting Aside a Contract Need Not Appear.

It has been held that a stipulation would not be set aside on grounds less than would justify the rescission of a contract or the setting aside of the verdict of a jury. Bingham *v.* Board of Supervisors, 6 Minn. 136; Keogh *v.* Main, 20 Jones & S. (N. Y.) 160; Harvey *v.* Thorpe, 28 Ala. 250. But this is not the general rule. See Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50.

In Porter *v.* Holt, 73 Tex. 447, 11 S. W. 494, the court in drawing the distinction between a stipulation and a contract said: "Agreements of

laches are a bar to relief in any case.⁴ The stipulation must be set aside in its entirety and it is improper to amend it or leave a portion of it in effect.⁵

C. AN UNAUTHORIZED STIPULATION. — The mere fact that an attorney had no express authority to stipulate, or even the fact that he acted against express instructions, is not of itself enough to justify the setting aside of a stipulation if it was such a stipulation as he had the implied power to make; but if the party's interests are prejudiced by it, the court in its discretion may grant relief as in the ordinary cases.⁶ A stipulation beyond the implied power of the attorney and not expressly authorized by the party, or by a party as to a subject within the exclusive control of the attorney, will be set aside upon application.⁷

counsel made during the progress of a cause ordinarily tend to the dispatch of business and should be favored by the court. The agreement should not be set aside at the instance of either party when the party invoking such action has obtained an advantage under it or when its withdrawal will place the opposite party in worse position than if it had never been made. But in this court such agreements have never been treated as binding contracts to be absolutely enforced, but as mere stipulations which may be set aside in the sound discretion of the court when such action may be taken without prejudice to either party."

4. *United States*. — *Dickerson v. Matheson*, 50 Fed. 73, 57 Fed. 524, 6 C. C. A. 466; *In re Reed*, 117 Fed. 358.

Minnesota. — *Warren v. Great Northern R. Co.*, 64 Minn. 239, 66 N. W. 984.

New Hampshire. — *Page v. Brewsters*, 54 N. H. 184.

New York. — *Milbank v. Jones*, 60 N. Y. Super. Ct. 259, 17 N. Y. Supp. 464; *Hine v. New York El. R. Co.*, 3 Misc. 462, 23 N. Y. Supp. 187; *Dubuc v. Lazell & Co.*, 182 N. Y. 482, 75 N. E. 401; *Smith v. Barnes*, 9 Misc. 368, 29 N. Y. Supp. 692.

Pennsylvania. — *Continental Ins. Co. v. Delpuech*, 82 Pa. St. 225.

5. *Welsh v. Noyes*, 10 Colo. 143, 14 Pac. 317; *Gerdtsen v. Cockrell*, 50 Minn. 546, 52 N. W. 930; *Lincoln*

v. Lincoln St. R. Co., 67 Neb. 469, 93 N. W. 766; *Seaver v. Moore*, 1 Hun (N. Y.) 305.

6. *United States*. — *Farmers' Trust Bank v. Ketchum*, 4 McLean 120; *In re Reed*, 117 Fed. 358.

Georgia. — *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133.

Iowa. — *Matter of Heath*, 83 Iowa 215, 48 N. W. 1037.

Minnesota. — *Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262.

New York. — *Palen v. Starr*, 7 Hun 422; *Tiffany v. Lord*, 40 How. Pr. 481.

North Carolina. — *Pierce v. Perkins*, 17 N. C. (2 Dev. Eq.) 250.

Pennsylvania. — *Williams v. Tracey*, 95 Pa. St. 308.

Texas. — *McClure v. Sheek*, 68 Tex. 426, 4 S. W. 552.

Wisconsin. — *Walker v. Rogan*, 1 Wis. 597.

7. *United States*. — *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338; *Earhart v. United States*, 30 Ct. Cl. 343.

California. — *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809.

Illinois. — *Du Pont v. Sanitary District*, 203 Ill. 170, 67 N. E. 815.

Massachusetts. — *Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N. E. 261.

New Jersey. — *Read v. Patterson*, 44 N. J. Eq. 211, 14 Atl. 490.

New York. — *People v. New York*, 11 Abb. Pr. 66; *Baron v. Cohen*, 62 How. Pr. 367; *Herbert v. Lawrence*,

21 Civ. Proc. 336; *Quinn v. Lloyd*,
36 How. Pr. 378.

Pennsylvania.—*Luzerne Bldg.*
Assn. v. People's Bank, 142 Pa. St.

121, 21 Atl. 806; *North Whitehall*
Twp. v. Keller, 100 Pa. St. 105.

Texas.—*Freeman v. Preston*
(Tex. Civ. App.), 29 S. W. 495.

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STOLEN GOODS.—See Larceny, Receiving Stolen
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I. CORPORATE EXISTENCE AND ITS INCIDENTS.

1. Judicial Notice. — A. IN GENERAL. — Under a well established rule of law the courts cannot take judicial notice of legislative acts of a private or special character, unless at the time of the passage the act is declared by the legislature to be public,¹ or unless a general statute exists requiring the courts to notice all legislative acts.² Private acts creating street-railroad corporations must be proved like any other controverted fact, if not within the scope of either of the above mentioned exceptions.³ But if a corporation has charge of an interest of so public a concern as to render its charter public, the courts will take judicial notice of it;⁴ but not of its name unless created and named in a public act.⁵

B. ACCEPTANCE OF CHARTER. — Judicial notice will not be taken that a railroad corporation has accepted the provisions of the statute which created it.⁶

C. TERMINATION OF CORPORATE EXISTENCE. — Nor will judicial notice be taken of the fact that the existence of a corporation, whose charter has not expired by limitation, has ceased.⁷

2. Presumption of Grant. — A grant may be presumed from years of uniform usage.⁸

3. Substance and Mode of Proof. — A. IN GENERAL. — When it becomes necessary to prove the corporate existence of a street-railway corporation, the proper mode of procedure is to prove its char-

1. Courts Must Take Judicial Notice of a Charter when declared by the legislature to be a public act. Stephens & C. Trans. Co. v. Central R. Co., 33 N. J. L. 229; Case v. Kelly, 133 U. S. 21; People v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64; Bank of Newberry v. Greenville & C. R. Co., 9 Rich. (S. C.) 495.

2. Charters of Railroad Companies Are Public Acts and courts will take judicial notice of their provisions and give effect to them as they would to any other public statute. Peoria, D. & E. R. Co. v. People, 116 Ill. 401, 6 N. E. 497; Bank of Newberry v. Greenville & C. R. Co., 9 Rich. (S. C.) 495.

Where a charter of a corporation is a public law which judicial tribunals are bound to notice *ex officio*, it is not necessary to give it in evidence. Hammett v. Little Rock & N. R. Co., 20 Ark. 204. See also articles "CORPORATIONS," Vol. III, p. 584; "JUDICIAL NOTICE," Vol. VII, p. 1026; "STATUTES."

3. Kelly v. Alabama & R. Co., 58 Ala. 489; *Montgomery v. Mont-*

gomery & W. P. R. Co., 31 Ala. 76; *Perry v. New Orleans, M. & C. R. Co.,* 55 Ala. 413; *Ohio & I. R. Co. v. Ridge,* 5 Blackf. (Ind.) 78; *Timlow v. Philadelphia & R. R. Co.,* 99 Pa. St. 284; *Conley v. Columbus T. R. Co.,* 44 Tex. 579; *Holloway v. Memphis, E. P. & P. R. Co.,* 23 Tex. 465, 76 Am. Dec. 68.

4. Hammett v. Little Rock & N. R. Co., 20 Ark. 204; *Rider v. Fritchey,* 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513.

5. Unless Created and Named in a public legislative act, courts will not take judicial notice of the name of corporations any more than of an individual. *Halloway v. Memphis, E. P. & P. R. Co.,* 23 Tex. 465, 76 Am. Dec. 68.

6. Gorman v. Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; *Southgate v. Atlantic & P. R. Co.,* 61 Mo. 89.

7. Shea v. Knoxville & K. R. Co., 6 Baxt. (Tenn.) 277.

8. Practical Construction of Grant, established by years of uniform usage, acquiesced in by the public, and not denied by those ad-

ter by production of the charter,⁹ and acceptance thereof,¹⁰ or by an authenticated copy of the charter or certificate of incorporation,¹¹ or by officially printed or properly authenticated copies of statutes creating the corporation.¹²

B. ACCEPTANCE OF CHARTER. — The acceptance of a charter, like any other controverted fact, is to be proved by the best evidence in the power of the party who relies upon it. The books of the corporation are the regular evidence of its acts,¹³ and so long as they are in existence and obtainable, parol evidence is not admissible to prove either the acceptance of the charter or what persons are members of the corporation.¹⁴ Such acceptance may, however, be implied from circumstances, such as lapse of time with exercise of the privilege granted,¹⁵ or even from the fact that the grant is benefi-

versely interested, is the strongest evidence that the grant has been rightly interpreted. *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

9. *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275.

10. In the case of a corporation created by a special charter, proof of the charter and acts of user is sufficient. *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275; *Wilmington R. Co. v. Saunders*, 48 N. C. (3 Jones L.) 126.

A certified copy from the secretary of state's office of an agreement for consolidation is conclusive evidence of consummation of consolidation in suits between a corporation and individual or other corporation. *Leavenworth County Comrs. v. Chicago, R. I. & P. R. Co.*, 134 U. S. 688.

11. The certificate of the comptroller of the currency is competent evidence of the existence of a charter of a national bank. See *First Nat. Bank v. Kidd*, 20 Minn. 234; *Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 So. 42; *Keyser v. Hitz*, 2 Mackey (D. C.) 473, *affirmed*, 133 U. S. 138.

12. The act under or by which a corporation is chartered may be proved, like any other statute, under special enactment, by copies officially printed, or by properly authenticated copies. See articles "CORPORATIONS," Vol. III; "STATUTES."

The Amount of Proof Required to Prove Corporate Existence differs in the case of conditional charter on one hand and unconditional charter

on the other. In both cases the charter itself must be proved, but in the case of conditional charters this alone is not sufficient; all preliminary steps required by the statute must be shown to have been complied with. *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204. In the latter case, where the corporation is created *eo instante* by the act itself, its existence is sufficiently proved by proof of charter alone. *St. Joseph & I. R. Co. v. Shambough*, 106 Mo. 557, 17 S. W. 581. And where the act is itself public this may be dispensed with. *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

13. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

14. See articles "BEST AND SECONDARY EVIDENCE," Vol. II; "CORPORATIONS," Vol. III; "WRITTEN INSTRUMENTS."

15. Evidence That the Corporation Has Assumed To Act as such under color of right, that is, that it is a corporation *de facto*, is also admissible. *Dunning v. New Albany & S. R. Co.*, 2 Ind. 437; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *Buffalo & H. R. Co. v. Cary*, 26 N. Y. 75 (slight proof of user held sufficient under the circumstances).

Proof of User is often made by the production of corporate books, records, or of written instruments, executed by the association in its corporate name. *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Peake v. Wabash R. Co.*, 18 Ill. 88; *East St. Louis & C. R. Co. v. Bellville City R. Co.*,

cial,¹⁶ or from the election of corporate officers.¹⁷ And evidence of a substantial, rather than a literal acceptance, will suffice.¹⁸

C. ACCEPTANCE OF AMENDMENTS.—Acceptance of amendments by a railway corporation may be proved in the same manner as the acceptance of its charter.¹⁹ It may be inferred from such acts or omissions as would raise a similar presumption in the case of natural persons.²⁰ And where the amendment is beneficial very little evidence is required to warrant the presumption of acceptance.²¹

159 Ill. 544, 42 N. E. 974; Peoria & P. U. R. Co. v. Peoria & F. R. Co., 105 Ill. 110.

It is not necessary to establish, *prima facie*, the existence of the corporation *de facto*, where the existence of a charter and user thereunder are proven. St. Louis, A. & T. H. R. Co. v. Belleville City R. Co., 158 Ill. 390, 41 N. E. 916.

Lapse of Time and User as Proof of Acceptance.—Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Bangor, O. & M. R. Co. v. Smith, 47 Me. 34; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581.

Proof of Acceptance by Witness of User.—Acceptance of a charter and the organization of a corporate body under such charter may be proved by a witness who saw the alleged corporators in the use and exercise of the franchise and powers conferred by the act of incorporation. Wilmington R. Co. v. Saunders, 48 N. C. (3 Jones L.) 126.

16. Beneficial Charter.—Where a grant of power is beneficial to a corporation, an acceptance may be presumed. It is not essential to the taking effect of a charter that the acceptance should appear on the records of the corporation. The burden is on the party denying the acceptance. In Astor v. New York Arcade R. Co., 48 Hun 562, 1 N. Y. Supp. 174, *affirmed*, 113 N. Y. 93, 20 N. E. 594, it was held that where an act creating a corporation was enacted for the benefit of the corporation, it must be proved that it had refused to accept the proffered benefit or else the presumption would be that it had accepted it.

17. Election of Officers.—While merely presumptive evidence, the

election of officers in pursuance of a new or the alteration of an old charter, is nevertheless strong evidence of the acceptance of the incorporation of the charter under which such election is held. Memphis & St. F. P. R. Co. v. Rives, 21 Ark. 302.

Partial or Conditional Acceptance.—Where a charter is granted, whether it be one of creation or an amendment to the charter of an existing corporation, acceptance in whole or in part may be inferred from the exercise of corporate powers or other unequivocal acts on its part; but this presumption cannot prevail against direct proof. Lyons v. Orange, A. & M. R. Co., 32 Md. 18.

18. The Performance of Corporate Functions raises the presumption of due incorporation. Packard v. Old Colony R. Co., 168 Mass. 92, 46 N. E. 433.

The Presumption of Regularity extends to proceedings in organization of corporations. Dunning v. New Albany & S. R. Co., 2 Ind. 437.

19. Proof of Acceptance of Amendments.—Illinois River R. Co. v. Zimmer, 20 Ill. 654; Bangor, O. & M. R. Co. v. Smith, 47 Me. 34.

20. Where a statute authorized "any railroad company organized in pursuance of law" to "lease or purchase any part or all of any railroad constructed by another company", it was held that leasing another railroad after the passage of this act was sufficient evidence of the acceptance of its provisions by a railroad, although a certificate of acceptance was not filed with the secretary of state. Cincinnati, H. & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729.

21. Astor v. New York Arcade R. Co., 48 Hun 562, 1 N. Y. Supp. 174; Bangor, O. & M. R. Co. v. Smith, 47

Acts of User Under an Amendment to its charter may be shown as evidence of an acceptance of such amendment.²²

D. ACCEPTANCE OF FRANCHISE. — While a grant of a street-railroad franchise must be accepted by the grantee before it can become binding,²³ such acceptance may be implied from circumstances,²⁴ such as a previous application therefor by the grantee.²⁵

E. TERMINATION OF FRANCHISE. — The termination of the existence of a railway company may be shown by proving a repeal of the act of incorporation;²⁶ or by proof of the expiration of time,²⁷ the

Me. 34; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

22. The general rule as to the acceptance of amendments to charter is, that acts of user under an amendment to a corporate charter, for which no authority can be found except in such amendment, and which amendment is supposed in good faith to be beneficial to the corporation, are evidence of an acceptance of such amendment by the corporation, and make it binding on all the members of the corporation. *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729.

23. *Logansport R. Co. v. Logansport*, 114 Fed. 688; *Trenton St. R. Co. v. Pennsylvania R. Co.*, 63 N. J. Eq. 276, 49 Atl. 481.

24. *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264.

Where a Street-Railroad Has Been in Operation for Twenty-seven Years, and no proceedings have been taken to forfeit its franchise, and additional franchises have been repeatedly granted it, all defaults have been waived and a stranger cannot urge them. *Dern v. Salt Lake City R. Co.*, 19 Utah 46, 56 Pac. 556.

25. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557.

Previous Request for an Ordinance obviates necessity of a subsequent acceptance. *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

26. *Citizens' St. R. Co. v. City R. Co.*, 64 Fed. 647; *City R. Co. v. Citizens' St. R. Co. (Ind.)*, 52 N. E. 157.

Repeal of Act of Incorporation. The presumption is, that the legislature, in the exercise of its alleged right of repeal, acted properly; and if certain facts must have existed to

justify such repeal, their existence will be presumed. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287, 300; *Com. v. Pittsburg & C. R. Co.*, 58 Pa. St. 26, 48. But in this latter case the court held that it was only a *prima facie* presumption casting the burden of proof on defendants.

27. *United States.* — *Detroit Citizens' St. R. Co. v. Detroit*, 64 Fed. 628, 12 C. C. A. 365; *Africa v. Knoxville*, 70 Fed. 729; *Detroit v. Detroit City R. Co.*, 56 Fed. 867; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 716.

California. — *People v. Sutter St. R. Co.*, 117 Cal. 604, 49 Pac. 736; *People v. Los Angeles Elec. R. Co.*, 91 Cal. 338, 27 Pac. 673.

Delaware. — *Wilmington City R. Co. v. Wilmington & B. S. R. Co.*, 46 Atl. 12; *Williamson v. Gordan Heights R. Co.*, 40 Atl. 933.

Georgia. — *Augusta & S. R. Co. v. Augusta*, 100 Ga. 701, 28 S. E. 126.

Illinois. — *McNeil v. Chicago City R. Co.*, 61 Ill. 150; *Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 73; *Bellville v. Citizens' Horse R. Co.*, 152 Ill. 171, 38 N. E. 584.

Kansas. — *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800.

Louisiana. — *Young v. Magazine St. R. Co.*, 24 La. Ann. 53.

Maryland. — *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; *United R. Co. v. Hayes*, 92 Md. 490, 48 Atl. 364.

Michigan. — *Hamtramck Twp. v. Rapid R. Co.*, 122 Mich. 472, 81 N. W. 337.

Missouri. — *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

New York. — *People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961; *In re King's County El. R. Co.*, 105 N. Y. 97, 13 N. E. 18; *In re Brook-*

surrender of its charters,²⁸ breach of conditions of grant²⁹ or non-user or mis-user.³⁰ But waiver of any of these may be shown by acquiescence and grant of additional franchises.³¹

II. MATTERS PERTAINING TO LOCATION OF ROAD.

A street-railway company may show that a divergence from its chartered route was reasonable,³² or that though authorized to construct it did not actually build.³³

Consent of Abutting Property Owners.—Where the consent of a majority of the abutting property owners is a prerequisite to the

lyn El. R. Co., 125 N. Y. 434, 26 N. E. 474; New York Cable Co. v. Mayor, 104 N. Y. 1, 10 N. E. 332; Auchincloss v. Metropolitan El. R. Co., 69 App. Div. 63, 74 N. Y. Supp. 534; Dusenberry v. New York Trac. Co., 46 App. Div. 267, 61 N. Y. Supp. 420.

Pennsylvania.—Plymouth Twp. v. Chestnut Hill & N. R. Co., 168 Pa. St. 181, 32 Atl. 19.

Texas.—Ft. Worth St. R. Co. v. Rosedale St. R. Co., 68 Tex. 163, 7 S. W. 381; Mayor of Houston v. Houston Belt & M. P. R. Co., 84 Tex. 581, 19 S. W. 786.

Evidence that work was stopped by injunction may be given as excuse for non-compliance within required time. Newport News & O. P. R. Co. v. Hampton Roads R. Co., 102 Va. 795, 47 S. E. 839.

28. West Philadelphia Pass. R. Co. v. Philadelphia Tpk. Co., 6 Pa. Dist. 160.

Acceptance of Surrender by Municipality.—Wood v. Seattle, 23 Wash. 1, 62 Pac. 135.

Acceptance by the State. Wright v. Milwaukee Elec. R. Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74.

29. **Suspension of Business for One Year.**—City of Tower v. Tower & S. St. R. Co., 68 Minn. 500, 71 N. W. 691, 64 Am. St. Rep. 493; Plymouth Twp. v. Chestnut Hill & N. R. Co., 168 Pa. St. 181, 32 Atl. 19.

30. **Forfeiture for Non-User.** State v. East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742 (failure for eighteen months); Attorney-General v. Petersburg & R. R. Co., 28 N. C. (6 Ired. L.) 456.

Any evidence is competent to show non-user or mis-user. Snouffer v. Cedar Rapids & M. C. R. Co., 118 Iowa 287, 92 N. W. 79.

Evidence That a Street-Railway Company Ran But One Car a Day over its tracks, doing this not for the accommodation of the public, but merely as a pretense for holding the franchise, shows a sufficient non-user to warrant a judgment of forfeiture. People v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736.

Non-User for Ten Years is sufficient evidence of abandonment. Henderson v. Central Pass. R. Co., 21 Fed. 358.

Insolvency is not alone sufficient evidence of non-user, but it may tend to show such financial condition that the company cannot operate the road with safety to the public. State v. Atchison & N. R. Co., 24 Neb. 143, 38 N. W. 43, 8 Am. St. Rep. 164; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405.

31. **Waiver of Forfeiture May Be Shown.**—People v. Los Angeles Elec. R. Co., 91 Cal. 338, 27 Pac. 673; Santa Rosa City R. Co. v. Central St. R. Co. (Cal.), 38 Pac. 986; Bohmer v. Haffen, 22 Misc. 565, 50 N. Y. Supp. 857; Matter of New York El. R. Co., 70 N. Y. 327.

Waiver by Acquiescence and Grant of Additional Franchises. Denver v. Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556; Bohmer v. Haffen, 22 Misc. 565, 50 N. Y. Supp. 857.

32. Jordan v. Washington C. R. Co., 25 Pa. Super. Ct. 564.

33. Harris v. Maccomb, 213 Ill. 47, 72 N. E. 762.

power of the council to grant permission to construct, it is competent to show that such owners stood by while the road was being constructed.³⁴ Such consent may be presumed from long exercise of the use of streets,³⁵ and the burden of proving the invalidity of the consent is on the one so claiming.³⁶ But the action of the council in granting permission is not conclusive evidence against the property owners of consent by the requisite majority.³⁷

III. INJURY TO PERSONS OR PROPERTY FROM DEFECTIVE CONSTRUCTION OR OPERATION OF ROAD.

1. Judicial Notice.— Courts will take judicial notice of all matters in regard to the construction of street-railways that are of common knowledge,³⁸ but in most cases any injury arising from the alleged defective construction thereof must be proved as any other fact.³⁹

34. Acquiescence of Abutting Owners as by proof of standing by while road is being constructed and operated. *Paterson & Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

Acquiescence of Municipality in Location of Tracks.— *Collins v. Carbondale Trac. Co.*, 5 Pa. Dist. 18.

35. Presumption of Grant of Right From Long Exercise. *Town of New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516; *Cox v. Louisville etc. R. Co.*, 48 Ind. 178; *Pape v. New York & H. R. Co.*, 74 App. Div. 175, 77 N. Y. Supp. 725.

After Lapse of Ten Years acquiescence by property owners, and the destruction of written evidence by fire, very slight evidence is required to establish that consent was obtained as required by statute. *Chicago City R. Co. v. People*, 73 Ill. 541.

36. Burden of Proving Invalidity of Consent.— *Adee v. Nassau Elec. R. Co.*, 65 App. Div. 529, 72 N. Y. Supp. 992; *affirmed*, 173 N. Y. 580, 65 N. E. 1113; *Mercer Co. Trac. Co. v. United N. J. R. & C. Co.*, 1 St. Ry. Rep. 528.

Conclusiveness of Question of Consent.— *Roberts v. Easton*, 19 Ohio St. 78. See also *Beeson v. Chicago*, 75 Fed. 880.

Burden of Proving Consent of Property Owners.— *Dusenberry v. New York, W. & C. Trac. Co.*, 46 App. Div. 267, 61 N. Y. Supp. 420.

37. Roberts v. Easton, 19 Ohio St. 78; *Beeson v. Chicago*, 75 Fed. 880; *Sommers v. Cincinnati*, 6 Ohio Dec. (reprint) 887; *Corry v. Gaynor*, 22 Ohio St. 584; *Hays v. Jones*, 27 Ohio St. 218; *Hamilton v. Cincinnati & H. Elec. Co.*, 8 Ohio Dec. 174, 5 Ohio N. P. 457; *Simmons v. Toledo*, 4 Ohio Cir. Dec. 69; *Simmons v. Toledo*, 8 Ohio C. C. 535.

38. Judicial notice will be taken by the courts that efforts to build elevated railroads in the city of New York failed, at one time, by reason of inability to procure capital. *Sun Printing & Pub. Assn. v. New York*, 8 App. Div. 230, 40 N. Y. Supp. 607.

It is a matter of common knowledge that cars marked "special" are run at frequent intervals carrying freight over some street-railways. *Attorney-General ex rel. Barbour v. Pingree*, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407.

So, too, it is a matter of common knowledge that electric cars are so constructed that, operated at a moderate rate of speed, they can be stopped in a given distance. *Young v. Atlantic Ave. R. Co.*, 10 Misc. 541, 31 N. Y. Supp. 441, 64 N. Y. St. 124.

39. Courts will not take judicial notice that a railroad is or is not fenced at certain points (*Texas Cent. R. Co. v. Childress*, 64 Tex. 346), nor that unprotected frogs or switches are inherently unsafe and dangerous (*Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401,

2. Presumption and Burden of Proof. — A. RELATIONSHIP OF CARRIER AND PASSENGER. — A person traveling upon a public conveyance used for passengers, is, in the absence of countervailing circumstances, presumed to be a passenger and rightfully there.⁴⁰ Such presumption may, however, be rebutted.⁴¹

B. THE FACT OF THE INJURY. — Of course, as in other personal injury actions, the burden is on the plaintiff to prove the injury complained of.⁴²

C. NEGLIGENCE OF COMPANY, ETC. — a. *Injuries to Passengers.* (1.) **Generally.** — In an action against a street-railroad company to recover damages for personal injuries suffered by a passenger, through the alleged negligence of the defendant, the burden of proving the negligence complained of is on the plaintiff.⁴³

(2.) **Presumption of Negligence From Fact of Injury.** — (A.) **GENERALLY.** In an action by a passenger on a street-car against the company for personal injuries, the general rule is that the mere fact of the injury,—of itself and divorced from all surrounding circumstances,—does not justify the inference that the injury was caused by the negligence of the defendant company.⁴⁴ Of course direct proof of neg-

2 L. R. A. 67), nor that a cable car is so constructed as to require the same protection for operatives as is required by electric cars (*State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317), nor that electricity used by a street railway company to propel its cars is dangerous (*Taggart v. Newport St. R. Co.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205), nor that there was but one elevated road in the state at a given time (*Matter of New York El. R. Co.*, 70 N. Y. 327), nor the relation between a street-car driver and conductor (*Seeman v. Koehler*, 122 N. Y. 646, 25 N. E. 353, 33 Am. St. Rep. 729).

40. *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 58 Am. & Eng. R. Cas. 4; *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 329; *Buffitt v. Troy & B. R. Co.*, 40 N. Y. 168. And see article, "CARRIERS," Vol. II, p. 904.

41. **May Be Rebutted.** — "The rule seems to be laid down with a significant limitation in Louisville, etc., *R. Co. v. Thompson*, 9 N. E. Rep. 357, cited and relied on by defendant. The rule as there stated is, that 'a person on a train used for passengers is, in the absence of countervailing circumstances, presumed

to be a passenger and rightfully there.' By the language there used, the presumption is allowable, 'in the absence of countervailing circumstances', which is equivalent to saying that the presumption, admitting it to exist, belongs to the class of disputable presumptions, and may be rebutted." *People v. Douglass*, 87 Cal. 281, 25 Pac. 417.

42. *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60; *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604. And see cases cited in the succeeding notes.

43. *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604; *Palmer v. Winona R. & L. Co.*, 78 Minn. 138, 80 N. W. 869; *Timms v. Old Colony St. R. Co.*, 183 Mass. 193, 66 N. E. 797. And see articles "CARRIERS," Vol. II, p. 908; "NEGLECT," Vol. VIII, p. 869; "RAILROADS," Vol. X, p. 467.

44. *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161, 20 So. 317.

Statement of Rule. — "As an injury may occur from causes other than the negligence of the party sued, it is obvious that, before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible for it;

ligence is not essential, and circumstantial evidence may be relied on as justifying an inference of negligence, as for example, negligence may be inferred from proof that the passenger was injured through some act or omission on the part of the company's servant,⁴⁵ or through some defect in the appliances or machinery used by the company,⁴⁶ or, as some of the courts state it, "a defect in the means

that is, that he has been guilty of the negligence that produced or occasioned the injury. In no instance can the bare fact that an injury has happened—of itself, and divorced from all the surrounding circumstance—justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstance from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. . . . There are instances in which the circumstances surrounding an occurrence, and giving a character to it, are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are the instances where the doctrine *res ipsa loquitur* is applied. This phrase, which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz: 'First, when the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is, in its very nature, so obviously destructive of the safety of the person or property, and is so tortious in its quality as, in the first

instance, at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency.' Thomas, Neg. 574. . . . The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical act produced that injury; but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn, as a legitimate deduction of fact.'" *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

Injury Does Not Raise Presumption.—"Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskilful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of *vis major*, or the tortious act of a stranger, tending to produce the accident, no such *prima facie* case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident, and the circumstances surrounding it, rather than from the mere fact of the accident itself." *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397.

45. *Whalen v. Consolidated Trac. Co.*, 61 N. J. L. 606, 40 Atl. 645, 68 Am. St. Rep. 723, 41 L. R. A. 836.

46. *Chicago City R. Co. v. Morse*, 98 Ill. App. 622; *Elwood v. Chicago City R. Co.*, 90 Ill. 397; *Bassett v.*

of transportation",⁴⁷ which, by the exercise of a high degree of care might have been prevented; or, as stated by some of the courts, by some act or thing which the company could and should have controlled as a part of its duty safely to carry its passengers.⁴⁸

(B.) PASSENGER BOARDING CAR. — Thus the mere fact that a passenger while attempting to board a street-car is injured is not of itself sufficient to warrant a presumption of negligence against the com-

Los Angeles Trac. Co., 133 Cal. xix, 65 Pac. 470.

47. Hand Rail Giving Way While Passenger Boarding Car. *McCarty v. St. Louis & S. R. Co.*, 105 Mo. App. 596, 80 S. W. 7.

Collision with Helpless Car on Grade. — "As a matter of fact the collision was due to the breaking of a brake chain; but the case was within the unbending rule, applicable to railroad and street passenger railways alike, that where a passenger on a car is injured, without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it." *Palmer v. Warren St. R. Co.*, 206 Pa. St. 574, 56 Atl. 49, citing *Dixey v. Philadelphia Trac. Co.*, 180 Pa. St. 401, 36 Atl. 924; *Kepner v. Harrisburg Trac. Co.*, 183 Pa. St. 24, 38 Atl. 416. See also to same effect, *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226, 79 S. W. 999; *Denver Cons. Tramway Co. v. Rush*, 19 Colo. App. 70, 73 Pac. 664; *United R. & Elec. Co. v. Woodbridge*, 97 Md. 629, 55 Atl. 444; *Magrane v. St. Louis & S. R. Co.*, 183 Mo. 119, 81 S. W. 1158.

"Evidence that plaintiff, who was standing near the edge of the rear platform without holding onto anything, was pitched off by a sudden stop, without showing that there was any defect in the car or rails, or that the apparently sudden stop was not justifiable, fails to show any negligence on the part of the defendant." *Timms v. Old Colony St. R. Co.*, 183 Mass. 193, 66 N. E. 797. See also *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604; *State v. United R. & Elec. Co.*, 101 Md. 183, 60 Atl. 249.

48. *Davis v. Paducah R. & L. Co.*, 24 Ky. L. Rep. 135, 68 S. W. 140.

"The general rule seems to be that proof of an injury occurring as the

proximate result of an act which, under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. And this is held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties." *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Armstrong v. Metropolitan St. R. Co.*, 23 App. Div. 137, 48 N. Y. Supp. 597, affirmed, 165 N. Y. 641, 59 N. E. 1118; *Stevenson v. Second Ave. R. Co.*, 35 App. Div. 474, 54 N. Y. Supp. 815.

Explosion of Controller. — *Chicago Union Trac. Co. v. Newmiller*, 215 Ill. 383, 74 N. E. 410.

Derailment Crossing Switch. *Minahan v. Grand Trunk Western R. Co.*, 138 Fed. 37, 70 C. C. A. 463.

Open Switch. — *Klinger v. United Trac. Co.*, 92 App. Div. 100, 87 N. Y. Supp. 864.

Poles or Wires Falling on Car. **Defendant Must Show Cause of.** *Stern v. Westchester Elec. R. Co.*, 99 App. Div. 491, 90 N. Y. Supp. 870. See also *Glassberg v. Interurban St. R. Co.*, 92 N. Y. Supp. 731; *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226, 79 S. W. 999.

Georgia, Statutory Presumption. § 2321, Civ. Code, makes railroads liable for injuries shown to have been occasioned by the running of their cars, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." And this has been held to apply "as well to street railway companies as to others." *Savannah, T. & I. v. Williams*, 117 Ga. 414, 43 S. E. 751; *Cordray v. Savannah, T. & I.*, 117 Ga. 464, 43 S. E. 755; *Perry v. Macon Cons. St. R. Co.*, 101 Ga. 400, 29 S. E. 304. The defendant is

pany unless the circumstances surrounding the occurrence are such as bring it within the rule just stated.⁴⁹

(C.) **BREAKING OF APPLIANCES.** — The fact that a passenger on a street-car received an injury through the breaking of some of the appliances used by the company in the operation of the car warrants a presumption of negligence on the part of the company.⁵⁰

(D.) **SUDDEN JERKING OF CAR.** — The fact of injury to a passenger on a street-car resulting from the sudden jerking of the car while in transit has been held sufficient to warrant a presumption of negligence.⁵¹

relieved from this statutory presumption by showing, (a) use of proper care and diligence; (b) negligence of plaintiff; (c) neglect of plaintiff to avoid accident caused by defendant's negligence; or, (d) pure accident. "It often happens that both parties may have been in the right or both in the wrong." *Atlanta R. & Power Co. v. Gaston*, 118 Ga. 418, 45 S. E. 508.

In *Connecticut* it has been held that although it is found that a passenger was guilty of no contributory negligence, proof of the accident is not *prima facie* evidence of negligence on the part of the company. *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

49. *Febig v. New Jersey St. R. Co.*, 64 N. J. L. 715, 45 Atl. 602.

Electric Shock from Hand Bar. In *Dallas Cons. Elec. St. R. Co. v. Broadhurst* (Tex. Civ. App.), 68 S. W. 315, the evidence showed that the plaintiff, while boarding a street-car, received a severe electric shock from the hand bar above the step, in consequence of which his grasp on the bar became fixed, and that while in this position the car started and the plaintiff was dragged some distance over a rough street until his grasp gave away, and he fell on the street and was injured; and it was held that the evidence warranted the presumption of negligence. The court said: "The hand hold and steps of the car were designed to be used by the passengers as aids in their entrance to and exit from the cars; the cars in their equipment were under the control and management of the defendant; and the accident was such as in the ordinary course of

things would not happen with the use of proper care by those who had their management."

50. *Sharp v. Kansas City C. R. Co.*, 114 Mo. 94, 20 S. W. 93; *Gilmore v. Brooklyn Heights R. Co.*, 6 App. Div. 117, 39 N. Y. Supp. 417. See also *Carter v. Kansas City C. R. Co.*, 42 Fed. 37, where the plaintiff was injured by the cable car on which he was a passenger breaking loose on a steep incline, running backward to the foot of the incline with great speed and there colliding with other cars; and it was held that negligence was to be presumed.

51. *Dougherty v. Missouri R. Co.*, 81 Mo. 325, 51 Am. Rep. 239; *Langley v. Metropolitan St. R. Co.*, 36 Misc. 804, 74 N. Y. Supp. 857; *Murphy v. Coney Island & B. R. Co.*, 36 Hun (N. Y.) 199. Compare *Stager v. Ridge Ave. P. R. Co.*, 199 Pa. St. 70, 12 Atl. 821, holding that there must be the additional proof that the jerking alleged to have been the cause of the injury was due to some default or neglect on the part of the company or its employees.

In *Jacksonville St. R. Co. v. Chappell*, 21 Fla. 175, it appeared that the plaintiff had entered one of the defendant's street-cars and started to walk to the other end of the car, and just as he turned to sit down the car suddenly started forward, throwing him to one side so that his leg struck the seat and he fell to the floor; and the court in holding that the facts did not warrant a presumption of negligence said that there was "no proof of such acts of omission upon the part of the driver as show a failure to observe such care, precaution and diligence as the cir-

(E.) **DERAILMENT OF CAR.** — Where a passenger on a street-car is injured by reason of the derailment of a car, there is a presumption of negligence upon the part of the company.⁵² But where it appears that such derailment is due to an accident, he cannot rely simply upon the fact of the derailment as proof of negligence.⁵³ It is necessary for him to prove that the company had notice of the existence of dangerous conditions.⁵⁴

(F.) **PASSENGER STRUCK BY AN OBJECT UNDER CONTROL OF COMPANY.** The fact that a passenger on a street-car is struck by some object under the control of the company and injured is sufficient to raise a presumption of negligence.⁵⁵

(G.) **COLLISIONS.** — Again, it has been held that the fact that a passenger on a street-car was injured in an accident caused by the collision of the car, upon which he was a passenger, with other cars, warrants the presumption of negligence.⁵⁶ But the fact that the

circumstances demanded—in a word, no affirmative proof of negligence.”

52. *Bergen Co. Trac. Co. v. Demarest*, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. Rep. 683; *Reading City Pass. R. Co. v. Eckert* (Pa.), 4 Atl. 530; *Electric R. Co. v. Carson*, 93 Ga. 652, 27 S. E. 156; *Spellman v. Lincoln R. T. Co.*, 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316, where the court said: “The transit company was a common carrier of passengers, and Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier’s negligence. The law of presumption supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence and foresight, the casualty could not have been prevented.” See to same effect, *Peoria, P. & J. R. Co. v. Reynolds*, 88 Ill. 418; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Feital & Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720.

53. Plaintiff having shown that the car in which he was riding was

derailed by a large stone which had been rolled upon the track from an embankment, it is too late for him to rely upon mere derailment as evidence of negligence. *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211, 65 N. E. 48.

54. **Plaintiff Required To Prove Defendant’s Knowledge of Condition in Order To Show Scienter.**—*Eddy v. Union R. Co.*, 25 R. I. 451, 56 Atl. 677, *Kelly v. Metropolitan St. R. Co.*, 25 Misc. 194, 54 N. Y. Supp. 173; *Donovan v. Oakland & B. Transit Co.*, 102 Cal. 245, 36 Pac. 516; *Cowan v. Muskegon R. Co.*, 84 Mich. 583, 48 N. W. 166; *Zanger v. Detroit City R. Co.*, 87 Mich. 646, 49 N. W. 879; *Thomas v. Consol. Trac. Co.*, 62 N. J. L. 36, 42 Atl. 1061.

55. *Baltimore Y. T. Co. v. Leonhardt*, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

56. **United States.**—*Carter v. Kansas City C. R. Co.*, 42 Fed. 37. **California.**—*Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682.

Illinois.—*Chicago City R. Co. v. Engel*, 35 Ill. App. 490; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899.

Kentucky.—*Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309.

Minnesota.—*Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Missouri.—*Wilkerson v. Corrigan Cons. S. R. Co.*, 26 Mo. App. 144.

Montana.—*Hamilton v. Great*

car in which the injured passenger was riding collided with objects not under the control of the defendant company is not sufficient to warrant a presumption of negligence against the defendant company.⁵⁷

(H.) PASSENGER INJURED WHILE ALIGHTING. — The mere fact that a passenger is injured while alighting from a street-car is not of itself sufficient to warrant the presumption of negligence.⁵⁸ But where it appears that the passenger, while so alighting, was injured by a sudden jerk of the car, it is then incumbent upon the company to show that it was not responsible for the jerking.⁵⁹

b. *Injuries to Pedestrians, Etc.* — (1.) Generally. — In an action against a street-railroad company to recover damages for personal injuries suffered by a person at some point on its track through the alleged negligence of the defendant company, the burden of proving the negligence complained of is on the plaintiff,⁶⁰ there being no presumption of negligence from the mere fact of the injury.⁶¹

Falls S. R. Co., 17 Mont. 334, 42 Pac. 860.

Negligence is shown where an electric car running behind a horse car on the same track, runs into the horse car when stopping at the street crossing. *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. 394, 35 N. Y. Supp. 1034, *affirmed*, 156 N. Y. 702, 51 N. E. 1094.

Street-Cars of Different Lines having equivalent rights, and the fact of the rear of one car being struck by the front of the other, of itself unexplained, raises presumption of negligence. *Chicago City R. Co. v. McLaughlin*, 40 Ill. App. 495.

57. *Federal St. & P. V. R. Co. v. Gibson*, 96 Pa. St. 83.

Mere Accident, No Presumption. In *Harrison v. Sutter St. R. Co.*, 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608, the court said: "The bed rock of this principle of presumption of negligence arising from the fact of the injury is that of probabilities, and in the very nature of things it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants wholly independent of each other, it being an open question as to which defendant had control of the particular instrumentality which caused the injury."

58. *Paynter v. Bridgeton & M. T. Co.*, 67 N. J. L. 619, 52 Atl. 367. Compare *Fielders v. North Jersey St. R. Co.*, 67 N. J. L. 76, 50 Atl.

533, where the plaintiff was injured by stepping into a hole in the street, which it was claimed defendant company should have repaired, and it was held that the presumption of negligence arose.

59. *Birmingham U. R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748; *United R. & Elec. Co. v. Beidelman*, 95 Md. 480, 52 Atl. 913.

Passenger Thrown to Street. — In *Consolidated Trac. Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132, it appeared that the plaintiff, having been notified by the conductor that the car was approaching the point where she desired to alight, left her seat and walked to the door of the car while it was still in motion, and while going through the doorway she was thrown into the street by the sudden jerk or lurch of the car and thus injured; and it was held that the presumption of negligence arose not from the fact of the injury, but from the act that caused the injury.

60. *Adams v. Wilmington & N. C. Elec. R. Co.*, 3 Pen. (Del.) 512, 52 Atl. 264; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199, 40 Atl. 945; *Kelly v. Hendrie*, 26 Mich. 255; *Lincoln Trac. Co. v. Webb* (Neb.), 102 N. W. 258. And see article "NEGLECT," Vol. VIII, p. 852 *et seq.*

61. *Reed v. Queen Anne's R. Co.*, 4 Pen. (Del.) 413, 57 Atl. 529. See

Presumption That Railway Company Has Done Its Duty.—A person using the streets has a right to rely on the presumption that a street-railway has performed its duty in keeping its tracks in a safe condition; and using such street, though knowing the dangerous character thereof, is not conclusive evidence against such person.⁶²

(2.) **Violation of Municipal Speed Ordinance.**—The weight of authority appears to be to the effect that where a street-car attains a speed greater than that permitted by a municipal ordinance, that fact is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury in determining the question of negligence.⁶³

c. *Injuries to Children.*—Railway companies owe a greater duty of care to children than to adults,⁶⁴ particularly at much frequented

also *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021; *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. And see article "NEGLIGENCE," Vol. VIII, p. 869, *et seq.*

62. *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73; *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220, 28 N. W. 873; *Newport News & O. P. R. Co. v. Bradford*, 100 Va. 231, 40 S. E. 900; *Farmer v. Findley St. R. Co.*, 60 Ohio St. 36, 53 N. E. 447. Compare *Watson v. Brooklyn City R. Co.*, 14 Misc. 405, 35 N. Y. Supp. 1039.

63. *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046; *Ireland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 22 N. E. 1062; *Davies v. Mann*, 10 Mees. & W. (Eng.) 546; *Lake Roland El. R. Co. v. McKewen*, 80 Md. 593, 31 Atl. 797; *Chicago, B. & I. R. Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1; *Metropolitan R. Co. v. Hammett*, 13 App. D. C. 370.

See *contra*, *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah 428, 37 Pac. 681.

Speed in Excess of Ordinance, Evidence of Negligence.—*Davis v. Durham Trac. Co.*, 141 N. C. 434, 53 S. E. 617.

Effect of Violation of Ordinance.—"There being evidence that the electric car of defendant was running at the unusual rate of twenty miles an hour at the time of the accident (much faster than was allowable by ordinance), and that no gong was

sounded, and that plaintiff, though he saw the car before he attempted to cross with his horse, considered that he had time to cross in front of the car, the question of contributory negligence was for the jury." *Dederichs v. Salt Lake City R. Co.*, 13 Utah 34, 44 Pac. 649.

"Where a car stops suddenly in the middle of a street intersection, and a wagon crossing at the intersection collided therewith, it was relevant to the question of negligence that in stopping where it did the company violated an ordinance." *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 47 Pac. 1019.

64. *Frost v. Eastern R. Co.*, 64 N. H. 220, 9 Atl. 790; *Gallagher v. Crescent City R. Co.*, 37 La. Ann. 288.

In *Ellwood Elec. St. R. Co. v. Ross* (Ind. App.), 58 N. E. 535, evidence that the car which killed a child was running about ten miles an hour when the child, about four years old, wearing a bonnet, was attempting to cross the track diagonally from the direction from which the car was coming, the track being straight, the child in plain sight of the motorman, and it appearing that he saw it in time to stop the car, but did not attempt to stop, was held sufficient to sustain judgment in favor of the child.

The verdict in favor of the child will not be disturbed where it appears that the street-car approached the street crossing at a fast rate of speed without any alarm while a boy was standing on the track in full

crossings in thickly populated localities,⁶⁵ and a child is not required to prove the exercise of the same degree of care and caution of persons of mature judgment and experience.⁶⁶ It is the general rule that in an action arising from injuries to a child, the defendant must prove the exercise of care and diligence proportionate to the degree of danger, considering all the circumstances and the age of the child.⁶⁷ The mere fact that a child has been killed by a street-car

view of the motorman or standing in the center of the track with his back toward the car. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997.

65. Children at Crossings.—The law will demand greater care and vigilance in running an electric car over a public street crossing which is much frequented by children going to and from school, at a time when they may reasonably be expected to be using the crossing, than is demanded at other places. *Wallace v. Suburban R. Co.*, 26 Or. 174, 37 Pac. 477, 25 L. R. A. 663.

"The duty of watchfulness rests upon the driver of a street-car approaching a street crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill across the tracks, though such conduct on the part of the children is unlawful." *Strutzel v. St. Paul St. R. Co.*, 47 Minn. 543, 50 N. W. 690. See also *Stanley v. Union Depot R. Co.*, 114 Mo. 606, 21 S. W. 832; *Roller v. Sutter St. R. Co.*, 66 Cal. 230, 5 Pac. 108; *Collins v. South Boston R. Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; *Fath v. Tower Grove & L. R.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *Giraldo v. Coney Island & B. R. Co.*, 16 N. Y. Supp. 774, 42 N. Y. St. 915; *Baltimore R. Co. v. McDonnell*, 43 Md. 534; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536.

Population of Localities Relevant. *Burnstein v. Cass Ave. & F. G. R. Co.*, 56 Mo. App. 45.

66. Same Degree of Care Not Required of Children.—"To hold that a child of the age of plaintiff would be guilty of contributory negligence if it failed to look for a car before crossing a street railway would be to practically refuse any

relief for an accident to such child caused by a passing car and the negligence of those operating it." *Mitchell v. Tacoma R. & M. Co.*, 13 Wash. 560, 43 Pac. 528.

It is permissible to prove the plaintiff's age and all other facts and circumstances necessary to enable the jury to decide whether or not she was guilty of contributory negligence. *Citizens' R. Co. v. Robertson* (Tex. Civ. App.), 91 S. W. 609.

Persons who knew the injured child may properly testify concerning her mental faculties, whether in that regard she was a normal or abnormal child. In other words, it would be permissible for those well acquainted with her to testify that she was an intelligent child, or the reverse, and to state all other facts that might aid the jury in deciding the question of contributory negligence. *Citizens' R. Co. v. Robertson* (Tex. Civ. App.), 91 S. W. 609.

Opinion of Family Physician Admissible.—*Central Texas & N. W. R. Co. v. Smith* (Tex. Civ. App.), 73 S. W. 537; *Mitchell v. Tacoma R. & M. Co.*, 13 Wash. 560, 43 Pac. 528.

67. Duty Toward Children Greater.—The defendant company will be required to show the exercise of a greater degree of care toward children, they being incapable of taking the same care of themselves as adults. *Frost v. Eastern R. Co.*, 64 N. H. 220, 9 Atl. 790; *Gallaher v. Crescent City R. Co.*, 37 La. Ann. 288.

Evidence held insufficient to establish the fact of plaintiff's intelligence or capacity to exercise care in view of the presumption that the company observed the law and exercised greater care at points where children crossed. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997.

Declaration of Child Six Years

does not raise the presumption of negligence,⁶⁸ but any evidence is admissible which tends to show whether, by use of the precaution and vigilance due under the circumstances from both sides, the accident could have been averted.⁶⁹

D. CONTRIBUTORY NEGLIGENCE. — *a. In General.* — As in other personal injury actions, contributory negligence, in many jurisdictions, will not be presumed, but is a matter of defense, the defendant being required to establish the plaintiff's contributory negligence,⁷⁰

Old Disregarded. — "An admission, if it is legally an admission, must be made by some one legally capable of making the same. The fact about which the child was questioned by these boys occurred when he was less than six years of age and his rights certainly ought not to be taken away by childish prattle indulged in by him when trying to explain the cause of the injury received by him." *West Chicago St. R. Co. v. Licserowitz*, 99 Ill. App. 591, *affirmed*, 197 Ill. 607, 64 N. E. 718.

Child of Tender Years Not Chargeable with Contributory Negligence. — *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76.

"Of a child of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401.

68. The mere fact that a child has been killed or injured by a street-car does not, of itself, create the inference of negligence on the part of the company. *Smith v. Kansas City El. R. Co.*, 61 Kan. 862, 60 Pac. 1059; *Welsh v. United Trac. Co.*, 202 Pa. St. 530, 51 Atl. 1026.

69. **Circumstantial Evidence.** In the case of a child on the sidewalk injured by reason of collision between car and wagon, evidence of negligence on the part of the driver of the wagon is immaterial. *Knoll v. Third Ave. R. Co.*, 46 App. Div. 527, 62 N. Y. Supp. 16.

Upon evidence that the motorman could have seen the plaintiff but his attention was distracted through conversation with a passenger, non-suit was properly denied. *Duncan v. Rome St. R. Co.*, 99 Ga. 98, 24 S. E. 953. To the same effect see *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 18 S. W. 890; *Barnes v. Shreveport City R. Co.*, 47 La. Ann. 1218, 17 So. 782; *Buente v. Pittsburg A. & M. Trac. Co.*, 2 Pa. Super. Ct. 185.

Ordinance Prohibiting Children in the Streets Inadmissible. — Evidence of the negligence of the child in being on the streets in violation of a municipal ordinance will not excuse the defendant in failing to exercise reasonable care to avoid running over him, and is irrelevant. "A child 21 months old cannot be affected by any such ordinance, and it is certain that the duty of the motorman to use care toward such a child alone on the streets is not and cannot be lessened by that ordinance." *Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 37 Atl. 683.

Evidence that the child had frequently played in the street is immaterial. *Smith v. Grand St. etc. R. Co.*, 11 Abb. N. C. (N. Y.) 62.

70. **Contributory Negligence Not Presumed.** — "The burden of proving negligence is on the plaintiff, and of proving contributory negligence is on the defendant, unless it is shown by the testimony of the plaintiff." *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245; *Washington & G. R. Co. v. Harmon*, 147 U. S. 579.

Negligence will not be presumed from mere fact of driving on track of electric railway at night, on a dark road. *Rascher v. East Detroit & G. P. R. Co.*, 90 Mich. 413, 51 N. W.

upon the theory that a person will exercise great care, and take proper precautions to avoid injury "from the instinct of self-preservation."⁷¹ In other jurisdictions, however, it is held that the plaintiff, in a personal injury action against a street-railroad company, based on the alleged negligence of the company, must prove his freedom from contributory negligence.⁷² But it is held in some jurisdictions that even proof of contributory negligence of the plaintiff will

463. See *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028; *Clark v. Kansas City, Ft. S. & M. R. Co.*, 129 Fed. 341, 64 C. C. A. 19.

Upon conflicting evidence, contributory negligence is a question for the jury. *Rascher v. East Detroit & G. P. R. Co.*, 90 Mich. 413, 51 N. W. 463; *Little v. Street R. Co.*, 78 Mich. 205, 44 N. W. 137.

"It is earnestly contended that, regardless of any question of negligence on the part of defendant, the place on the car where the plaintiff sat was not one provided for the seating of passengers, and was obviously unsafe, and that in occupying such place, when there were vacant seats inside the car, the plaintiff was, as a matter of law, guilty of such contributory negligence as precludes a recovery. There is no other basis in the evidence for the claim of contributory negligence. It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom." *Seller v. Market St. R. Co.*, 139 Cal. 268, 72 Pac. 1006, 14 Am. Neg. Rep. 249.

In *Cornis v. Toronto St. R. Co.*, 23 U. C. C. P. (Can.) 355, it appeared that plaintiff, as a passenger on a crowded car, was thrown off by a sudden jolt, and it was held that the fact of the plaintiff not proving

affirmatively that he was holding on was not a ground for nonsuit.

71. "In the absence of evidence to the contrary, a jury may infer from the instinct of self-preservation that a person about to cross a street railway track both looked and listened." *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469. See also *Riska v. Union Depot R. Co.*, 180 Mo. 168, 79 S. W. 445; *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518, 77 S. W. 313; *Miller v. Bosion & M. R. Co.*, 73 N. H. 330, 61 Atl. 360; *Dubiver v. City R. Co.*, 44 Or. 227, 74 Pac. 915, 75 Pac. 693; *Texas & P. R. Co. v. Shoemaker*, 98 Tex. 451, 84 S. W. 1049.

72. *Manigold v. Black River Trac. Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861; *Nichols v. Baltimore & O. S. W. R. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

"Contributory negligence is not a matter of defense in this state, and the plaintiff must show affirmatively by pleading and proof, that his fault or negligence did not contribute to his injury, before he is entitled to recover therefor." *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138.

Freedom From Contributory Negligence Not Presumed.—"It cannot be presumed that the plaintiff is free from fault. The rule has been long and firmly settled in this state that the evidence must show that the plaintiff, in actions to recover for an injury resulting from the negligence of another, was himself free from contributory negligence." *Toledo, W. & W. R. Co. v. Brannagan*, 75 Ind. 490.

Rule Held To Apply to Child.—"The rule of law that before a person can recover for injuries sustained he must show that he was in the exercise of due care and caution, ap-

not defeat his action, if the proximate cause is shown to lie with defendant.⁷³

b. *Injury to Pedestrians.* — In the case of an injury to a pedestrian, it is incumbent upon him, in an action to recover damages, to present a case free from evidence of his own culpable negligence.⁷⁴ Some negligence on his part, however, may not excuse the company from liability.⁷⁵

plies to infants as well as adults." *Cauley v. East St. Louis Elec. St. R. Co.*, 58 Ill. App. 151. See *Holt v. Spokane & P. R. Co.*, 4 Idaho 443, 40 Pac. 56.

Contributory Negligence, Unless Proximate Cause, Will Not Defeat.

"When the injured party was negligent in the first instance, such negligence will not defeat his action, if it be shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence." *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Davies v. Mann*, 10 Mees. & W. (Eng.) 546; *Little v. Superior R. T. R. Co.*, 88 Wis. 402, 60 N. W. 705; *Lake Roland El. R. Co. v. McKewen*, 80 Md. 593, 31 Atl. 797.

73. *Sharpton v. Augusta & Aiken R. Co.*, 72 S. C. 162, 51 S. E. 553; *Charping v. Toxaway Mills*, 70 S. C. 470, 50 S. E. 186.

For full discussion of this question see articles "NEGLECT," Vol. VIII; "RAILROADS," Vol. X.

74. **Evidence Held Sufficient To Establish Contributory Negligence.** *Higgins v. Los Angeles R. Co.* (Cal. App.), 91 Pac. 344.

Admissibility. — The exclusion of plaintiff's testimony on cross-examination that she crossed the street through the snow where she knew the crossing to be dangerous is erroneous, it bearing on her contributory negligence in unnecessarily exposing herself to danger. *Newport News & O. P. R. & Elec. Co. v. Bradford*, 99 Va. 117, 37 S. E. 807.

Motion for Non-Suit admits plaintiff's evidence, and it must be construed most strictly against the defendant and in favor of plaintiff, without regard to the credibility of the plaintiff's witnesses, or conflict between them as to facts. *Kramm v. Stockton Elec. R. Co.*, 3 Cal. App.

606, 86 Pac. 738, 903, where there was some evidence tending to sustain the action, and where there was evidence of reasonableness of plaintiff's efforts to escape after discovery of his danger, and as to wanton negligence of defendant after discovering plaintiff's peril.

New York Rule. — "The questions at issue are always whether there is want of reasonable care on the part of the parties, the burden of proof being upon the plaintiff to show freedom from negligence on his part and negligence on the part of the defendants which constituted the proximate cause of the injury." *Killen v. Brooklyn Heights R. Co.*, 48 App. Div. 557, 62 N. Y. Supp. 927.

Any error as to admission of evidence of defendant's negligence will be cured by proof of plaintiff's death resulting from contributory negligence. *Higgins v. Los Angeles R. Co.* (Cal. App.), 91 Pac. 344.

75. "Stop," "Look," "Listen," Etc. — Evidence of plaintiff's failure to stop, look and listen does not *per se* establish such contributory negligence as to prevent recovery. *Consolidated R. Co. v. Rifcowitz*, 89 Md. 338, 43 Atl. 762; *Burbridge v. Kansas Cable R. Co.*, 36 Mo. App. 669; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 22 N. E. 1062.

Presumption. — In the absence of proof to the contrary it will be presumed, in an action for death by being run over at a crossing, that the deceased looked and listened for the approaching car and was in the exercise of due care. *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593, 89 S. W. 602.

Sufficiency. — If plaintiff cannot remember whether she looked and listened on that particular occasion, and if but one witness testify that she did do so, the testimony of the plaintiff that it was her custom to

Evidence That the Plaintiff Did Not Look, or had a clear view and could have seen his danger,⁷⁶ will preclude recovery, unless because of age⁷⁷ or infirmity⁷⁸ it appears that he was unable to exercise the degree of care required of persons possessing normal faculties.⁷⁹ It

look and listen before crossing the tracks is held sufficient to support a finding in her favor. *Cowan v. Third Ave. R. Co.*, 56 Hun 644, 9 N. Y. Supp. 610, 31 N. Y. St. 145.

Ordinary Care Not the Same as in Commercial Railway Cases. Though ordinary care is required on the part of persons crossing the tracks of both street and commercial railroads, what is ordinary care is widely different in the two cases. *Kramm v. Stockton Elec. R. Co.*, 3 Cal. App. 606, 86 Pac. 738, 903; *Finnick v. Boston & N. St. R. Co.*, 190 Mass. 382, 77 N. E. 500.

Louisiana Rule.—The rule in Louisiana is that plaintiff must prove that he exercised the same degree of care in crossing street railway tracks as in an action against commercial railroads. *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 1302, 22 So. 330.

76. Plaintiff Did Not Look or Could Have Seen.—If the facts showed that if the plaintiff had looked he could have seen the car, his testimony that he looked and saw no car must be disregarded. *Reno v. St. Louis & S. R. Co. (Mo.)*, 79 S. W. 464; *Brown v. Elizabeth, P. & C. J. R. Co.*, 68 N. J. L. 618, 54 Atl. 824; *McKinley v. Metropolitan St. R. Co.*, 91 App. Div. 153, 86 N. Y. Supp. 461.

In *Ries v. St. Louis Transit Co.*, 179 Mo. 1, 77 S. W. 734, it was held that as a general rule evidence that he went in front of a car and did not look, or had a clear view and did not see the danger will preclude recovery. "The demurrer to the evidence was properly sustained. While the evidence for the plaintiff tended to show that the defendant's motorman was negligent in failing to give proper warning and to keep a proper lookout on approaching the crossing, it also showed that the deceased at any time, after he came out of the saloon, could have both seen and heard the approaching car, and yet, without looking or listening

or paying any attention whatever to the approaching car, he attempted to cross its tracks in front of the car and by it was immediately struck and killed in the attempt." See to the same effect, *Baly v. St. Paul City R. Co.*, 90 Minn. 39, 95 N. W. 757; *DuFrane v. Metropolitan St. R. Co.*, 83 App. Div. 298, 82 N. Y. Supp. 1; *Wolf v. City & S. R. Co. (Or.)*, 72 Pac. 329.

Discernibility of Objects Ahead. Evidence is admissible to show whether there were obstructions to prevent the motorman from seeing persons approaching the track from the side of the street. *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624, 41 S. W. 968.

Where an accident occurred in the middle of the block on a dark night when a person could more easily see the approaching car than the motorman could see him, evidence of the distance within which a person could be seen is held immaterial. *Reich v. Union R. Co.*, 78 Hun 417, 28 N. Y. Supp. 1105, 60 N. Y. St. 450.

77. Evidence of Age Admissible. **When.**—Evidence of old age and the muddy condition of the street held sufficient to sustain finding for the plaintiff. *Mills v. Brooklyn City R. Co.*, 10 Misc. 1, 30 N. Y. Supp. 532; *Farrar v. New Orleans & C. R. Co.*, 52 La. Ann. 417, 26 So. 995.

78. Infirmity or Disabilities May Be Shown.—*Buttelli v. Jersey City, H. & R. Elec. R. Co.*, 59 N. J. L. 302, 36 Atl. 700, 2 Chic. Wkly. L. J. 202; *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206; *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 290, 5 Fed. 523.

79. Plaintiff Being Seventy Years Old and extremely feeble, it was incumbent upon him to prove exercise of greater caution in stepping upon defendant's tracks. *Farrar v. New Orleans & C. R. Co.*, 52 La. Ann. 417, 26 So. 995.

Intoxication.—Defendant may show that plaintiff was intoxicated,

has been held, however, that evidence of a person's deafness⁸⁰ or defective eyesight⁸¹ raises the necessity of proving a greater degree of caution on his part, in approaching or attempting to cross a busy street.⁸²

3. Substance and Mode of Proof. — A. MATTERS PERTAINING TO NEGLIGENCE OF COMPANY. — a. *In general.* — While, of course, the conditions under which street-railroads are operated, and the circumstances surrounding accidents resulting in personal injuries for which damages are sought to be recovered, differ in many respects from those where a steam railroad is involved, nevertheless, inasmuch as negligence is ordinarily the gist of the action, the rules of evidence applicable to negligence cases generally are in the main applicable to actions against street-railroads,⁸³ except of course in so far as concerns matters peculiar to the construction, maintenance and operation of such roads.⁸⁴

Judgment Against a Municipality. — Where a judgment is recovered against a municipality for injuries received by reason of a fail-

but "paraphrasing the language in *Robinson v. Pioche*, 5 Cal. 461, a drunken man is as much entitled to the exercise of such care as a sober one and much more in need of it." *West Chicago St. R. Co. v. Ranstead*, 70 Ill. App. 111, 2 Chic. Wkly. L. J. 271.

Drunkenness Is Not Negligence Per Se, but is evidence of negligence more or less cogent according to circumstances. *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 290, 5 Fed. 523. And evidence thereof is admissible in determining the question of contributory negligence. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

80. Deafness. — "The circumstance that he was deaf might make it more difficult for defendant to give him notice, but a deaf man is not debarred from the use of the public highways, although he is held to such degree of care as a prudent man with his disability would take. Whether plaintiff took such care was plainly a question for the jury." *Buttelli v. Jersey City, H. & R. Elec. R. Co.*, 59 N. J. L. 302, 36 Atl. 700, 2 Chic. Wkly. L. J. 202.

"The evidence shows that plaintiff's wife was hard of hearing, in point of fact deaf, and wore a large sunbonnet at the time which covered both sides of her face, and came down over her shoulders." *Held*, sufficient to establish contributory

negligence. *Schulte v. New Orleans, C. & L. R. Co.*, 44 La. Ann. 509, 10 So. 811.

Plaintiff Eighty Years Old and Very Deaf. — In *Hall v. West End St. R. Co.*, 168 Mass. 461, 47 N. E. 124, the court held that "his want of hearing made it incumbent on him to be more alert in the use of his other faculties."

81. Defective Eyesight. — Must Take More Care. — *Robbins v. Springfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334.

82. Person Deaf and Dumb must use more care in the exercise of his eyesight. *Thompson v. Salt Lake R. T. Co.*, 16 Utah 281, 52 Pac. 92, 40 L. R. A. 172.

83. Chicago City R. Co. v. Taylor, 170 Ill. 49, 48 N. E. 831; *Palmer v. Cedar Rapids & M. R. Co.*, 113 Iowa 442, 85 N. W. 756; *Floyd v. Paducah R. & L. Co.*, 23 Ky. L. Rep. 1077, 64 S. W. 653; *Fitzpatrick v. Bloomington City R. Co.*, 73 Ill. App. 516; *Pyne v. Broadway & S. A. R. Co.*, 138 N. Y. 627, 33 N. E. 1083. *Contra*, *Seller v. Market St. R. Co.*, 139 Cal. 268, 72 Pac. 1006, 14 Am. Neg. Rep. 249.

84. A railroad having a right to lay rails and operate a railroad in a street, and undertaking to pave a street when it shall be required by the city council, is not liable for injuries to pedestrians caused by defective crosswalks alongside the

ure of a street-railway company to comply with the condition of the license, the record of the judgment is competent evidence in an action by the municipal corporation against the railroad company, and is conclusive as to defendant's liability and as to the amount the plaintiff is entitled to recover if the defendant had notice of the action against the plaintiff and an opportunity to defend.⁸⁵

b. *Circumstances Surrounding the Occurrence.* — (1.) **Generally.** All the facts and circumstances, generally, prevailing at the time and place of the occurrence in issue, may be proven,⁸⁶ and courts exercise much leniency in the admission of any evidence affording a clear understanding of the entire situation,⁸⁷ owing to the question of liability for injuries of this kind being usually one of negligence, and, consequently, of fact, and for the jury.⁸⁸

(2.) **Cause of Derailment.** — Injuries to passenger caused by derailment of the car may or may not be the direct fault of the company,

tracks, in the absence of evidence that the council ever ordered the railroad to pave. *Ross v. Metropolitan St. R. Co.*, 104 App. Div. 378, 93 N. Y. Supp. 679.

85. *Troy v. Troy & L. R. Co.*, 49 N. Y. 657; *Waterbury v. Waterbury Trac. Co.*, 74 Conn. 152, 50 Atl. 3; *St. Joseph v. Union R. Co.*, 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *Ft. Worth St. R. Co. v. Allen* (Tex. Civ. App.), 39 S. W. 125; *Carty v. London*, 18 Ont. (Can.) 122.

86. **General Conditions.** — *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551.

Where the negligence of a person on a particular occasion is in issue, it is usual to prove every fact known to such person at the time which would have a tendency to increase or decrease the danger of a particular course of action. *Bresee v. Los Angeles Trac. Co.*, 149 Cal. 131, 85 Pac. 152.

Circumstantial Evidence Admissible. — *Manning v. West End St. R. Co.*, 166 Mass. 230, 44 N. E. 135.

87. **Wide Scope of Admissibility.** *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Palmer v. Cedar Rapids & M. R. Co.*, 113 Iowa 442, 85 N. W. 756; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859; *Hays v. Gainesville St. R. Co.*, 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

Conduct of Employees. — *Pyne v.*

Broadway & S. A. R. Co., 138 N. Y. 627, 33 N. E. 1083, 19 N. Y. Supp. 217, 46 N. Y. St. 662.

Usual Practice of Company. *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

Discharge of Employee. — *Christiansen v. Union Trunk L. R. Co.*, 6 Wash. 75, 32 Pac. 1018.

Photograph of Plaintiff's Intestate. — *Stiasny v. Metropolitan St. R. Co.*, 58 App. Div. 172, 63 N. Y. Supp. 694. See also *Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311; *Cook v. Los Angeles Elec. R. Co.*, 134 Cal. 279, 66 Pac. 306.

Conduct of Employees After Accident. — The question where the conductor was after the car stopped and while the deceased was under it, is improper, as the conductor's acts after the accident cannot affect the question of careless running at the time of the accident. *Wilcox v. Wilmington City R. Co.*, 1 Penne. (Del.) 245, 40 Atl. 191.

88. **Fact for the Jury.** — *Alabama.* — *Highland Ave. & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566. *California.* — *Kramm v. Stockton Elec. R. Co.*, 3 Cal. App. 606, 86 Pac. 738, 903; *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561, 47 Pac. 452; *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238.

Kansas. — *Metropolitan St. R. Co. v. Slayman*, 64 Kan. 722, 68 Pac. 628; *Metropolitan St. R. Co. v. Arnold*, 67 Kan. 260, 72 Pac. 857.

and evidence tending to show the cause of the derailment may be introduced,⁸⁹ as, for example, that an obstruction on the track was the cause thereof.⁹⁰

(3.) **Passenger Injured While Alighting.** — Street-railroad companies are expected to exercise greater care than that expected of steam roads in the discharge of passengers,⁹¹ so that the facts surrounding the management of cars on a given occasion are relevant.⁹²

(4.) **Injuries or Insults by Fellow Passengers or Other Third Person.** A street-railway company is under obligation to a passenger to protect him from insults or assaults by other passengers,⁹³ and evidence

Missouri. — *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624, 41 S. W. 968.

New York. — *Lhowe v. Third Ave. R. Co.*, 14 Misc. 612, 36 N. Y. Supp. 463; *Wooley v. Grand St. R. Co.*, 83 N. Y. 121.

Oregon. — *Dubiver v. City R. Co.*, 44 Or. 227, 74 Pac. 915, 75 Pac. 693; *Smith v. City R. Co.*, 29 Or. 539, 46 Pac. 136, 780.

Washington. — *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214.

Wisconsin. — *Little v. Superior R. T. Co.*, 88 Wis. 402, 60 N. W. 705.

Where the evidence is as consistent with the absence as with the existence of negligence the case should not be left to the jury. *Deverill v. Grand Trunk R. Co.*, 25 U. C. Q. B. (Can.) 517.

"All that we have in evidence is a case of accidental death under the circumstances, in the absence of testimony of how the accident happened inferentially, equally consistent with no negligence or negligence on the part of the defendants, and such evidence has been held to amount to no proof of negligence." *Blackmore v. Toronto St. R. Co.*, 38 U. C. Q. B. (Can.) 172.

^{89.} *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211, 65 N. E. 48.

^{90.} **Obstructions.** — *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211, 65 N. E. 48.

Evidence of Comparison of defendant's apparatus with that of other corporations is inadmissible as showing that cars can be run over a track at a certain speed with safety. *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682; *Smedley v. Hestonville M. & F. Pass. R. Co.*, 184 Pa. St. 620, 39 Atl. 544.

^{91.} **Higher Degree of Care Required Than of Steam Roads.** — *Bir-*

mingham Union R. Co. v. Smith, 90 Ala. 60, 6 So. 86, 24 Am. St. Rep. 761. See *West Chicago St. R. Co. v. Luka*, 72 Ill. App. 60, 30 Chi. Leg. 82; *Metropolitan R. Co. v. Jones*, 1 App. D. C. 200; *Piper v. Minneapolis St. R. Co.*, 52 Minn. 269, 53 N. W. 1060; *Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763.

Question for Jury. — *Cobb v. Lindell R. Co.*, 149 Mo. 135, 50 S. W. 310.

^{92.} **Starting of Cars During Discharge of Passengers.** — Evidence that driver of horse-car checked his car while passenger was attempting to alight, then suddenly started, throwing him to the street, held sufficient to establish negligence of driver. *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780.

Evidence that a car in response to a signal slowed up, and as a passenger was about to alight, suddenly started, causing injury, held sufficient to establish liability. *Medler v. Atlantic Ave. R. Co.*, 12 N. Y. Supp. 930, 36 N. Y. St. 89. See also *Birmingham Union R. Co. v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761; *Boikens v. New Orleans & C. R. Co.*, 48 La. Am. 831, 19 So. 736; *Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763; *Chicago City R. Co. v. Mumford*, 97 Ill. 560; *Wardle v. New Orleans City R. Co.*, 35 La. Ann. 202.

Proof that a car stopped near an excavation to permit passenger to alight, without warning him of danger, or assisting him to alight, and that he was injured by stepping in the excavation, is sufficient evidence of negligence. *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

^{93.} See *Holly v. Atlanta St. R. Co.*, 61 Ga. 215.

Attacked by Drunken Person.

that a conductor or motorman knew of the plaintiff's plight, and refused to interfere is relevant,⁹⁴ though as a rule the carrier will not be held responsible for the tortious acts of persons on the streets.⁹⁵

(5.) **Injuries to Street Laborers.**—It is proper for the plaintiff to introduce evidence of the fact that at the time of being struck by defendant's car he was working on the streets, in the employ of the municipality.⁹⁶ The plaintiff's occupation is a fact which prevents him from watching constantly for approaching cars, and is evidence which dispenses with proof of the exercise of a degree of watchfulness and caution chargeable to an ordinary pedestrian,⁹⁷ and in his behalf the defendant's servants are bound to use greater care, both in controlling the car, and in their lookout for workmen.⁹⁸

c. *Speed of Car, Etc.*—(1.) **Passenger Injured While Boarding Car.** Where it appears that the injury to a passenger while boarding a car resulted from the car suddenly starting forward after it had

Putnam v. Broadway & Seventh Ave. R. Co., 55 N. Y. 108, 14 Am. Rep. 190.

94. Conductor Negligent for Failure to Interfere.—Flannery v. Baltimore & O. R. Co., 4 Mackey (D. C.) 111.

Proof of Actual Damages Not Necessary.—Lafitte v. New Orleans, C. & L. R. Co., 43 La. Ann. 34, 8 So. 701.

95. Not Liable, When.—"The presumption of negligence in such cases arises only where the thing causing the injury complained of was under the exclusive control of the carrier, or its servants or employes. The act complained of here being that of a stranger, it was incumbent upon the plaintiff affirmatively to prove that defendant failed to exercise proper care to prevent it." Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127. See also Evansville & I. R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636.

96. Street Employes.—Owens v. People's Pass. R., 155 Pa. St. 334, 26 Atl. 748; Pittsburg Elec. R. Co. v. Kelly, 57 Kan. 514, 46 Pac. 945; Schmidt v. Steinway & H. P. R. Co., 55 Hun 496, 606, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939.

97. City Employes Not Required To Exercise the Same Degree of Care as Other Pedestrians.—"It has been held that persons who are the employes of a municipality, and working upon public highways are not required to exercise the same

degree of care while in the street that would be required of ordinary pedestrians." O'Connor v. Union R. Co., 67 App. Div. 99, 73 N. Y. Supp. 606.

98. Duty of Railway Company Greater.—"The plaintiff's intestate was working on the public street, where he not only had the right but was required to be, and it was the duty of the motorman in charge of the defendant's car to use reasonable care in avoiding him." O'Connor v. Union R. Co., 67 App. Div. 99, 73 N. Y. Supp. 606.

See also Smith v. Bailey, 14 App. Div. 283, 43 N. Y. Supp. 856; Dipaolo v. Third Ave. R. Co., 55 App. Div. 566, 67 N. Y. Supp. 421.

Evidence That a Street-Car Driver Knew That Work was in progress on a sewer under the car track, and knowingly drove forward without looking for the workmen, though beckoned to go ahead by another person, shows negligence. Schmidt v. Steinway & H. P. R. Co., 55 Hun 496, 606, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939.

Plaintiff, a Bandsman, in Parade. Bunyan v. Citizens' R. Co., 127 Mo. 12, 29 S. W. 842; Montgomery v. Lansing City Elec. R. Co., 103 Mich. 46, 61 N. W. 543.

Street Workers.—Hamilton St. R. Co. v. Moran, 24 Can. Sup. Ct. 717; Green v. Toronto R. Co., 26 Ont. (Can.) 319.

stopped, evidence of the speed of the car as it approached the crossing is immaterial and inadmissible.⁹⁹

(2.) **Injury to Passenger in Collision.** — In the absence of evidence of a statutory right, intersecting street-railroads are supposed to stand upon the same footing, each owing to the other the duty of exercising reasonable care.¹ And where a passenger was injured in a collision, evidence tending to show the speed of the car in which he was a passenger at the time of the collision is admissible on the question of the negligence of the company operating the car.²

(3.) **Derailment.** — In the case of an injury to a passenger caused by the derailment of the car, evidence of the speed of the car at the time may be received as tending to show the cause of the derailment.³

(4.) **Passenger Injured While Alighting.** — In the case of an injury received by a passenger while alighting from a street-car, evidence as to the speed of the car prior to reaching the corner is not admissible.⁴

(5.) **Injury to Pedestrian.** — In a case of an injury to a pedestrian, evidence as to the speed of the car causing the injury at the time thereof may be shown.⁵

Evidence of the Distance That a Car Ran after an accident may be evidence of excessive speed.⁶

(6.) **Proof of Speed. — Non-Experts.** — Witnesses to an accident, having previously availed themselves of opportunities for observation,

99. *Birmingham R. & Elec. Co. v. Ellard*, 135 Ala. 433, 33 So. 276. See also *Deutschmann v. Third Ave. R. Co.*, 78 App. Div. 413, 79 N. Y. Supp. 1043.

1. *Metropolitan R. Co. v. Hammett*, 13 App. D. C. 370.

2. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988, holding further that in the absence of evidence as to the relative conditions of speed of the cars as they approached the intersecting point, the negligence of both companies was a question of fact for the jury. See also *Gillespie v. Coney Island & B. R. Co.*, 16 N. Y. Supp. 850, 41 N. Y. St. 97, holding further that such proof would have a tendency to show the violence with which the passenger was thrown.

3. **Evidence of Speed Admissible.** *Griffith v. Utica & M. R. Co.*, 137 N. Y. 566, 3 N. E. 339, 17 N. Y. Supp. 692, 43 N. Y. St. 835.

4. **Question of Speed Not Material.** — *Patterson v. Omaha & C. B. R. & B. Co.*, 90 Iowa 247, 57 N. W. 880.

5. *Omaha St. R. Co. v. Larson*, 70 Neb. 591, 97 N. W. 824.

6. *Little Rock R. & Elec. Co. v. Green*, 78 Ark. 129, 93 S. W. 752.

Distance Car Traveled After Accident. — "The witness was permitted to testify that the car ran a certain distance after the accident. This was proper as bearing upon the general conduct and control of the train as it came down the hill and passed the crossing, even though the motorman made no effort to stop the car until signaled to do so by the conductor, for the bearing it might have upon whether the train stopped at the Garfield street crossing, and whether the motorman slowed up as usual or kept a proper look out for persons approaching the crossing." *Gray v. St. Paul City R. Co.*, 87 Minn. 280, 91 N. W. 1106.

The circumstance that the car has run an unusual distance before it stops is some evidence of improper management. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997.

See also *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 190.

Sufficiency. — Deceased left the curb when the car was about 200 feet

although they are not experts, may testify as to the speed of the street-car causing the injury complained of.⁷ And this rule has been held applicable to a passenger on the car.⁸ So experts in the man-

away. When struck she was nearly across the track. Three witnesses testified that no bell was sounded; two witnesses testified that they heard none. It appeared that the car ran 180 feet before stopping. *Held*, sufficient to sustain finding of negligence. *Henderson v. United Trac. Co.*, 202 Pa. St. 527, 51 Atl. 1027.

7. *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081.

Evidence of Speed of Car.—One who sees a moving car and possesses knowledge of time and distance is competent to express an opinion as to its speed. The opinion would not be so material and reliable as that of one accustomed to observe, with timepiece in hand, the motion of an object of such size and momentum, but this would go to the weight of the testimony, not to its admissibility. Any one possessing the knowledge of time and distance would be competent to express an opinion upon the subject. *Omaha St. R. Co. v. Larson*, 70 Neb. 591, 97 N. W. 824; *Chipman v. Union Pac. Co.*, 12 Utah 68, 41 Pac. 562; *Walsh v. Missouri Pac. R. Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Covell v. Wabash R. Co.*, 82 Mo. App. 180.

Proof of Speed Must Not Be Vague and Unsatisfactory.—*Graham v. Consolidated Trac. Co.*, 64 N. J. L. 10, 44 Atl. 964.

Evidence of Comparison Inadmissible.—*Richmond P. & P. Co. v. Racks*, 101 Va. 487, 44 S. E. 709.

Statement That Car Was Going at a "Terrible Rate" of Speed, Incompetent.—In *Chicago City R. Co. v. Wall*, 93 Ill. App. 411, the witness testified in part as follows: "I saw the car coming down at a terrible speed." Counsel for appellant moved to strike out this answer as being improper. The court overruled the motion saying: "That is one way of telling what kind of speed it was. I do not see anything improper about it." It was held that the answer was improper and should have been stricken out on motion. It conveyed

to the jury no measurement of the rate of speed of the car except as it conveyed to them that it was such a rate as the witness disapproved. The remark of the judge was calculated to give added weight to the evidence. See also *Ehrmann v. Nassau Elec. R. Co.*, 23 App. Div. 21, 48 N. Y. Supp. 379.

Erroneous Exclusion of Evidence Cured.—Testimony as to speed of the car at the time, though erroneously excluded, being subsequently admitted, the error is cured. *Higgins v. Los Angeles R. Co.* (Cal. App.), 91 Pac. 344.

Any Error as to the Admission of Evidence of Speed Was Harmless where the injury or death resulted from contributory negligence. *Higgins v. Los Angeles R. Co.* (Cal. App.), 91 Pac. 344.

What Is Usual Rate.—The witness who testifies that a car was proceeding at the usual rate of speed at the time of the collision may very properly be questioned as to the particular rate. "In view of the fact that some of the defendant's witnesses had testified that a car, at the time of the accident, was going at the usual rate of speed, we see no harm in permitting the witness to testify what that rate was, if there was a usual rate and he knew what it was." *Robbins v. Springfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334.

Opinion Evidence.—"It is conceded that a witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street-cars, but he must be shown to have had, and to have availed himself of, an opportunity for observation in the case in hand." *Mathieson v. Omaha St. R. Co.* (Neb.), 92 N. W. 639.

8. **What Witnesses Competent.** "The witness who testified to the speed of the car was a passenger on the occasion in question, a civil engineer of eleven years' experience, at one time connected with the railroad business, and accustomed to

agement of a street-car may testify as to the management of the car causing the injuries complained of.⁹

The Customary Speed of the car over the same portion of track is also admissible.¹⁰

d. Precautions, Etc. — (1.) **Generally.** — Under an allegation of negligence of an employe, plaintiff may show the failure of the driver to "look," etc., or to exercise that degree of care and caution with which he is charged as the agent of the carrier.¹¹

Absence of Conductor. — In the absence of evidence showing the necessity of a conductor, the fact that there was no conductor on the car at the time of the accident is immaterial.¹²

Injury to Pedestrian. — In the case of an injury to a pedestrian,

time the speed of cars by the watch. That such a person was competent to testify to the speed of a car has been frequently held." *Fisher v. Union R. Co.*, 86 App. Div. 365, 83 N. Y. Supp. 694; *Gillespie v. Coney Isl. & B. R. Co.*, 16 N. Y. Supp. 850, 41 N. Y. St. 97.

9. *Laufer v. Bridgeport Tract. Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

A motorman may be asked whether he used the most effective method of stopping the car as quickly as possible. So, too, may a witness testify whether the car stopped suddenly or gradually, and whether he was thrown forward when it was being stopped. *Birmingham R. L. & P. Co. v. Hayes* (Ala.), 44 So. 1032; *Southern R. Co. v. Choate*, 119 Ala. 358, 24 So. 726.

Opinion of plaintiff admissible though not so reliable as testimony of one accustomed to observe. *Chipman v. Union Pac. R. Co.*, 12 Utah 68, 41 Pac. 562; *Walsh v. Missouri Pac. R. Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Covell v. Wabash R. Co.*, 82 Mo. App. 180.

Contra. — Question whether conductor could have stopped the car under given circumstances excluded as calling for opinion. *Von Diest v. San Antonio Trac. Co.*, 33 Tex. Civ. App. 577, 77 S. W. 632.

10. **Custom.** — Where negligence of a railway company consists in an unusual rate of speed, the usual rate of speed at which the car is wont to be propelled over the portion of the track in question may always be shown. *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902;

Canfield v. North Chicago St. R. Co., 98 Ill. App. 1.

Length of Route and Schedule Time. — Evidence of the distance traversed and the schedule time to make the round trip on a certain street is competent as tending to show the average rate of speed in comparison with the rate at which the car was running at the time of the accident. *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. 725.

11. **Care of Operators.** — Evidence that it was a part of the driver's duty to see that the passengers put their fares in the box, and in attending to that duty he had to turn round so as to face the car, is competent to show whether he was in a situation to give undivided attention to the driving. *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453.

Evidence of carelessness of inspector in signaling to vehicle when car was approaching is competent. *Fay v. Brooklyn Heights R. Co.*, 69 App. Div. 563, 75 N. Y. Supp. 113.

12. **Evidence of Absence of Conductor.** — "In view of the fact that there was no testimony showing that the conductor was required or necessary in order for the safe running or management of the car, we think it was error to admit testimony to show that there was no conductor upon this car at the time of the accident. If a conductor was necessary to the proper management of the car, that fact should have been shown, and if unnecessary, the fact that there was none was immaterial and should have been excluded from the jury." *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

evidence as to what precautions were exercised by the motorman is competent.¹³

(2.) **Precautions Subsequent to Accident.**—The adoption of additional precautions for safety by the defendant company after the accident cannot be proved as tending to show liability for the methods used at the time of the accident.¹⁴ If it is shown that the conditions have not been changed since the accident, evidence is admissible as to the conditions subsequent to the accident;¹⁵ but if changes have been made since the accident, evidence is only admissible for the purpose of showing conditions at the time of the accident.¹⁶

13. Evidence of Motorman's Caution.—"It is a question of fact for the jury whether the gripman or motorman of such a car keeps such a lookout as the circumstances demand, or gives such warning of approach as is necessary when he discovers that a child is on the track or approaching it, and the circumstance that the car has run an unusual distance before it stops is some evidence of improper management." *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

Evidence of Inproficiency.—"The sole question, therefore, was, what was the conduct of the servant at the time? And this was to be unembarrassed by any consideration of his general qualifications. The latter consideration is proper where the defendant is required to exercise the highest or utmost degree of care, and is held responsible for slight negligence." *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561, 47 Pac. 452; *Bennett v. Brooklyn Heights R. Co.*, 1 App. Div. 205, 37 N. Y. Supp. 447.

14. Adoption of Precautions After Accident.—The adoption of additional precautions for safety after the accident cannot be proved as tending to show liability for the methods used at the time of the accident. *Stevens v. Boston El. R.*, 184 Mass. 476, 69 N. E. 338. See also, *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 61, 27 Pac. 590; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N. W. 358; *Mahaney*

v. St. Louis & H. R. Co., 108 Mo. 191, 18 S. W. 895; *Aldrich v. Concord & M. R. Co.*, 67 N. H. 250, 29 Atl. 408.

Contra.—*Savannah F. & W. R. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 74 Am. St. Rep. 183: "There is much authority to the contrary (see *Patterson on Railway Accident Law* 421, 422), but we think consistency with our own decisions requires us to hold that it was admissible to show that, after the accident, the cars of the company ran more slowly at the place of the accident than they had previously. The cause of this change of speed was a question for the jury. *Augusta, Etc., R. R. Co. v. Renz*, 55 Ga. 126, *Central R. R. Co. v. Gleason*, 69 Ia. 200. The evidence was certainly of very great value, but its admissibility did not depend upon what it proved, but upon its tendency."

15. Such Evidence Admissible, When.—*Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093; *Byrne v. Brooklyn City & N. R. Co.*, 6 Misc. 260, 26 N. Y. Supp. 760, *affirmed*, 145 N. Y. 619, 40 N. E. 163; *Houston & T. C. R. Co. v. Waller*, 56 Tex. 331.

16. *Scagel v. Chicago, M. & St. P. R. Co.*, 83 Iowa 380, 49 N. W. 990; *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Iowa 67, 40 N. W. 92; *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104.

Discharge of Motorman.—The fact that the motorman was discharged after an accident, it appearing to be a rule of the company to discharge any employee after an accident, is immaterial. *Christenson v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

e. *Custom.* — Custom in the operation of cars¹⁷ and the customary surrounding conditions to which their operation is subject is always relevant.¹⁸

The Habitual Crowding of Cars has been held to be a condition which may be shown.¹⁹

Passenger Injured While Boarding Car. — The relation of passenger and carrier, according to the general rule, arises the moment the person signals the car,²⁰ so that in an action by a person injured while boarding a car at a crossing, even though the car be moving at the time, evidence showing that it was customary for passengers at that crossing to board the cars while in motion is relevant.²¹

17. Customary Operation.

"There was no allegation in the declaration that propelling the car northward on the westerly or south-bound track was an act of negligence; still the court did not err in permitting the appellee to prove the existence of the custom of running all north-bound cars on the east track and all south-bound cars on the west track. The existence of this custom entered into the consideration of the question of whether the motorman was in the exercise of ordinary care in propelling the car northward on the westerly track at such a high rate of speed as twelve or fifteen miles an hour, and also bore upon the question of negligence of the deceased in leaving the space between the tracks and going upon the west track in order to be out of danger from the car moving northward." *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077.

18. Customary Conditions. Plaintiff, driving behind a "wood wagon" alleged to have obstructed his view, defendant may show that the ordinary wood wagon in use is about five feet, four inches high. *Lightfoot v. Winnebago Trac. Co.*, 123 Wis. 479, 102 N. W. 30.

19. Where it is shown that at the time of the accident, the car causing it was under the exclusive control of a driver who also acted as conductor, evidence is admissible to show that, at the time and previous thereto, cars upon that line were habitually crowded with passengers. But this suggests the duty on the part of the company to employ conductors to relieve the drivers and thus avoid accidents. *Anderson v. Minneapolis St.*

R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. Rep. 525.

20. Becomes a Passenger, When. — *Hall v. Terre Haute Elec. Co.*, 38 Ind. App. 43, 76 N. E. 334; *Cincinnati Trac. Co. v. Holzenkamp*, 3 Ohio N. P. (N. S.) 537; *Waller v. Wilmington City R. Co. (Del.)*, 61 Atl. 874.

Duty of Motorman to Heed Signal. *Pitcher v. People's St. R.*, 154 Pa. St. 560, 26 Atl. 559; *De Rozas v. Metropolitan St. R. Co.*, 13 App. Div. 296, 43 N. Y. Supp. 27.

Ticket as Evidence Between Parties. — *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350.

Evidence That No Fare Paid Immaterial. — *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. 315; *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284, 29 Am. Rep. 679.

What Constitutes a Signal. "But appellant's counsel urge that it was incumbent on the appellee to prove that he signaled for the car to stop. . . . The usual way is to stand, awaiting the car, at a place where it usually stops, when one desiring to board it may raise his hand or give some sort of sign; but it is sufficient if, in any way, the conductor or motorman has notice that a person wants to board a car." *South Chicago City R. Co. v. Du Fresno*, 102 Ill. App. 493, *affirmed*, 200 Ill. 456, 65 N. E. 1075.

Evidence of grasping handrail of slowly moving car was held contributory negligence. *Sellers v. Union Trac. Co.*, 21 Pa. Super. Ct. 5.

21. Where Custom at That Point Relevant. — *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849, 85 Ill. App. 316. "Plaintiff was

In the Case of a Passenger Injured While Alighting from a street-car, evidence as to the custom of the company at the place of the injury may be received.²²

Pedestrians. — Evidence of the usual practice of a street-railroad company sued by a pedestrian for damages for personal injuries, in the operation of its cars upon the street in which the accident occurred, is proper.²³ So also is evidence as to the custom of other persons who recognized such practice and were governed by it.²⁴

f. Condition of Road, Instrumentalities, Etc. — Evidence as to the condition of the company's tracks other than at the place of the accident in question cannot be received.²⁵ But evidence of the condition of the tracks prior to the accident in controversy is admissible as tending to prove a failure to repair, and thereby establish the negligence of the company.²⁶ So also is evidence admissible as to the condition of the tracks some time after the accident in controversy

a passenger entitled to the degree of care due from the defendant to the passenger, and if the defendant knew that persons would probably be getting on the moving trains at that place and consented to the practice, the law imposes upon it the duty to not expose the plaintiff to unnecessary danger in adopting the practice and to manage the train accordingly. (*Pennsylvania Co. v. McKaffrey*, 173 Ill. 169; *Chicago, Milwaukee & St. Paul Railroad Co. v. Lowell*, 15 U. S. 209.) The defendant might have had the effect of the evidence properly limited when it was admitted, by instruction, but as it was competent for one purpose it was not error to admit it."

22. Rules of the Company Forbidding Motormen To Stop at the point where the injury occurred, admissible as tending to show defendant's knowledge of the danger. *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41.

Customary Practice of Company. *Nassau Elec. Co. v. Corliss*, 126 Fed. 355, 61 C. C. A. 257. See also *Gleason v. Metropolitan St. R. Co.*, 99 App. Div. 209, 90 N. Y. Supp. 1025.

23. Usual Practice. — The fact that snow was frequently piled in that vicinity is admissible, but not the practice elsewhere. *Mayer v. Milwaukee St. R. Co.*, 90 Wis. 522, 63 N. W. 1048.

Running Car on Particular Track of Double Track System. — *North Chicago St. R. Co. v. Irwin*, 82 Ill. App. 146.

24. Evidence of Conduct as Governed by Custom. — Evidence of the number of people accustomed to pass that corner where the accident occurred and how they traveled is admissible. *Highland Ave. & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566. To the same effect see *Newport News & O. P. R. & Elec. Co. v. Bradford*, 100 Va. 231, 40 S. E. 900.

Plaintiff, a Woman, Injured While Crossing Street At a Dangerous Point. — "It was shown by a number of witnesses introduced by defendant, who did business on the street, that it was very unusual for a woman to cross the street at this point, . . . it was competent, not for the purpose of showing contributory negligence on the part of Mrs. Henry, but it was competent for the purpose of showing that it was unusual for persons to cross the street where she did, and that a greater degree of care and caution was required on her part than would have been required of her had she crossed at the regular place of crossing and the injury had occurred, at that point.

. . . But what was due care and caution on the part of the plaintiff was a question for the jury, under all the facts and circumstances in proof, to be determined in the light of the dangers to be reasonably apprehended." *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, 21 S. W. 214.

25. Cunningham v. Fair Haven & W. R. Co., 72 Conn. 244, 43 Atl. 1047.

26. Cunningham v. Fair Haven & W. R. Co., 72 Conn. 244, 43 Atl. 1047.

when accompanied by evidence of there having been no change in the interval.²⁷

A Contract Between the Railway Company and the City as to the former's duty upon streets, is admissible in actions involving negligence in that respect.²⁸

Defective Maintenance. — Evidence is admissible to show failure of street-railways to keep their tracks level with the surface of the street,²⁹ or that holes or excavations existed between the tracks,³⁰ or that electric wires were defective,³¹ or that the rails were defectively bonded,³² or that electricity escaped through slot of under-

27. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

28. **Contract.** — An ordinance and contract between defendant and the city providing that the railroad company must keep its tracks in such condition as to not obstruct passage of vehicles, are admissible in an action for injuries due to insufficient ballasting of its track. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

29. *Canada.* — *Joyce v. Halifax St. R. Co.*, 24 Nova Scotia 113; *Halifax St. R. Co. v. Joyce*, 22 Can. Sup. Ct. 258.

Alabama. — *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

Connecticut. — *Cunningham v. Fair Haven & W. R. Co.*, 72 Conn. 244, 43 Atl. 1047.

Illinois. — *Stratton v. Central City Horse R. Co.*, 95 Ill. 25.

Kentucky. — *Groves v. Louisville R. Co.*, 109 Ky. 76, 58 S. W. 508.

Maine. — *Bangs v. Lewiston & A. Horse R. Co.*, 89 Me. 194, 36 Atl. 73.

Maryland. — *Central R. Co. v. State*, 82 Md. 647, 33 Atl. 265.

Minnesota. — *McKillop v. Duluth St. R. Co.*, 57 Minn. 408, 59 N. W. 481; *Baumgartner v. Mankato*, 60 Minn. 244, 62 N. W. 127.

New York. — *Wooley v. Grand St. R. Co.*, 83 N. Y. 121; *Schild v. Central Park N. & E. R. Co.*, 62 Hun 620, 16 N. Y. Supp. 701, *affirmed*, 133 N. Y. 446, 31 N. E. 327, 28 Am. St. Rep. 658.

Texas. — *Houston City St. R. Co. v. Delesdernier*, 84 Tex. 82, 19 S. W. 366. See also *Citizens' R. Co. v. Gossett* (Tex. Civ. App.), 68 S. W. 706.

Washington. — *Gray v. Washing-*

ton Water Power Co., 27 Wash. 713, 68 Pac. 360.

Wearing Down of Surface by Traffic. — *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621, 43 S. W. 1028; *Fash v. Third Ave. R. Co.*, 1 Daly (N. Y.) 148. See *Eddy v. Ottawa City Pass. R. Co.*, 31 U. C. Q. B. (Can.) 569.

30. *Kearns v. Southern Middlesex St. R. Co.*, 181 Mass. 587, 64 N. E. 200; *Citizens' St. R. Co. v. Marvil*, 161 Ind. 506, 67 N. E. 921; *Fox v. Wharton*, 64 N. J. L. 453, 45 Atl. 793; *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203; *Wolf v. Third Ave. R. Co.*, 67 App. Div. 605, 74 N. Y. Supp. 336.

31. *Kankakee El. R. Co. v. Whittemore*, 45 Ill. App. 484.

A *prima facie* case of negligence is shown where trolley pole on electric car slips from wire, strikes and tears down cross wire and conductor goes on without stopping to see whether any mishap is likely to be done by leaving the wire hanging in the street. *Larson v. Central R. Co.*, 56 Ill. App. 263, *citing* *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Gross v. South Chicago City R. Co.*, 73 Ill. App. 217; *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; *United Elec. R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; *Chattanooga Elec. R. Co. v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703. *Compare Freeman v. Brooklyn Heights R. Co.*, 54 App. Div. 596, 66 N. Y. Supp. 1052.

32. *Braham v. Nassau Elec. R. Co.*, 72 App. Div. 456, 76 N. Y. Supp. 578.

Res Ipsa Loquitur. — Escape of electricity through its tracks is *prima*

ground trolley wires,³³ or as in the case of a cable company that the grip slot was of excessive and improper width.³⁴ And the manner of removing snow from its tracks may be shown where injury is caused thereby.³⁵ So evidence as to defects in grip or break,³⁶ or defects of platform or steps,³⁷ or that road was insufficiently surfaced and ballasted,³⁸ may be received.

facie evidence of negligence on part of street railway company. *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592.

33. *Ludwig v. Metropolitan St. R. Co.*, 71 App. Div. 210, 75 N. Y. Supp. 667.

34. Cable Slot of Improper Width.—*Keitel v. St. Louis Cable & W. R. Co.*, 28 Mo. App. 657 (wheel of buggy catching in slot); *Griveaud v. St. Louis Cable & W. R. Co.*, 33 Mo. App. 458; *Minster v. Citizens' R. Co.*, 53 Mo. App. 276; *Brown v. Metropolitan St. R. Co.*, 60 App. Div. 184, 70 N. Y. Supp. 40 (wheel of bicycle going through cable slot); *Humbert v. Brooklyn Cable R. Co.*, 12 N. Y. St. 172 (horse catching calk of shoe in slot).

35. Removal of Snow From Tracks.—*United States.*—*McDonald v. Toledo Consol. St. R. Co.*, 74 Fed. 104, 20 C. C. A. 322.

Massachusetts.—*Mahoney v. Metropolitan R. Co.*, 104 Mass. 73.

Michigan.—*Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220, 28 N. W. 873. See also *Wallace v. Detroit City R. Co.*, 58 Mich. 231, 24 N. W. 870.

New Hampshire.—*Smith v. Nashua St. R. Co.*, 69 N. H. 504, 44 Atl. 133.

New York.—*Broadway & S. A. R. Co. v. New York*, 49 Hun 126, 1 N. Y. Supp. 646; *Somerville v. City R. Co.*, 63 Hun 628, 17 N. Y. Supp. 719; *Mowrey v. Central City R. Co.*, 66 Barb. 43, *affirmed*, 51 N. Y. 666; *Dixon v. Brooklyn City & N. R. Co.*, 100 N. Y. 170, 3 N. E. 65; *Somerville v. City R. Co.*, 17 N. Y. Supp. 719, 43 N. Y. St. 425.

Virginia.—*Newport News & O. P. R. & Elec. Co. v. Bradford*, 99 Va. 117, 37 S. E. 807, 100 Va. 231, 40 S. E. 900.

Wisconsin.—*Gerrard v. La Crosse City R. Co.*, 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465 (declivities on

side of tracks caused in removal of snow).

Testimony that ice had been between defendant's tracks is incompetent, the duty not resting upon street railroad companies ordinarily to keep the space between their tracks free from snow and ice, and evidence that there had been no storm for two days is inadmissible. *Silberstein v. Houston, W. St. & P. F. R. Co.*, 117 N. Y. 293, 22 N. E. 951.

Evidence that snow and ice were removed after accident is immaterial. *Markowitz v. Dry Dock, E. B. & B. R. Co.*, 12 Misc. 412, 33 N. Y. Supp. 702.

36. Defective Brakes.—Evidence that brakes worked hard and failed to check speed and were out of repair is admissible. *South Chicago City R. Co. v. Purvis*, 193 Ill. 454, 61 N. E. 1046.

Though there was no positive evidence that brakes were out of repair, the mere circumstance that the car ran an unusual distance before it was stopped was some evidence thereof. *Mitchell v. Tacoma R. & Motor Co.*, 9 Wash. 120, 37 Pac. 341.

37. Evidence of Platform Falling.—*Haselton v. Portsmouth, K. & Y. St. R. Co.*, 71 N. H. 589, 53 Atl. 1016.

Platform and Steps.—*Herbert v. St. Paul City R. Co.*, 85 Minn. 341, 88 N. W. 996.

38. In an action against a street railway company for injuries due to the insufficient surfacing and ballasting of its tracks, where complaint sets up a contract between defendant and city, and also a municipal ordinance whereby it is made defendant's duty to keep its track in such condition as not to obstruct the passage of vehicles over them, both contract and ordinance are admissible in evidence. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

The Opinions of Witnesses as to the safety of the crossing where the accident occurred may be received.³⁹

Photographs. — Photographs of the place of the accident may be received in evidence.⁴⁰

g. *Other Similar Accidents.* — The general rules of evidence apply with regard to the admissibility of evidence to prove defects in the street and tracks, and under this head may be shown evidence of similar accidents.⁴¹ But accidents of a different nature,⁴² or to a different car under different conditions, cannot be shown.⁴³

h. *Municipal Ordinances.* — In the case of a passenger injured while alighting from a street-car, municipal ordinances regulating the operation of cars at intersecting streets may be given in evidence.⁴⁴

39. *Laughlin v. Grand Rapids R. Co.*, 62 Mich. 220, 28 N. W. 873.

40. *Cunningham v. Fair Haven R. Co.*, 72 Conn. 244, 43 Atl. 1047. And see article "PHOTOGRAPHS," Vol. IX, p. 770.

41. *Morrow v. Westchester Elec. R. Co.*, 54 App. Div. 592, 67 N. Y. Supp. 21.

Evidence of Collateral Facts. — In an action sustained by the upsetting of plaintiff's sleigh by striking against a street railway switch, evidence of other accidents at the same place is admissible. *Wooley v. Grand St. & N. R. Co.*, 83 N. Y. 121.

42. In an action where plaintiff received injuries while riding in a vehicle driven by another, it was proper to give evidence of all previous occasions when such driver had been seen to drive in front of cars carelessly and dangerously near thereto, coupled with proof of injury thereby on the part of the plaintiff. *Bressee v. Los Angeles Trac. Co.*, 149 Cal. 131, 85 Pac. 152.

Experiment Under Different Conditions. — "The plaintiff may be allowed to show at what gait Veitch was driving at the time of the accident, how far he had to go in making the train and clearing the street-car tracks, but experiments made on the same ground with a different horse should not be admitted, for it is very evident that if Veitch had had a quarter of a second more, he could have cleared the street-car tracks, and this difference would be made by a quicker horse when he was not perceptibly traveling faster than

other horses." *Louisville R. Co. v. Hoskins*, 28 Ky. L. Rep. 124, 88 S. W. 1087.

43. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

Collision, Cause of Derailment. "It is manifest that the plaintiff could not recover upon the ground that it was the custom of the defendant's cars to jump the track at other places on the road. This evidence may have very greatly prejudiced the jury, and influenced it in coming to the conclusion that the plaintiff's contention that the car left the rails before the collision was right, and that the defendant's position was untrue. Evidence of this character is only permissible where previous, similar accidents have happened in the same locality under the same conditions." *Perras v. United Trac. Co.*, 88 App. Div. 260, 84 N. Y. Supp. 992.

44. **Municipal Ordinance Governing Stopping of Cars at Crossings Admissible.** — *Jackson v. Grand Ave.*, 118 Mo. 199, 24 S. W. 192, the court said: "We think it was proper to put all the circumstances before the jury. While it is true the plaintiff testified to a complete stop the conductor denied it. If the train did not stop, and the court could not assume either that it did or did not, it is a fair inference that defendant and its servants were endeavoring to obey the ordinance and rule; it was due to the defendant to allow it to show the jury that it was going under municipal direction and not according to any arbitrary

As Between Street-Cars and Pedestrians, it is universally held that the former possess no exclusive or paramount right of way over the part of the street occupied by their tracks.⁴⁵ The operation of street-cars is usually governed by municipal ordinances or statutes, and in an action by a pedestrian for personal injuries, he may introduce a valid ordinance or statute so designed,⁴⁶ and may testify that his knowledge thereof led him to rely upon a compliance therewith by the railway company.⁴⁷ It is proper to show that the defendant's car was running in violation of municipal ordinances.⁴⁸ But ordinances

rules of its own making, nor was there any error in permitting the defendant to prove how its crossings were made, as the evidence tended to show how important to the safety of passengers it was, to use every precaution at the crossings like this, to avoid collisions with the cars of other lines. The admission of this evidence was to sustain defendant's case, and the fact that the plaintiff testified to a full stop, did not deprive the defendant of the right to show, if it could, that the car did not stop, and why."

If a conductor permits a lady to alight from the car while in motion, and in violation of a city ordinance, the question of negligence is one for the jury. *Fortune v. Missouri R. Co.*, 10 Mo. App. 252.

An Ordinance Prohibiting Cars To Stop at the place where plaintiff was injured, is admissible for defendant to show that the car did not slow up for that purpose. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

45. No Paramount Right of Way. *Chicago W. Div. R. Co. v. Ingraham*, 131 Ill. App. 659; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Buttelli v. Jersey City, H. & E. R. Co.*, 59 N. J. L. 302, 36 Atl. 700; *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682; *Gibbons v. Wilkes-Barre & S. St. R. Co.*, 155 Pa. St. 279, 26 Atl. 417; *Ewing v. Toronto R. Co.*, 24 Ont. 694; *Gosnell v. Toronto R. Co.*, 21 Ont. App. 553, 24 Can. Sup. Ct. 582.

Gathering of Large Crowd Imposes Duty of Greater Care. *Washington & G. R. Co. v. Wright*, 7 App. D. C. 295.

Evidence of Population of Vicinity

Relevant. — *Burnstein v. Cass Ave. & F. G. R. Co.*, 56 Mo. App. 45.

46. Ordinances Admissible. Plaintiff may show the requirements of city ordinances. *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

But a speed ordinance is not relevant in the absence of evidence of the speed of the particular car in question. *Mathieson v. Omaha St. R. Co. (Neb.)*, 92 N. W. 639.

47. Admissibility of Ordinances. An ordinance showing rate of speed a car was allowed to run is competent evidence and should be received unless it is invalid, and does not apply to the case. *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046. See also *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 47 Pac. 1019; *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

Plaintiff May Testify as to His Knowledge of Existing Ordinance, and to the conduct of the company thereunder, and as indicating what he had reason to expect regarding headlights and warnings. *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1. The court said: "Plaintiff had a right to say, not only what was required by the ordinance of the city in this regard, but what was the usual practice of the defendant in respect to its cars running on Clark street, and thus, what, by its own conduct, the plaintiff had reason to expect would be its practice in regard to headlights and giving of warning of approach of its cars on the night in question."

48. Speed Ordinance. — Plaintiff may show that the car was running in excess of the rate of speed allowed by ordinance or statute, notwithstanding that such statute or ordinance simply imposes a penalty

are not so admissible where they state simply the general rule of law.⁴⁹

i. *Res Gestae*. — *Declarations*. — Evidence of the declarations of parties at the time of, or immediately after, an accident are admissible as part of the *res gestae*,⁵⁰ but they must constitute a part of the transaction and must not be misleading.⁵¹

for violation thereof. "The admission of the ordinance and the instructions given were proper, unless as is contended, there was no evidence tending to show that the defendant was running its car, when plaintiff was injured, at more than ten miles per hour; the accident not having occurred at a street crossing." *Norfolk R. & L. Co. v. Corletto*, 100 Va. 355, 41 S. E. 740.

Horse Railroads. — An ordinance providing for the rate of speed of horse railways may be introduced for the purpose of showing that at the time of the accident defendant's driver was driving at a greater speed. *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283.

49. An ordinance requiring operators to use reasonable care and diligence to prevent injury to persons, is held inadmissible in evidence because the rules of law require this care independently of such an ordinance. *Christy v. Des Moines City R. Co.*, 126 Iowa 428, 102 N. W. 194.

50. **Declarations.** — The admissibility of evidence depended upon whether the statements were the natural emanations from the occurrence, made spontaneously and so clearly contemporaneous as to be in the presence of the occurrence, and under such circumstances as to preclude the idea of design or deliberation." *Cincinnati, L. & A. Elec. St. R. Co. v. Stahle*, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363. See *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 576, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520.

"It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestae*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, safely be said: that declarations which are

the natural emanations and outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made and so clearly contemporaneous as to be in the presence of the transaction which they illustrate and explain and were made under such circumstances as to necessarily exclude the idea of design or deliberation, must upon the clearest principles of justice be admissible as part of the act or transaction itself." *Louisville & N. A. C. R. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Com. v. M'Pike*, 3 Cush. (Mass.) 181; *Keyser v. Chicago & G. T. R. Co.*, 66 Mich. 390, 33 N. W. 867.

51. **Declarations Inadmissible Unless of Res Gestae.** — "To make his declarations admissible as part of the *res gestae* it was not necessary that Dalton should have been in the employ of the company for the purpose of running its cars or for any purpose. His acts were part of the occurrence and they could have been proved if done by an entire stranger. His declarations made at the time explained the nature of his acts and the acts of others which make up the whole occurrence under investigation. The declarations of the motorman of which proof was offered were separated in time two minutes only from the infliction of the injuries. It emanated from the act and it was in association with and stood in immediate relation to it. The occurrence had not ended. He was not speaking as a relator of past events but as a participant in an incomplete one." *Coll v. Easton Transit Co.*, 180 Pa. St. 618, 37 Atl. 89.

Declarations of the motorman almost immediately after the accident

B. MATTERS PERTAINING TO CONTRIBUTORY NEGLIGENCE OF PERSON INJURED. — a. *In General.* — As in other personal injury cases, so in an action against a street-railroad company to recover damages for personal injuries, circumstantial evidence is of necessity resorted to on the question of contributory negligence of the plaintiff.⁵²

b. *"Stop, Look, and Listen."* — It is a general rule that evidence that the plaintiff did not stop, look, and listen, or if he had done so he could have averted the accident, will preclude a recovery.⁵³ And in some jurisdictions it has been held that it is his duty to continue looking until he reaches the track.⁵⁴

c. *Injured While Alighting.* — Evidence as to the care exercised by the person injured is of course admissible on the question of contributory negligence on his part.⁵⁵ So also on this question it is

that he "lost control" is not admissible as part of the *res gestae*. *Norris v. Interurban St. R. Co.*, 90 N. Y. Supp. 460.

England. — "By the rules of evidence established in courts of law, circumstances of great moral weight are often excluded, which circumstances might, in particular cases, be offered, in coming to a just conclusion, but which are nevertheless excluded upon general principles lest they should produce an undue influence upon the minds of persons not accustomed to consider the limitations and restrictions by legal views imposed." *Berkeley's Case*, 4 Campb. (Eng.) 401, 14 R. R. 782. See *Wright v. Doe*, 7 Ad. & El. 313, 34 E. C. L. 95.

Declarations of Plaintiff. — "The defense offered as a witness a Mrs. Berry, and claimed she would testify that in a conversation which she had with the mother of said Mizze shortly after the accident which resulted in the death of Mizze, she, the mother, stated that she did not blame the motorman. On objection this testimony was ruled out and we think properly. Whether the mother blamed the motorman or did not blame him was an irrelevant fact." *Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 37 Atl. 683. See article "RES GESTAE," Vol. XI.

52. *Root v. Des Moines City R. Co.*, 113 Iowa 675, 83 N. W. 904; *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161, 20 So. 317.

53. **Evidence of Care Exercised By Plaintiff.** — The requirement as to

looking and listening before crossing does not apply to persons crossing a street railroad track to the same extent as in cases involving commercial roads. *Niemyer v. Washington Water Power Co. (Wash.)*, 88 Pac. 103.

As a general rule where there is evidence that the driver of a wagon either did not look for the car or could have seen it if he had looked for it, there is not such freedom from contributory negligence as to preclude defeat. *Kueski v. New York & Q. C. R. Co.*, 109 App. Div. 207, 95 N. Y. Supp. 650; *Minnich v. Wright*, 214 Pa. St. 201, 63 Atl. 428; *Houston Bros. Co. v. Consolidated Trac. Co.*, 28 Pa. Sup. Ct. 374; *Weske v. Chicago Union Trac. Co.*, 117 Ill. App. 298; *Robinson v. Rockland, T. & C. St. R. Co.*, 99 Me. 47, 58 Atl. 57.

54. **Continued Caution.** — A person is not relieved from the duty of continuing to look for approaching cars until he reaches the track by reason of the fact that the electric railroad is in the country and that the cars are not so frequent and obstructions to travel are not so great as in a city. *Keenan v. Union Trac. Co.*, 202 Pa. St. 107, 51 Atl. 742.

55. **Passengers Alighting, in Violation of the Rules of the Company.** *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41.

Passengers Getting Off Wrong Side of Car. — The question of plaintiff's practice on other occasions, either before or after, is improper.

proper to consider his infancy,⁵⁶ and previous inexperience.⁵⁷

A person injured while attempting to alight from a moving car without the knowledge of the conductor or motorman is not excused by the fact that a co-passenger rang the bell to stop.⁵⁸

d. *Ordinances and Rules.* — An ordinance giving certain persons or vehicles the right of way is admissible on the question of contributory negligence.⁵⁹ But the rules of the defendant company forbidding the boarding of cars when in motion are not so admissible.⁶⁰

IV. EJECTION OF PERSON AS TRESPASSER.

1. Presumptions and Burden of Proof. — Street-railroad compa-

Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41.

If a Car Is Standing, it is not material to determine whether plaintiff asked permission to alight, though it was not at the proper or usual stopping point. Chicago West. Div. R. Co. v. Mills, 105 Ill. 63.

Plaintiff Getting Off Behind Another Passenger who had previously signaled conductor to stop need not signify his desire to alight. Rathbone v. Union R. Co., 13 R. I. 709.

The fact that a passenger violated the rules of the company in alighting from the front end of the car is immaterial and does not relieve it from negligence. Platt v. Grand St. F. R. Co., 2 Hun (N. Y.) 124.

56. The Fact That a Passenger Is Evidently Very Young is a circumstance that must be taken into consideration by a carrier in the discharge of its duty to stop the car a sufficient length of time to give the passenger reasonable opportunity to alight in safety. The fact that the court permitted a witness to testify, after objection made on account of his youth, is equivalent to ruling that it is satisfied of the witness' competency. Ridenhour v. Kansas City C. R. Co., 102 Mo. 270, 283, 13 S. W. 889, 14 S. W. 760.

The fact that a child, six years old was permitted to alight, the sudden start of the car after slowing up throwing him to the street, thereby injuring him, was held sufficient evidence for submission to the jury. Buck v. People's St. R., El. L. & P. Co., 46 Mo. App. 555.

Where negligence is shown to have occurred, the child will not be

held to the exercise of the same decree of care and discretion as an adult. Crissey v. Hestonville, M. & F. Pass. R. Co., 75 Pa. St. 83.

57. Evidence of Previous Inexperience in traveling upon an electric car was admissible, not for the purpose of affecting the measure of the company's diligence, but as a fact tending to illustrate his failure to alight in safety. Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

58. Acts of Third Person Immaterial. — Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

59. Ordinances and Rules As To Firemen. — "As the evidence showed that both motorman and the deceased were familiar with the rule requiring that the fire department be given right of way, they were clearly admissible as bearing upon the question of contributory negligence of the deceased in permitting the engine to approach the crossing at the speed it did." Chicago City R. Co. v. McDonough, 221 Ill. 69, 77 N. E. 577.

An ordinance on rules of the road giving certain vehicles right of way over others is admissible, "as every man proceeding lawfully may rightfully assume that others will conform their conduct to the requirements of statute and regulations having the force of statute. Knipple v. Knickerbocker Ice Co., 84 N. Y. 488." Geary v. Metropolitan St. R. Co., 84 N. Y. Supp. 282; Omaha St. R. Co. v. Larson (Neb.), 97 N. W. 824; Geary v. Metropolitan St. R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54.

60. Rules of Company Irrelevant. Evidence of the violation of rules of

nies as carriers owe no duty of protection to a trespasser,⁶¹ and in an action for wrongful ejection, plaintiff's right of recovery is dependent, at least in the first instance, upon his proving the exercise of wilful, wanton violence used by the defendant's employes in ejecting him.⁶²

If a Passenger Presents a Defective Transfer or ticket, his expulsion from the car is not *wrongful*,⁶³ though if such defect be proven due to a mistake on the part of the conductor or agent issuing it, the carrier will be liable.⁶⁴ That the ticket presented does not upon its face designate the particular route or line intended,⁶⁵ or whether the

the company forbidding the boarding of cars in motion is immaterial. *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672.

61. *Ansteth v. Buffalo R. Co.*, 145 N. Y. 210, 39 N. E. 708.

62. **Evidence of Violence in Ejection of Trespassers Held Sufficient.** To establish the liability of the defendant for injuries sustained by a trespasser it is necessary to prove: "That the act of the defendant's servants was improper, unnecessarily dangerous, and the approximate cause of the injury and done for the purpose of removing the plaintiff from the car." *Ansteth v. Buffalo R. Co.*, 145 N. Y. 210, 39 N. E. 708; *Biddle v. Hestonville, M. & F. P. R. Co.*, 112 Pa. St. 551, 4 Atl. 485; *Citizens' St. R. Co. v. Willoby*, 134 Ind. 563, 33 N. E. 627, 58 Am. & Eng. R. Cas. 485; *Hewson v. Interurban St. R. Co.*, 95 App. Div. 112, 88 N. Y. Supp. 816.

63. **Holder of Defective Ticket Should Alight When Same Is Rejected.**—"When the conductor demanded that plaintiff pay her fare or leave the car, she would have been justified in refusing to pay and in leaving the car on the command of the conductor and holding the appellee responsible for the consequences." *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626.

64. **Carrier Liable for Mistake.** "If he be expelled on account of a defective ticket when he has acted in good faith and is without fault, the carrier is liable in damages for such expulsion." *O'Rourke v. Street R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614. See also *Laird v. Pittsburgh Tract. Co.*, 166

Pa. St. 4, 31 Atl. 51; *Ellsworth v. Chicago, B. & Q. R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 7 S. E. 217; *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 31 N. W. 544.

That the conductor ejecting the passenger is not the one who made the mistake, is not material. "It makes no difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was in effect the act of the second conductor, because the acts of both were the acts of the company; the company having, for its own convenience, intrusted its business to two agents instead of one." *Lawshe v. Tacoma R. & P. Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350.

65. **Face of the Ticket Not Material to the Question of Liability.** "If any other rule prevailed, the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in no wise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked, and for which he paid, it being absolutely impracticable for passengers to make technical examination of the transfer slips which they receive." *Lawshe v. Tacoma R. & P. Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350.

passenger held any ticket whatever,⁶⁶ is, under such circumstances, no defense. The decisions are in conflict, however, as to whether such evidence presents a case in damages for breach of contract⁶⁷ or for wrongful ejection.⁶⁸

Presumption That Police Act Officially.—When a disorderly person ejected and arrested by a police officer, is unduly assaulted, the presumption is that the officer acted in an official capacity.⁶⁹

2. Substance and Mode of Proof.—A. IN GENERAL.—Rules and regulations of the carrier directing conductors to reject defective tickets are not material upon the defense of such actions.⁷⁰

Evidence of Mental Suffering, humiliation and indignity incurred by passengers through wrongful ejection is admissible in aggravation of damages.⁷¹ But testimony regarding the company's ignorance of plaintiff's susceptibility to nervous disturbance will not be accepted.⁷²

66. Plaintiff Not Accountable for Oversight of Previous Conductor.

"The plaintiff was not called upon to question the right of the first conductor in taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage on its cars." *Sloane v. Southern California R. Co.*, 111 Cal. 668, 677, 44 Pac. 320, 32 L. R. A. 193.

67. Action in Damages for Breach of Contract.—*Hufford v. Grand Rapids & I. R. Co.*, 53 Mich. 118, 18 N. W. 580; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481.

68. Action in Damages for Wrongful Expulsion.—*Laird v. Pittsburg Tract. Co.*, 166 Pa. St. 4, 31 Atl. 51; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351.

69. Presumption That Police Officer Acts Officially.—When a disorderly person is arrested by a police officer, the presumption is that the officer is acting in an official capacity and not as the agent for the party who is by law required to pay him. *Foster v. Grand Rapids R. Co.*, 140 Mich. 689, 104 N. W. 380.

70. Rules of Company Irrelevant. A company of course retains the right of enacting rules and regulations for the management of its affairs, but, in an action by a passenger ejected from a car upon presentation of a ticket regularly punched, such rules and regulations tending to show the *intention* of the company

are not admissible. *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 31 N. W. 544.

"The plaintiff had a right to rely upon statements of the agent that it was good and entitled him to a ride between the two stations. It was a contract for a ride between two stations that the defendant's agent had a right to make, and did make, with the plaintiff. The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties by which the defendant should thereafter recognize the rights of plaintiff in his contract, and neither the company nor any of its agents, could thereafter be permitted to say the ticket was not such evidence and conclusive upon the subject." *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 31 N. W. 544. See also *Lawshe v. Tacoma R. & P. Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350.

71. Aggravation of Damages. "Although mental suffering alone will not support an action, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of. (3 *Sutherland On Damages*.)" *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 680, 44 Pac. 320, 32 L. R. A. 193.

Rule in Ireland the Same.—*Bell v. Great Northern R. Co.*, L. R. 26 Ir. 428.

72. Ignorance of Plaintiff's Susceptibility to Shock Immaterial. "Whether the defendant or its

B. RES GESTÆ. — All the circumstances and conversations between the parties from the commencement of the relation of passenger and carrier to its termination are of the *res gestæ*,⁷³ as well as exclamations of children in the custody of the passenger.⁷⁴ But statements made between employes and strangers to the action are incompetent when not a part of the *res gestæ*.⁷⁵

C. CUSTOM. — Under an ordinance providing for the segregation of races upon street cars, a passenger ejected for refusing to occupy

agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to recovery therefor." *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 680, 44 Pac. 320, 32 L. R. A. 193; *Baltimore R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134; *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646, 4 C. C. A. 540.

73. Circumstances and Conversations at the Time, Part of the Res Gestæ. — "The ejection and fight were really part and parcel of one and the same transaction, and the concluding struggle was really the result of the attempt by Reed to get on the car, and the conductor to still prevent him from riding. It was certainly competent to prove these facts, both to prove what injury the passenger sustained from the continuance of the assault on the ground, and to throw light on the character of the transaction, the amount of force used, and the spirit and method adopted by the conductor in his attempt to execute what he believed to be his duty. The admission of the evidence can be justified on many grounds, and there is no evident reason why the proof respecting it should have been excluded." *Denver Tramway Co. v. Reed*, 4 Colo. App. 500, 36 Pac. 557.

Exclamations at the Time. *Jackson v. St. Louis S. W. R. Co.*, 52 La. Ann. 1706, 28 So. 241.

"The *res gestæ* commenced when he paid his fare, and includes all the conversation between himself and the conductor in respect to the pay-

ment of his fare while riding on the car and at the time immediately after he was ejected, and just after he got on the car again." *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897.

74. Exclamations as Evidence of Fright. — "The trial court excluded statements of the manifestations of the child saying that the fact of 'their excitement cannot be taken.' In this ruling his honor was in error. The excluded testimony was competent and should have been considered. It related to a fact which formed part of the *res gestæ* and which, in the minds of the jury, might have shed some light on the immediate issue as to the real demeanor of the conductor towards the plaintiff. The spontaneous manifestations of the children were just so much of the transaction itself and cannot be separated from it. Proof of them is essential to a true and complete history of the thing done. *Sudden exclamations and outbursts of bystanders as well as of the participants, are parts of the res gestæ, and as such may properly be brought forward in evidence, whenever the occurrence producing them is under judicial investigation.*" *O'Rourke v. Street R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614; *Twomley v. Central Park, N. & E. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162; *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

75. Statements by Witnesses to Conductor Not Admissible. — *Foster v. Atlanta Rapid Transit Co. (Ga.)*, 2 St. Ry. Rep. 75; *Birmingham R., L. & P. Co. v. Mullen*, 138 Ala. 614, 35 So. 701. See article "RES GESTÆ," Vol. XI.

the proper section of the car, may show that it was customary for the company to permit the intermingling of races on its cars.⁷⁶

Where it is customary for a newsboy to board street-cars while selling newspapers, it has been held that evidence showing that he was forcibly ejected or compelled to jump from a moving car to his injury, is admissible,⁷⁷ though in some jurisdictions, even though he be pushed from the car, the carrier is not liable.⁷⁸

D. DISORDERLY CONDUCT ALLEGED BY DEFENSE. — Plaintiff having been ejected for alleged disorderly conduct cannot prove character by evidence of subsequent arrest and acquittal on a similar charge.⁷⁹

E. CHARACTER OF EMPLOYEE. — Nor is evidence of the general character and disposition of an employee admissible in an action based merely upon breach of contract.⁸⁰ In any event his general character and disposition must be excluded, as the only subject of inquiry would, even under proper pleading, be his character and disposition at that particular time.⁸¹

76. Customary Practice of Company. — In *Walddauer v. Vicksburg R. & L. Co.*, 88 Miss. 200, 40 So. 751, a passenger was ejected from a car, and caused to be arrested for refusing to leave the rear platform and take his stand on the front of the car, under a law providing for the separation of races. It was held error to refuse to admit testimony to establish that it was the custom of the appellee to permit passengers of both races to occupy the back platforms of street cars.

77. Newsboy Injured From Forceful Ejection. — "If he was forcibly ejected, by anyone for whom the defendant was responsible, he is entitled to recover, no matter how he got on the train, since there is no law authorizing the taking off of a boy's arm at the shoulder as a penalty for trespassing on a railroad or any other property." *Jackson v. St. Louis S. W. R. Co.*, 52 La. Ann. 1706, 28 So. 241; *Biddle v. Hestonville, M. & F. P. R. Co.*, 112 Pa. St. 531, 4 Atl. 485; *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.) 435; *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269, 68 N. E. 238.

Testimony of One Witness Held Sufficient. — *Chicago City R. Co. v. O'Donnell*, 207 Ill. 478, 69 N. E. 882.

78. A trespasser, though a boy, may be forced off a car. *Coll v. Toronto R. Co.*, 25 Ont. App. (Can.)

55; *Philadelphia Trac. Co. v. Orban*, 119 Pa. St. 37, 12 Atl. 816.

Statements Out of Court. — In *Nussbaum v. Louisville R. Co.*, 22 Ky. L. Rep. 271, 57 S. W. 249, the appellant introduced a witness by the name of Franklin, expecting to prove by him that he was present, and saw the motorman push the boy from the car, and that he fell under the feet of the passing team. But Franklin swore to the contrary, making, in substance, the same statement as the motorman as to what occurred. Appellant then introduced his attorneys and proved by them that Franklin had before the trial stated to them that the motorman pushed the boy off the car, and caused him to fall under the passing team. The court instructed the jury that this evidence was only to be considered so far as it affected the credibility of the witness Franklin. This was held proper since the statements of Franklin out of court were not substantive testimony of what occurred.

79. Subsequent Conduct Irrelevant. — Evidence that the plaintiff who was ejected for alleged disorderly conduct was several days thereafter arrested for disorderly conduct and acquitted, is inadmissible. *Vadney v. Albany R.*, 47 App. Div. 207, 62 N. Y. Supp. 140.

80. *Braymer v. Seattle R. & S. R. Co.*, 35 Wash. 346, 77 Pac. 495.

81. Character and Disposition at

F. ACTION FOR PHYSICAL INJURIES.—Where plaintiff alleges physical injury caused by defendant, he may introduce testimony to show that the conductor wilfully pushed him off the car.⁸² However, a passenger who presents an invalid transfer, should either pay his fare or alight peaceably, and if he resists efforts to eject him, he will not be permitted to prove injuries caused by necessary forcible expulsion, in aggravation of damages.⁸³

That Time.—*Braymer v. Seattle R. & S. R. Co.*, 35 Wash. 346, 77 Pac. 495.

82. Where Defendant's Act Is Alleged To Be Cause of Injury, evidence on the part of the plaintiff that the conductor wilfully pushed him off the car is proper. *Block v. Third Ave. R. Co.*, 60 App. Div. 191, 69 N. Y. Supp. 1107.

83. Evidence of Injuries From Forcible Expulsion Induced by Resistance.—“When the conductor demanded that plaintiff pay her fare or leave the car, she would have been justified in refusing to pay and in leaving the car on the command of the conductor and holding appellee responsible; and had she done so, in-

stead of resisting the conductor, she would not have received the injuries complained of.” *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626.

“If the company has agreed to furnish him with the proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but he is bound to yield for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way.” *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

STREETS.—See Highways; Municipal Corporations; Special Assessments.

STRIKING OUT AND WITHDRAWAL OF EVIDENCE.

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I. GENERAL RULE.

Where objectionable evidence is before a court, such evidence should, under proper circumstances, be stricken out or withdrawn by the court on motion of one of the parties to the action at the trial of which the evidence is offered,¹ or on the court's own mo-

1. *United States*. — *Jones v. Vanzandt*, 2 McLean 596, 13 Fed. Cas. No. 7,501.

Alabama. — *Bibby v. Thomas*, 131 Ala. 350, 31 So. 432.

Arizona. — *Pringle v. King*, 78 Pac. 367.

California. — *People v. Colvin*, 118 Cal. 349, 50 Pac. 539.

Colorado. — *Christian v. Tucker*, 1 Colo. 49.

Florida. — *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Lake Side Press & P. E. Co. v. Campbell*, 39 Fla. 523,

22 So. 878; *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Dickens v. State*, 38 So. 909.

Illinois.—*Clark v. Carr*, 45 Ill. App. 469; *Rowell v. Chicago G. W. R. Co.*, 92 Ill. App. 103; *Chicago, P. & St. L. R. Co. v. Blume*, 137 Ill. 448, 27 N. E. 601.

Indiana.—*Heady v. Brown*, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85.

Iowa.—*Payne v. Dicus*, 88 Iowa 423, 55 N. W. 483; *State v. Dexter*, 115 Iowa 678, 87 N. W. 417; *Duer v. Allen*, 96 Iowa 36, 64 N. W. 682.

Kansas.—*Hynes v. Jungren*, 8 Kan. 391.

Missouri.—*Vette v. Johnson*, 43 Mo. App. 300; *Wilson v. Wilson*, 106 Mo. App. 501, 80 S. W. 711.

Nebraska.—*Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744.

New York.—*Bishop v. Hendrickson*, 16 N. Y. Supp. 799, 42 N. Y. St. 37; *Keegan v. Third Ave. R. Co.*, 34 App. Div. 297, 54 N. Y. Supp. 391; *Mersereau v. Mersereau*, 49 App. Div. 647, 63 N. Y. Supp. 336; *Parsons v. New York Cent. & H. R. R. Co.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683; *McDermott v. Brooklyn Heights R. Co.*, 94 N. Y. Supp. 516.

South Carolina.—*Norris v. Clink-scales*, 59 S. C. 232, 37 S. E. 821.

Texas.—*Sims v. Chance*, 7 Tex. 561; *Gulf, C. & S. F. R. Co. v. Matthews* (Tex. Civ. App.), 89 S. W. 983.

Motion to Strike Out—Objection—Distinguishing Features. Where a question is asked a witness and it is apparent from the nature of the question that the answer will be inadmissible, the proper remedy is to object to the admission of the answer called for; but when evidence is already before the court the proper remedy is by motion to strike out. In *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061, the court said: "The witness Boyd was a surveyor, and, in giving his testimony, stated: 'I do not think the downtown monuments were changed.' Counsel for plaintiff then objected to the witness testifying as to what he thought about the matter, and the objection was overruled. The witness had been testifying about certain monuments and

a survey made by Mr. Bassett, and incidentally made the said remark. No motion was made to strike the remark out, and the witness went on testifying as to the facts without objection. It is clear that there was no prejudicial error in the ruling complained of, for two reasons: 1. The remark objected to was entirely inconsequential; 2. The remark was made before the objection, and, if counsel deemed it injurious to his case, a motion should have been made to strike it out." See also *Smith v. Dawley*, 92 Iowa 312, 60 N. W. 625; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696.

Form of Motion—May Be in Form Objection.—In *Waddell v. Metropolitan St. R. Co.*, 113 Mo. App. 680, 88 S. W. 765, which was an action for personal injuries, the court said: "The following is from the direct examination of one of plaintiff's witnesses: 'Q. Now, after the car stopped, did the motor-man get out? A. Well, no. It was a good thing he didn't, too. Q. How is that? A. He didn't stay there any longer than he had to. They would have mobbed him. Counsel for Defendant: I object to that as stating the opinion of the witness; as irrelevant, incompetent, and immaterial.' The objection was overruled. The claim of defendant that the matter injected by the witness into his answer was extraneous to the issues and highly prejudicial must be sustained. . . . Improper statements of witnesses must be pointed out and objected to, else the right to complain is waived. The fundamental principle controlling the subject is that the trial court must be given a fair opportunity to correct errors as they arise. Parties will not be permitted to take advantage in the appellate court of errors concealed from the trial judge, or to which his attention has not been specifically directed. But where it appears that objectionable statements in the answer of the witness have been made a subject of timely and specific complaint, the function of a motion to strike out is accomplished, and its purpose subserved. Such motion is but a form of objection, and is not

tion.² But it is sometimes held to be within the discretion of the court to strike out evidence, and that the only remedy to which the aggrieved party is entitled is obtained by asking the court for an instruction to disregard such evidence.³

II. WHEN ALLOWABLE.

1. In General. — Immaterial, irrelevant, incompetent or improper

devoid of legal equivalents. The objection under consideration was in substance a motion to strike out, and will be so regarded. The error was harmful, and requires that a new trial be ordered."

Part of Testimony May Be Struck Out. — A part of witness' answer, subject to an objection, may be struck out by the court and the remainder allowed to stand. *Texas Portland Cement & Lime Co. v. Ross*, 35 Tex. Civ. App. 597, 81 S. W. 94. See also *Frenchi v. New York City R. Co.*, 46 Misc. 612, 92 N. Y. Supp. 771; *Campiglia v. New York City R. Co.*, 46 Misc. 612, 92 N. Y. Supp. 771.

2. United States. — *Specht v. Howard*, 16 Wall. 564.

Alabama. — *Jarvis v. State*, 138 Ala. 17, 34 So. 1025.

Georgia. — *Salter v. Williams*, 10 Ga. 186.

Louisiana. — *Roquest v. Boutin*, 14 La. Ann. 44.

Maine. — *Caven v. Bodwell Granite Co.*, 99 Me. 278, 59 Atl. 285.

Missouri. — *Clark v. Hill*, 69 Mo. App. 541.

North Carolina. — *McAllister v. McAllister*, 34 N. C. (12 Ired. L.) 184; *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810.

Oregon. — *First Nat. Bank v. Home Ins. Co.*, 33 Or. 234, 52 Pac. 1055.

Vermont. — *Coruth v. Jones*, 77 Vt. 441, 60 Atl. 814.

Birchfield v. Russell, 3 Coldw. (Tenn.) 228. This was an action of slander. A judgment was rendered in the lower court, from which an appeal in error is prosecuted to this court. The court said: "The error assigned, is, the admission of illegal testimony in the progress of the trial. The defendant's attorney, under objection made at the time, asked the witness as to the general char-

acter of the plaintiff. The objection was overruled by the court, and the witnesses allowed to testify as to his general character before the speaking of the slanderous words. Several witnesses spoke of the plaintiff's bad reputation; and, on cross-examination, particular facts, based upon rumor, were brought out, involving the plaintiff's infidelity to his marriage vow. The evidence went to the jury, but, upon reflection, the presiding judge stated, in his charge, after the testimony was closed, that he erred in admitting the testimony, and that 'the jury would discard from their minds all the evidence touching the plaintiff's general character, except such as impeached his general character for veracity before the time he was sworn before the Justice.' The action of the Circuit Judge, in admitting evidence of the general character of the plaintiff, and then withdrawing it, after the testimony was closed, it is insisted, was error, and we are called upon, on this ground, to reverse the judgment.

. . . It is clear the Court erred in admitting the testimony; but he had the justice and moral integrity to retrace his steps, as soon as he was convinced of the error into which he had fallen, and to withdraw the evidence from the jury. What more could he do? . . . The time at which the illegal testimony was withdrawn, constituted no error for which we could reverse."

3. Marks v. King, 64 N. Y. 628; *Harrington v. City of Buffalo*, 50 Hun 601, 2 N. Y. Supp. 333; *Hogan v. Mutual Aid & Acc. Assn.*, 75 Hun 271, 26 N. Y. Supp. 1081; *Cohu v. Husson*, 14 Daly (N. Y.) 200, *affirmed* 113 N. Y. 662, 21 N. E. 703; *Smith v. Nassau Elec. R. Co.*, 57 App. Div. 152, 67 N. Y. Supp. 1044; *Parker v. Paine*, 37 Misc. 768, 76 N.

evidence should be stricken out by the court on motion of the party aggrieved,⁴ or allowed to be withdrawn by the offering party.⁵

2. Hearsay or Not Responsive.—A motion to strike out is a proper remedy when a question, proper in itself, has been propounded to a witness, but the answer given in response thereto is objectionable because hearsay⁶ or not responsive;⁷ and unless a

Y. Supp. 942; *Telegraph Co. v. Messenger*, 5 P. F. Smith (Pa.) 262.

4. Alabama.—*Birmingham Roll Mill Co. v. Rockhold*, 42 So. 96.

Connecticut.—*Levidow v. Starin*, 77 Conn. 600, 60 Atl. 123.

Florida.—*Snelling v. State*, 49 Fla. 34, 37 So. 917.

Iowa.—*State v. Dexter*, 115 Iowa 678, 87 N. W. 417.

Michigan.—*People v. Pope*, 108 Mich. 361, 66 N. W. 213.

Missouri.—*Burns v. Lindell R. Co.*, 24 Mo. App. 10.

Nebraska.—*McKibbin v. Day*, 104 N. W. 752.

New York.—*Jennings v. Osborne*, 13 Daly 518; *Bishop v. Hendrickson*, 16 N. Y. Supp. 799, 42 N. Y. St. 37; *Date v. New York Glucose Co.*, 104 App. Div. 207, 93 N. Y. Supp. 249; *Mackey v. Interurban St. R. Co.*, 115 App. Div. 467, 101 N. Y. Supp. 439.

Wyoming.—*Metz v. Willitts*, 14 Wyo. 511, 85 Pac. 380.

Where oral evidence has been introduced concerning the purchase of a school land certificate by the plaintiff from a defendant, and it is established by the cross-examination of the defendant that the contract for such purchase was in writing, it is error for the trial court, upon proper motion being made, to refuse to exclude all oral evidence concerning the transaction, after such written contract had been read in evidence. When parties have committed their engagements to paper, the law presumes that the whole contract is included in the written agreement. *Rich v. Northwestern Cattle Co.*, 48 Kan. 197, 29 Pac. 466.

Fact of Irrelevancy or Immateriality Must Be Clearly Shown.—In *Chester v. Bakersfield T. H. Assn.*, 64 Cal. 42, 27 Pac. 1104, it appeared that no objection had been made in the lower court to the testimony of a certain witness until after it was all in, and then a motion was made

to strike out a part of it on the ground that it was immaterial and irrelevant. This was refused. In upholding the position of the lower tribunal the court said: "A motion to strike out on that ground ought not to be granted unless the evidence is clearly irrelevant and immaterial. The evidence which the court refused to strike out is not, in our opinion, clearly of that character."

5. Spence v. McMillan, 10 Ala. 583; *Davenport v. Harris*, 27 Ga. 68; *Chapin v. Curtenius*, 15 Ill. 427; *King v. Cooper, Walk. (Miss.)* 359; *Wright v. Gillespie*, 43 Mo. App. 244; *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497.

6. Alabama.—*McDonald v. Wood*, 118 Ala. 589, 24 So. 86; *Theodore Land Co. v. Lyon*, 41 So. 682.

Arkansas.—*Lovell & Co. v. Sneed*, 79 Ark. 204, 95 S. W. 157.

Florida.—*Dickens v. State*, 38 So. 909.

Iowa.—*In re Dunahugh's Will*, 130 Iowa 692, 107 N. W. 925.

Kansas.—*Stone v. Bird*, 16 Kan. 488; *Hite v. Stimmell*, 45 Kan. 469, 25 Pac. 852.

Maryland.—*Baltimore & O. R. Co. v. Shipley*, 39 Md. 251.

Missouri.—*Thaxter v. Missouri Pac. R. Co.*, 123 Mo. App. 636, 100 S. W. 1102.

New York.—*Farmers' Bank v. Cowan*, 2 Abb. Dec. 88; *Turner v. City of Newburgh*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453.

In *Swearingin v. Hartford Ins. Co.*, 52 S. C. 309, 29 S. E. 722, a witness in answer to a question as to how she knew certain facts said: "My agent told me so." The court held that it was error not to strike out the evidence, on motion, as hearsay.

7. California.—*Yaeger v. Southern Cal. R. Co.*, 51 Pac. 190.

District of Columbia.—*Woodiey v. Baltimore & P. R. Co.*, 8 Mackey 542.

Florida. — Jacksonville Elec. Co. v. Sloan, 42 So. 516.

Indiana. — Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961; Diamond Block Coal Co. v. Cuthbertson (Ind. App.), 67 N. E. 558, 73 N. E. 132, *affirmed* 73 N. E. 818, 166 Ind. 290, 76 N. E. 1060.

Kansas. — City of Atchison v. Rose, 43 Kan. 605, 23 Pac. 561; City of Wyandotte v. Gibson, 25 Kan. 236; Kansas F. F. Ins. Co. v. Hawley, 46 Kan. 746, 27 Pac. 176.

Michigan. — Williams v. Clink, 90 Mich. 297, 51 N. W. 453, 30 Am. St. Rep. 443.

Missouri. — Burns v. Lindell R. Co., 24 Mo. App. 10; State v. Sykes, 191 Mo. 62, 89 S. W. 851.

Nebraska. — German Nat. Bank v. Leonard, 40 Neb. 676, 59 N. W. 107; Arabian Horse Co. v. Bivens, 96 N. W. 621.

New Mexico. — Territory v. Smith, 12 N. M. 229, 78 Pac. 42.

New York. — Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180; Crippen v. Morss, 49 N. Y. 63; Cowan v. Third Ave. R. Co., 56 Hun 644, 9 N. Y. Supp. 610; Barton v. Govan, 116 N. Y. 658, 22 N. E. 556; Shaw v. New York Elev. R. Co., 187 N. Y. 186, 79 N. E. 984, *affirming* 110 App. Div. 892, 96 N. Y. Supp. 1145.

South Dakota. — Davis v. Holy Terror Min. Co., 107 N. W. 374.

Wisconsin. — Simon v. State, 125 Wis. 439, 103 N. W. 1100.

In *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121, the court said: "This action was brought to recover for personal injuries caused by a defective sidewalk. The negligence charged against the defendant was that it did not exercise reasonable care to keep the sidewalk in a safe condition. . . . The plaintiff lived but a short distance from the place of the accident, and went home immediately, where she was met at the door by her daughter. The daughter was asked: 'State what was the appearance of your mother at that time.' No objection was made to the question. The witness answered: 'When I met her at the door, she said: "Give me your hand. I am terribly hurt. I fell on the sidewalk, and I feel a tearing sensation around here" (indicating). She looked ter-

ribly bad.' All that appears from the record to have occurred after the witness gave this answer is as follows: 'Objected to as part of the *res gestae*.' No motion was made to strike out the answer. The court made no ruling on the objection, no exception was taken, and the examination of the witness proceeded. The question was entirely proper; at least, there was no objection to it. The answer, so far as it related to what plaintiff said, was not responsive to the question, and no motion was made to strike it out. Further comment is unnecessary."

In *Standard Life & Acc. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856, the court said: "This was an action by Eve Davis against the Standard Life & Accident Insurance Company to recover \$5,000 upon an accident policy issued to Jonathan M. Davis, her husband, and payable to her in the event of his death. The petition alleged that Jonathan M. Davis was accidentally injured by the kick of a mule on January 21, 1893, and that afterwards, about February 27, 1893 he accidentally fell from a buggy, and that by reason of these injuries, and independent of other causes, his death resulted, on March 15, 1893. . . . Complaint is made of the ruling of the court upon objection to a hypothetical question submitted to an expert witness, who had examined the brain of Davis some time after his death. The hypothetical case put embodied several matters and facts recited in detail, and upon which there was testimony, and ended with the inquiry as to what the witness would say was the cause of the condition in which the brain of Davis was found. His answer was that the cause of Davis' death commenced at the time of certain injuries, which he said were quite sufficient to produce death. The complaint is that the question and its answer invaded the province of the jury, and in fact disposed of the principal issue submitted to the jury for decision. The only objection made was to the form of the question, in which we find no substantial defects. The answer, it is true, is not responsive to the question; for, instead of giving the condition of the brain, the witness went

motion to strike out is made the objection is waived.⁸ But it is held in at least one case that it rests within the discretion of the trial court whether or not to strike out testimony on the ground that it is not responsive to the question asked.⁹

Contra, Where Evidence Is Otherwise Competent.—In a Montana

further, and stated the cause of the death. No objection was made to the answer, and the attention of the court was not called to its objectionable character. 'Where the answer of the witness is not responsive to the question put to him, an objection to the question is not available on error. There must be a motion to strike out the answer.'

Question Altered, or Testimony Limited, by the Court.—Where a witness is asked a question and the court alters the question, if the witness gives an answer irresponsive to the question as altered, the proper remedy is by motion to strike out. *Crawford v. Southern R. Co.*, 56 S. C. 136, 34 S. E. 80.

In *Jaquish v. Town of Ithaca*, 36 Wis. 108, which was an action to recover damages for injuries to his person and property suffered by plaintiff because of a defective bridge in the defendant town, it appeared that plaintiff attempted to drive a team of horses across such bridge, but the horses broke through or ran off the bridge into the water, by reason of which the horses were killed. It appeared that the health of the plaintiff was seriously impaired in consequence of exposure and exertion in endeavoring to rescue his horses. The court said: "Some slight testimony was introduced on behalf of the defendant tending to show that the plaintiff was intoxicated when he attempted to pass over the bridge. To rebut this testimony the plaintiff called one Stofer as a witness, who testified, without objection, that he did not know that the plaintiff was in the habit of using intoxicating liquors. The plaintiff then called one De Lap, and put to him this question, which was objected to: 'What are his (the plaintiff's) habits as to the use of intoxicating liquors?' The court said: 'His general habits are not in issue, but the testimony will be allowed so far as it bears upon

the question of his being under the influence of liquor at the time of the accident.' To this ruling the defendant excepted, and the witness answered: 'I have no knowledge of Jaquish other than a man of perfectly temperate habits.' No objection was made that the answer was not responsive to the question as limited by the court, and no motion to strike it out was interposed. We find no error in the ruling. The learned judge limited the question to the very point in issue, to wit, the alleged intoxication of the plaintiff at the time of the accident. If the answer was not responsive to the question thus restricted, a motion should have been made to strike it out."

Stricken Evidence Reinstated. In *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596, it was held that where an answer to a question was stricken out as not responsive, and the witness in reply to a subsequent question referred to his former answer as an answer to the latter question, the evidence stricken out is reinstated.

Cross-Examination.—The rule applies as to testimony brought out on cross-examination. *In re McKenna's Estate*, 143 Cal. 580, 77 Pac. 461.

8. *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833; *Borin v. Johnson*, 63 Kan. 885, 65 Pac. 640; *Pren-tiss v. Strand*, 116 Wis. 647, 93 N. W. 816; *Hill v. Bahrs*, 158 Ill. 314, 41 N. E. 912; *Hagins v. Aetna Life Ins. Co.*, 72 S. C. 216, 51 S. E. 683.

"Where an improper answer is given to a legitimate question, or where a part of the answer is improper, the party complaining must move to strike out the answer, or the part he considers improper, in order to have it reviewed in this court." *Reiley v. Haynes*, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737.

9. *Nies v. Broadhead*, 75 Hun 255, 27 N. Y. Supp. 52.

case it was held that if evidence is in every respect competent it should not be stricken out merely because it is not responsive to the question which brought it forth.¹⁰

3. Evidence Relevant When Received — Afterwards Irrelevant. In cases where evidence is relevant when admitted as against a part of the defendants, but afterwards becomes irrelevant on account of the dismissal of the complaint as to them, their co-defendants, against whom the action has been sustained, should move to have the evidence stricken out on the ground of its irrelevancy.¹¹

4. Evidence Admitted on Condition. — Where evidence, clearly incompetent, is admitted on condition that the party offering it will introduce further evidence to render the former competent, upon failure to do so, the aggrieved party is entitled to a remedy by a motion to strike out,¹² and it is held error to overrule such a mo-

10. *Harrington v. Butte & B. Min. Co.*, 19 Mont. 411, 48 Pac. 758.

11. *Tuomey v. O'Reilly*, 3 Misc. 302, 22 N. Y. Supp. 930.

12. *United States V. Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *Wood v. Chapman*, 24 Colo. 134, 49 Pac. 136; *People v. Bird*, 132 Cal. 261, 64 Pac. 259; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437, 66 Pac. 799.

In *Long v. Osborn*, 91 Iowa 160, 59 N. W. 14, the court said: "The plaintiff owns and seeks to recover the possession of a farm in Decatur county, which is occupied by the defendant. It was leased to the defendant for the year which commenced March 1, 1891, and he claims that in November it was leased to him for the next year. That is denied by the plaintiff. 1. The lease for the first year was in writing. The defendant claims that the lease for the second year was verbal, and that it was made on behalf of the plaintiff by one S. A. Gates, as agent. The defendant testified that the business involved in the execution of the first lease was transacted by Gates in the presence of Long; and he then testified that he went to see Gates about renting it for another year, as we understand the record, in October. He was then asked to tell what occurred. The plaintiff objected to the question for the reason that it had not been shown that Gates was authorized to act for the plaintiff. The defendant stated that he expected to show that Gates was

the agent of plaintiff, and the objection was overruled. The defendant then testified at some length respecting negotiations with Gates, at different times, in regard to renting the farm, and that terms were finally agreed upon, and a verbal lease for another year made by Gates, for the plaintiff. When the evidence for the defendant had been submitted, the plaintiff moved that all the testimony showing declarations of Gates, as the agent of Long, be withdrawn from the jury, on the ground that the agency had not been shown. The motion was overruled. We think it should have been sustained. There was some evidence which tended to show that Long knew that Osborn was intending to remain on the farm another year; and was willing to have him do so, and directed him where to do certain work, which defendant claims was to be done in payment of rent. That evidence may have been competent, as tending to show a ratification by plaintiff of the alleged agreement entered into by Gates for a second lease; but it did not show that he was authorized to act as agent when the declarations in question were made, and there was no other evidence tending to show that he had such authority."

People v. Powell, 87 Cal. 348, 25 Pac. 481. Upon trial of a charge of murder evidence was admitted in behalf of the prosecution, of conversations between a witness and certain third parties, not in the presence of the defendant, and with

tion;¹³ or the court may strike out on its own motion;¹⁴ though it is sometimes held that the aggrieved party is, as a matter of right, entitled only to an instruction to the jury to disregard such evidence.¹⁵

5. Evidence Admitted by Consent. — Where, on the trial of a cause, incompetent evidence is admitted with the consent of a party, but subject to his objection, the proper remedy of the party desiring to nullify the effect thereof is by motion to strike out.¹⁶ But where defective evidence is received with the consent of an opponent, without objection reserved, a subsequent motion to strike out will be denied.¹⁷

6. Witness Refusing To Be Cross-Examined. — Where a witness has been examined and refuses on cross-examination to answer a question pertinent to the issue, such action will entail upon the party calling him the loss of his direct testimony, *i. e.*, his direct testimony will be stricken out.¹⁸

7. Witness Absents Himself. — Likewise it is within the discretion of the court to strike out testimony where a witness by absenting himself has prevented the opposite party from cross-examining¹⁹

which he was in no way connected. It was admitted by the lower court upon the assurance of counsel for the defendant that it would be brought home to the defendant, which was not done. The prosecution having failed to connect the defendant with the subject-matter of the conversation, the defendant moved to strike out the evidence. The motion was denied. *Held*, error. The evidence should have been stricken out.

13. *Little Klamath W. D. Co. v. Ream*, 27 Or. 129, 39 Pac. 998; *Huckins v. Kapf* (Tex. App.), 14 S. W. 1016; *Brennan v. People*, 113 Ill. App. 361.

14. *Barker v. Deignan*, 25 S. C. 252; *Martin v. State*, 17 Ohio C. C. 406, 9 O. C. D. 621.

15. *Marks v. King*, 64 N. Y. 628, *affirming* 1 Hun 435; *Platner v. Platner*, 78 N. Y. 90; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558.

16. *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; *Thayer v. Luce*, 22 Ohio St. 62.

17. *Markey v. State*, 47 Fla. 38, 37 So. 53; *Long v. Girdwood*, 150 Pa. St. 413, 24 Atl. 711, 30 Wkly. Notes Cas. 473.

18. *Burnett v. Phalon*, 19 How. Pr. (N. Y.) 530, 11 Abb. Pr. 157.

McElhannon v. State, 99 Ga. 672,

26 S. E. 501. This was an indictment for mutilating and destroying the books of a corporation with intent to defraud and injure it. One of the alleged motives for the perpetration of the offense being a purpose on the part of the accused to conceal a misappropriation by him of money belonging to the corporation, it was competent to show in behalf of the state that shortly before the disappearance of the books the accused had been seen gambling; but, when the witness offered for this purpose declined, on cross-examination, to answer certain pertinent questions, on the ground that in so doing he would criminate himself, the whole of his testimony on this subject should have been ruled out.

19. In *Price v. Wilson*, 67 Barb. (N. Y.) 9, the court said: "This is an equity action, brought for the purpose of settling a partnership and for an accounting among the partners. It has been referred to a referee, who has made his report; from which the defendants appeal. During the trial, Jay Gould was examined as a witness on the part of the defense. Pending his cross-examination, the referee adjourned the trial. Gould neglected to appear for further cross-examination. He was required by the referee to appear on

or completing his cross-examination.²⁰ But where a witness having been examined and cross-examined leaves the court room without being notified by cross-examining counsel that his attendance is further required for cross-examination, it is no ground of exception that the trial court refused to order that such witness either return to be further examined, or have his testimony stricken out.²¹ But in at least one case it is held that although cross-examining counsel notify the witness, unless he goes further and notifies

one of three days, or, in default thereof, to have his examination stricken out. He failed to appear, and upon the plaintiff's motion and on notice to Gould's counsel, his testimony was stricken out. There was no injustice or impropriety in this course. The plaintiff was entitled to the benefit of the cross-examination; and the defendant Gould was in fault for not attending."

20. Succession of Townsend, 40 La. Ann. 66, 3 So. 488.

Matthews v. Matthews, 53 Hun 244, 6 N. Y. Supp. 589. This was a suit for divorce on the ground of adultery. The cross-examination of a witness who had testified to defendant's guilt was suspended, it being stipulated between the parties and the witness that he should be present when called for further cross-examination. Upon being recalled the witness failed to appear. *Held*, that it was reversible error to refuse to strike out the testimony of such witness.

Succession of Rieger, 37 La. Ann. 104. On the trial of a suit by one of the heirs of a succession against the surviving widow of the deceased, for the purpose of compelling her to include in the inventory property which she claimed as part of her separate estate, the surviving widow, who was the administratrix, went on the stand. She was examined in chief, and while she was being cross-examined, she complained of being sick and asked to postpone her cross-examination, which was, in consequence, continued to the next day. On that day she sent an excuse for continued illness, whereupon the case was continued to a fixed day, with the warning by the court to her counsel that, in case of her continued illness, her testimony should

be taken under a commission. Her counsel made no effort in that direction, although notified by the opposite counsel of their readiness to proceed to take the testimony under a commission. On the day fixed for the final hearing, the administratrix failed to appear, and counsel for opponents insisting for their right of cross-examination, the court entered an order striking her testimony, as far as given, from the record. The court said: "We are not disposed to interfere with the discretion wisely vested in courts of the first instance in their rulings on such points. If the judge believed, as he had every reason to conclude, that this party, by her persistent failure to submit to a cross-examination, and by her conduct impeded the settlement of the succession which she represented, with possession of all the property, it was his duty to put an end to such a state of things. After due warning to her counsel, the judge used the most efficient means of preventing a denial of justice, and we cannot take the responsibility of disturbing his ruling."

21. In Ward v. Fuller, 7 Gray (Mass.) 179, which was an action of contract for work and labor, the plaintiff testified in his own behalf and was cross-examined. The defendant introduced evidence including his own testimony. Pending his cross-examination, the usual hour of adjournment on Saturday arrived, and the court adjourned till Monday morning, when the cross-examination was completed. The defendant then proposed to recall the plaintiff, but the plaintiff was not in court. Counsel for plaintiff gave a plausible reason for his absence. No notice had been given by the defendant that his further attendance was desired. The

the court as to his intention to further cross-examine, he will not be entitled to a motion to strike out.²²

8. Volunteered Testimony.—Where objectionable evidence is given by a witness voluntarily and not in response to any particular question, a proper remedy of the party injured thereby is by motion to strike out.²³

Contra.—But in Pennsylvania it is held that in such instances a motion to strike out is not a proper remedy, but that the proper course is to ask the court for an instruction that the testimony ought to be disregarded.²⁴

9. Witness Answering Too Quickly.—When a witness answers a question too quickly to give an opportunity to counsel to object to the question before answer, counsel may, after the answer is given, move that it be stricken out on the ground that the question called for an objectionable answer.²⁵

defendant's counsel then moved the court that, as the plaintiff had put himself on the stand as a witness and was now absent without notice to the defendant, he should either come into court for the purpose of being further examined, or his testimony already given should be stricken out. The court denied the motion, declining to take any action relative to the plaintiff's absence. Exception was taken to this ruling of the lower court, but was overruled by Bigelow, J.

22. *Clark v. Harmer*, 9 App. D. C. 1.

23. *Lankford v. State*, 144 Ind. 428, 43 N. E. 444; *Greenup v. Stokes*, 7 Ill. 688; *Lee v. Heuman*, 10 Tex. Civ. App. 666, 32 S. W. 93; *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557; *Waddell v. Metropolitan St. R. Co.*, 113, Mo. App. 680, 88 S. W. 765.

"It is further urged that the lower court properly overruled the motion to exclude the evidence, for the reason that no objection was made to the question asked the witness. It does not appear from the record that any question was asked the witness eliciting the statement objected to; in fact the record does not show that any question was asked at all, but on the contrary, it appears that the witness without any question having been asked him, proceeded to deliver his evidence in a narrative form, and in this manner the objectionable statement, to which the mo-

tion to exclude was addressed, was made. There is nothing by which a party can usually anticipate illegal testimony when the evidence is given in this manner, and, for that reason, the motion to exclude is the proper remedy." *Southern R. Co. v. Crowder*, 135 Ala. 417, 33 So. 335.

24. *Telegraph Co. v. Menger*, 5 P. F. Smith (Pa.) 262.

"The second reason assigned for a new trial is the refusal of the judge to strike out certain testimony contained in answers which, it is alleged, were not responsive to the questions put to the witness and not evidence. An order to strike out testimony which inadvertently, accidentally or unavoidably escapes from a witness and gets to a jury, is altogether unknown to our practice. The proper course is to ask the court for an instruction that the testimony ought to be disregarded." *Owen v. Schmidt*, 14 Phila. (Pa.) 183.

25. *Vernon Ins. Co. v. Glenn*, 13 Ind. App. 340, 40 N. E. 759, 41 N. E. 829; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

In *Board of Trade Tel. Co. v. Blume*, 176 Ill. 247, 52 N. E. 258, the court said: "In regard to the objection to the evidence of the witness Smith, he was asked this question: 'State in a general way what damages, if any, it would be to these lands, in their market value, to construct this line as proposed in this petition.' No objection was interposed to the question, and the witness

10. Evidence Apparently Admissible.—If when evidence is offered it is apparently admissible, but subsequently it is shown to be inadmissible on account of reasons not known or not stated at the time it was offered, counsel may ask to have it stricken out, and it should be stricken out by the court accordingly,²⁶ or the court may

gave the answer heretofore set out, without any objection being made to his evidence from any quarter; but, after the witness had concluded his evidence, we find in the record the following: 'All the foregoing evidence was objected to. Objection overruled and exception taken.' When the witness commenced to answer the question, if appellant desired to call in question the admissibility of his evidence, he ought to have objected to it, and obtained a ruling of the court upon it, or, if the witness answered before appellant had an opportunity to object, a motion to exclude the evidence should have been made."

Answer Given Too Quickly—Right and Duty of Court to Strike Out.—In *Barkly v. Copeland*, 85 Cal. 483, 25 Pac. 1, a question was answered in the trial before the lower court before an objection had been made to the question; and upon the statement that the defendant's counsel had endeavored to state the objection before answer, and was unable to anticipate it, the court, upon motion, struck it out, and the plaintiff excepted. The court said that there was nothing in the exception; that a court had a right and that it was his duty to give the opposite side a chance to object to a question which had been answered too quickly, and to strike out the answer for such purpose.

26. Alabama.—*Hill v. Helton*, 80 Ala. 528, 1 So. 340.

Florida.—*Jacksonville, T. & K. W. R. Co. v. Peninsular Land, T. & Mfg. Co.*, 27 Fla. 1, 157, 9 So. 661, 689, 7 L. R. A. 33, 65.

Illinois.—*Hulick v. Scovil*, 9 Ill. 159.

Indiana.—*Jenney Elec. Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

Iowa.—*State v. Farrell*, 82 Iowa 553, 48 N. W. 940.

Maine.—*Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23.

Minnesota.—*Lake Superior & M. R. Co. v. Greve*, 17 Minn. 322.

Missouri.—*St. Louis D. Co. v. C. C. & Tow. Co.*, 77 Mo. App. 362.

New York.—*Montgomery v. Miller*, 3 Redf. Sur. 154; *Whitman v. Foley*, 125 N. Y. 651, 26 N. E. 725, reversing 54 Hun 634, 7 N. Y. Supp. 310; 53 Hun 631, 7 N. Y. Supp. 954; *Jennings v. Osborne*, 13 Daly 518.

Texas.—*Gulf, C. & S. F. R. Co. v. Ryon* (Tex. Civ. App.), 72 S. W. 72; *Wolf Cigar Stores Co. v. Kramer* (Tex. Civ. App.), 89 S. W. 995.

"The next exception is to the admission of the testimony of a jurymen at a prior term of the court, who was allowed to testify to a conversation had with him by the defendant, wherein the defendant asked him 'to hang out for him.' The defendant's counsel now claim that this conversation was with reference to another case—an indictment then pending against him and about to be tried. Before this testimony was admitted, the justice presiding inquired if the conversation was about this case, and, upon being answered in the affirmative, said: 'I do not see any grounds for excluding any of your client's admissions.' The record does not disclose that the counsel raised the objection that the conversation was not about the case on trial. As it appeared when the testimony was offered, it was clearly admissible. If it was ascertained subsequently that the conversation was about another trial, the counsel should have asked to have had it stricken out, and for appropriate instructions." *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23.

"After said trial had progressed and the evidence closed on both sides, but before the cause was submitted to the jury, it came to the knowledge of the defendant's counsel for the first time, that William L. Brent, a witness sworn and examined as a witness for the plaintiff, was one of the sureties of the plaintiff in her

strike it out on its own motion²⁷ or withdraw it from the consideration of the jury.²⁸ But it has been held that where evidence is properly received, although subsequent developments in the case demonstrate its incompetency, the correct practice is for the litigant against whom it was offered to request the court to instruct the jury to disregard it, and not to ask that it be stricken out.²⁹

Particular Applications of the Rule.—Where evidence is given under a misapprehension of right as to privileged communications, it may be stricken out.³⁰

bond as administratrix of said Joseph T. Mitchell, and thereupon the defendant's counsel prayed the court to reject the evidence which had been given to the jury by the said William L. Brent, contained in the first bill of exceptions, which is made a part of this, on the ground that the said witness was a surety of the plaintiff in her administration bond, and an incompetent witness for the plaintiff in this cause, which fact was unknown to defendant's counsel at the time he was examined; but the court rejected said prayer, but was of opinion, and so instructed the jury, that the said William L. Brent notwithstanding his said suretyship, was a competent witness for the plaintiff. To which refusal to grant said prayer, and to the opinion of the court as given to the jury, the defendant excepted." Exceptions sustained. *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 388.

In *Vickers v. People*, 31 Colo. 491, 73 Pac. 845, a witness qualified himself on the direct examination to testify as to the general reputation of the defendant; but upon cross-examination it was shown that he did not know the general reputation of the defendant in the community where the defendant resided at or about the time of the trial. It further appeared that witness did not reside in the same neighborhood with the defendant. In support of his statement that he knew the general reputation of the defendant, and that it was bad, witness said, when asked how many persons he had talked with upon the subject of the defendant's reputation, "two that worked for him, and one neighbor." Held, that the witness was clearly incompetent to testify to the general reputation of the defendant, and the proper practice required

the testimony to be stricken out on motion.

27. *Mayo v. Mayo*, 119 Mass. 290.

28. *McAllister v. McAllister*, 34 N. C. (12 Ired L.) 184.

29. *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558.

30. In *Mayo v. Mayo*, 119 Mass. 290, the court said: "The libelee called Mrs. French as a witness. He asked her if she was the woman spoken of as being at the hotel with him. She declined to answer, on the ground that it would tend to criminate herself, and the court instructed her that she was not obliged to do so. He then asked her a number of questions, which she answered without objection. Those answers, so far as they were of any materiality or relevancy in the case, would furnish links in a chain of evidence which would tend to convict her either of adultery or of a criminal conspiracy. She then declined to answer further. The court then instructed her as to her rights more fully than at first, and inquired of her if she had fully understood them. She replied that she had not, and the court, being satisfied, 'that she had not fully comprehended her rights, and especially that she had not understood that if she answered upon any subject having any tendency to criminate herself, she must answer fully and minutely both on examination and cross-examination in relation thereto, ruled that she might then claim her privilege, and that the evidence heretofore given by her, having been given under this misapprehension, should be struck out of the case,' to which the libelee excepted. We are of opinion that this course of proceeding of the presiding justice was not open to exception."

Where, upon direct examination, the testimony is given as if upon personal knowledge and is subsequently shown on cross-examination to be hearsay, it may be stricken out.³¹

If a witness on cross-examination answering a proper question makes a statement of fact, but afterwards in the cross-examination shows by his testimony that his statement was founded on hearsay, such evidence should be stricken out on motion of the cross-examiner.³²

Testimony of an alleged conversation between the witness and plaintiff is properly admitted under the statement of plaintiff's counsel that it was in the defendant's presence, but if such latter fact is not established by the testimony of the witness himself it should be stricken from the case.³³

III. WHEN NOT ALLOWABLE.

1. In General.—When evidence is relevant, competent and responsive, it should not be stricken out³⁴ or allowed by the court to

31. *Davis v. Arnold*, 143 Ala. 228, 39 So. 141; *Turner v. Fuhersing*, 67 Ga. 161; *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295; *Shealey v. South Carolina & G. R. Co.*, 67 S. C. 61, 45 S. E. 119; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297.

Bennett v. Smith, 40 Mich. 211. This was an action involving the possession of certain logs. A witness testified that a large quantity of logs were in the possession of a party named, but on cross-examination admitted that he had no personal knowledge about more than three or four of the logs. *Held*, that his testimony should have been struck out.

32. *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644.

33. *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174.

34. *Alabama*.—*Brannan v. Henry*, 142 Ala. 698, 39 So. 92.

California.—*People v. Easton*, 148 Cal. 50, 82 Pac. 840; *Spotswood v. Spotswood* (Cal. App.), 89 Pac. 362.

Connecticut.—*Palmer v. Smith*, 76 Conn. 210, 56 Atl. 516.

District of Columbia.—*Metropolitan R. Co. v. Lond*, 20 App. D. C. 330.

Illinois.—*Star Brew. Co. v. Farnsworth*, 172 Ill. 247, 50 N. E. 228.

Indiana.—*Green v. Witte*, 5 Ind. App. 343, 32 N. E. 214; *Golibart v.*

Sullivan, 30 Ind. App. 428, 66 N. E. 188.

Iowa.—*Campbell v. Ormsby*, 65 Iowa 518, 22 N. W. 656; *DeLay v. Carney Bros.*, 100 Iowa 687, 69 N. W. 1053; *State v. Hossack*, 116 Iowa 194, 89 N. W. 1077; *Stanley v. Core*, 119 Iowa 417, 93 N. W. 343. *Maryland*.—*Myers v. Smith*, 27 Md. 43.

Missouri.—*Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075.

New York.—*Hahn v. Rogers*, 34 Misc. 549, 69 N. Y. Supp. 926; *Hubner v. Metropolitan St. R. Co.*, 77 App. Div. 290, 79 N. Y. Supp. 153; *Deutschmann v. Third Ave. R. Co.*, 87 App. Div. 503, 84 N. Y. Supp. 887; *Ventresca v. Beckwith*, 112 App. Div. 72, 98 N. Y. Supp. 134.

Oregon.—*State v. Warren*, 41 Or. 348, 69 Pac. 679; *Jones v. Peterson*, 44 Or. 161, 74 Pac. 661.

Washington.—*Island County v. Babcock*, 20 Wash. 238, 55 Pac. 114.

In *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858, it appeared that one Newton Kibler had been indicted for the murder of his uncle, Willis D. Kibler. In the county court he was tried, found guilty and sentenced to be hanged. During the progress of his trial he took sundry exceptions to the ruling of the court, and presented a petition for a writ of error to the circuit court of Page county. The writ was granted, but the judg-

ment of the county court was subsequently affirmed, and thereupon Kibler obtained a writ of error from one of the judges of this court. "During the progress of the trial Miley Riley was asked: 'Did you not state to John P. Mauch, on yesterday, in Luray, on the morning after you put Newton Kibler across the river (that being the 5th of November last), Newton Kibler told you that he and his uncle Willis Kibler had had a big fuss on the Friday or Saturday previous, or words to that effect?' To this question the witness replied: 'I didn't say "fuss." I said he told me they had a little difference. Those are the words I said to Mr. Mauch.' The prisoner asked to have this question and answer stricken out, because Mauch was not put upon the stand to impeach Riley. It is very likely that the object of the prosecuting attorney in propounding the question to Riley was to lay the foundation for impeaching him, he being a witness for the defense, by the introduction of Mauch. But Riley's answer is, in itself, admissible evidence. In it he gives what the prisoner had said to him,—'that he and his uncle had had a little difference.' With that answer proving a statement made by the prisoner upon the morning of the homicide, and which was admissible in evidence for what it was worth, the attorney for the commonwealth was content, and there was no error in refusing to strike out the question under the circumstances."

In *Spitzer v. Nassau Newspaper Del. Exp. Co.*, 20 Misc. 327, 45 N. Y. Supp. 682, which was an action brought by plaintiff, an infant, for personal injuries received at the hands of the defendant, the court said: "The plaintiff's physician, being asked if he found any permanent injury to the child, described the results of an examination, and said that the wound on the head would be the only cause of trouble, with the development of the brain as she grew up, to the best of his knowledge, concluding: 'I believe, to the best of my opinion, that the fracture of the out table of the skull,

such as she had—that it might be a lack of development—of some lack in her mental capacity as she grew up.' The defendant moved to strike out the words 'might be,' which was denied, and an exception taken. No error is disclosed by this. The motion to strike out the words in question would simply alter the testimony of the witness, and make it different from what he had actually given, namely, a positive, instead of a qualified, statement. The court was not at liberty to do this. It could strike out the whole answer, if improper, but not certain qualifying words, which were a part of it. Besides, the motion, if granted, might have left the witness' answer unintelligible, and this defendant had no right to ask."

Haggarty v. Strong, 10 S. D. 585, 74 N. W. 1037, was an action brought by Haggarty, an infant, by his guardian *ad litem* against Strong for personal injuries. Judgment was rendered for plaintiff in the lower court. Defendant appealed. On appeal the court said: "It is further contended by appellants that the court erred in not striking out the deposition of Dr. Cummins. The action was for negligence on the part of the defendants causing injuries to the plaintiff, a boy of nine years, who was employed in driving horses that ran an elevator. The foot of the boy was caught in the machinery, and badly crushed or injured. Dr. Cummins was the physician who attended the boy after his injury, and in describing the injury he was unable to state definitely what muscles, bones, and ligaments of the foot were injured. The grounds of the motion to strike out the doctor's deposition were that his answers on cross-examination were not responsive to the questions, and were evasive. We are of the opinion there was no merit in the motion. We discover nothing in the doctor's deposition that indicates any disposition on his part to suppress anything in regard to the condition of the foot, or nature of the injury. In answer to cross-interrogatories, he says the wound was a lacerated wound, and that the bones, muscles, and ligaments extending from the

be withdrawn at the instance of counsel of either party to the suit.³⁵

2. On Failure to Object.—A motion to strike out is generally not available to a party failing to object to a question when asked,³⁶

ankle to the toe were injured, and had the appearance of being all ground together. He was then asked to state what bones, muscles, and ligaments were injured. This he stated he could not do; that in the condition of the wound it would be impossible to designate them. The court ruled correctly in denying the motion."

35. *Com. v. Carbin*, 143 Mass. 124, 8 N. E. 896.

36. *United States*.—*Bailey v. Warner*, 118 Fed. 395, 55 C. C. A. 329.

Alabama.—*Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; *Pittman v. Pittman*, 124 Ala. 306, 27 So. 242; *Ard v. Crittenden*, 39 So. 675; *Southern R. Co. v. Leard*, 39 So. 449; *Birmingham R. L. & P. Co. v. Wise*, 42 So. 821; *Southern Coal & Coke Co. v. Swinney*, 42 So. 808.

Colorado.—*Seerie v. Brewer*, 90 Pac. 508.

Illinois.—*Poehlmann v. Kertz*, 204 Ill. 418, 68 N. E. 467.

Indiana.—*Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. 644; *Ellinger v. Rawlings*, 12 Ind. App. 336, 40 N. E. 146; *Taylor v. McGrath*, 9 Ind. App. 30, 36 N. E. 163; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

Iowa.—*State v. Wright*, 98 Iowa 702, 68 N. W. 440; *Murphy v. McCarthy*, 108 Iowa 38, 78 N. W. 819.

Kansas.—*Missouri River, Ft. S. & G. R. Co. v. Owen*, 8 Kan. 409.

Minnesota.—*Barnes v. Christofferson*, 62 Minn. 318, 64 N. W. 821.

Missouri.—*Martin v. Block*, 24 Mo. App. 60.

New York.—*Prentice v. Goodrich*, 1 App. Div. 15, 36 N. Y. Supp. 740; *In re Ramsdell*, 51 Hun 636, 3 N. Y. Supp. 499.

North Dakota.—*Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847.

South Dakota.—*LaRue v. St. Anthony & D. Elev. Co.*, 17 S. D. 91, 95 N. W. 292.

Smith v. Birmingham R. L. & P. Co. (Ala.), 41 So. 307. This was an action brought by plaintiff as ad-

ministrator of the estate of one Hall. The action was for personal injuries received by plaintiff's intestate at the hands of the defendant. The court said: "The witness, Harris, for plaintiff, testified that a flagman was placed at the crossing of the railroad, when deceased was hurt, and before that there was an ordinance of the city that the conductor or some one should go ahead of the train, which order was carried out, and there had not been any change in the place of stopping since the ordinance was passed. The counsel for defendant asked, 'And prior to that city ordinance?' Plaintiff's counsel then moved to exclude any evidence as to the ordinance, on the ground that it was immaterial and irrelevant. The court overruled the motion, saying, 'You did not object to the question,' and plaintiff excepted. What the court said was correct, so far as is shown by the transcript. The question was never objected to, and the objection that was made, related to the motion to exclude an answer, after it was made without objection to an unchallenged question calling for it. The motion came too late, even if the question asked was irrelevant and immaterial, which we do not hold. It wears the appearance of speculation on what the witness' answer would be."

In *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098, the court said: "Many objections were interposed by counsel for appellant to questions propounded to witness on behalf of the prosecution and overruled by the court, and such rulings are assigned as error. With singular uniformity, however, counsel, except in a few instances, interposed his objections after the answers were given. In no instance does it appear that any of such questions were answered before counsel had an opportunity to object. Under such circumstances it needs neither discussion nor citation of authorities to the proposition that objections and exceptions so taken are unavailing. A party cannot haz-

or to evidence when offered;³⁷ and it is accordingly held error to

and whether the reply of a witness to an objectionable question will be favorable or unfavorable to him, and when it appears unfavorable then object to it. He must object when the question is asked and before the answer is given, and if he does not, he waives his right to complain of the admission of the testimony under the answer. Neither can other alleged errors in the same line be considered, for the reason that appellant saved no exceptions to the rulings. In other instances, having failed to object until after the answers were given and the objections overruled, counsel then moved to strike out the evidence, which was denied, and we think properly. There are occasions when it is not necessary to object to a question in advance in order to avail oneself of the right to move to strike out the answer. This is always true when the character of the answer is not indicated by the terms or nature of the question. When, however, the nature of the question clearly indicates that the evidence sought to be elicited would under any circumstances be inadmissible, a motion to strike out is not available, unless a preliminary objection to the question is made. On this point it is said in *People v. Williams*, 127 Cal. 216, where the general rule is discussed, that 'When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late, unless preceded by an objection to the question.' The instances at bar fall within this latter branch of the rule. If the questions asked were objectionable for the reasons assigned by counsel, their objectionable character was plainly apparent on the face of the questions, and any evidence was necessarily inadmissible under them, so that a motion to strike out was not available unless preceded by an objection properly and duly made to the question. No such objection was made. As the failure to object to the evidence at the proper time is a waiver of any objection to its admissibility, so is in effect the absence of any ob-

jection. If an objection taken after answer is not available to exclude evidence because taken too late, it cannot be made the basis of a motion to strike out the evidence after it is in, where the rule requires an objection properly interposed to precede such motion, as a prerequisite to its exercise. Any other rule would in a great measure do away with the necessity of interposing seasonable objections and enlarge the motion to strike out. The rules of practice relative to interposing objections and exercising the right to move to strike out evidence are so simple and well settled that no difficulty should arise on a trial in properly applying them, and no departure from them should be countenanced or tolerated."

37. *United States*.—*Brockett v. New Jersey Steamboat Co. (C. C.)*, 18 Fed. 156; *Farmers' & Traders' Nat. Bank v. Greene*, 74 Fed. 439, 20 C. C. A. 500, 43 U. S. App. 446.

Alabama.—*Payne v. Long*, 121 Ala. 385, 25 So. 780; *McCalman v. State*, 96 Ala. 98, 11 So. 408; *Traylor v. State*, 100 Ala. 142, 14 So. 634; *Ellis v. State*, 105 Ala. 72, 17 So. 119; *Wright v. State*, 108 Ala. 60, 18 So. 941; *East Tennessee, V. & G. R. Co. v. Turvaville*, 97 Ala. 122, 12 So. 63; *Coppin v. State*, 123 Ala. 58, 26 So. 333; *McLeroy v. State*, 120 Ala. 274, 25 So. 247; *King v. Franklin*, 122 Ala. 559, 31 So. 467; *Rhodes v. State*, 141 Ala. 66, 37 So. 365; *Franklin v. State*, 39 So. 979; *Birmingham R. L. & P. Co. v. Wise*, 42 So. 821.

California.—*Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688; *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; *People v. Ardell*, 135 Cal. xix, 66 Pac. 970; *Churchill v. More (Cal. App.)*, 88 Pac. 290.

Illinois.—*Western Union Tel. Co. v. Hope*, 11 Ill. App. 289; *Chicago Union Tract. Co. v. May*, 221 Ill. 530, 77 N. E. 933.

Indiana.—*Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Cleveland, C. & I. R. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Chicago, St. L. & P. R.*

Co. v. Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357; *Campbell v. Conner*, 15 Ind. App. 23, 42 N. E. 688, 43 N. E. 453; *Brown v. Owen*, 94 Ind. 31; *Newlon v. Tyner*, 128 Ind. 466, 27 N. E. 168, 28 N. E. 59; *Wysor Land Co. v. Jones*, 24 Ind. App. 451, 56 N. E. 46; *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961; *Ginn v. State*, 161 Ind. 292, 68 N. E. 294.

Iowa.—*State v. McDonough*, 104 Iowa 6, 73 N. W. 357; *State v. Moats*, 108 Iowa 13, 78 N. W. 701; *Walrod v. Webster County*, 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480; *Tuttle v. Wood*, 115 Iowa 507, 88 N. W. 1056; *Mallory Com. Co. v. Elwood*, 120 Iowa 632, 95 N. W. 176; *Slattery v. Slattery*, 120 Iowa 717, 95 N. W. 201.

Kansas.—*Atchison, T. & S. F. R. Co. v. Frasier*, 27 Kan. 463; *Anthony v. Atwood* (Kan. App.), 62 Pac. 720.

Louisiana.—*State v. Rohfrisch*, 12 La. Ann. 382; *Huey v. Drinkgrave*, 19 La. 482; *Langfitt v. Clinton & P. H. R. Co.*, 2 Rob. 217.

Maine.—*Cook v. Brown*, 39 Me. 443.

Maryland.—*Goldman v. State*, 75 Md. 621, 23 Atl. 1097.

Michigan.—*McWilliams v. Lake Shore & M. S. R. Co.*, 146 Mich. 216, 109 N. W. 272.

Minnesota.—*Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528.

Mississippi.—*Mabry v. State*, 71 Miss. 716, 14 So. 267; *Dick v. State*, 30 Miss. 593; *Brown v. State*, 72 Miss. 95, 16 So. 202.

Missouri.—*Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; *State v. Arnewine*, 136 Mo. 130, 37 S. W. 799; *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *State v. Rapp*, 142 Mo. 443, 44 S. W. 270; *State v. McAfee*, 148 Mo. 370, 50 S. W. 82.

Montana.—*Yoder v. Reynolds*, 28 Mont. 183, 72 Pac. 417; *Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 33 Mont. 338, 83 Pac. 886; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.

Nebraska.—*Palmer v. Witcherly*, 15 Neb. 98, 17 N. W. 364; *Fulton v. Ryan*, 60 Neb. 9, 82 N. W. 105.

New Jersey.—*Flannery v. Central*

Brew. Co., 70 N. J. L. 715, 59 Atl. 157.

New York.—*Rodee v. Detroit F. & M. Ins. Co.*, 74 Hun 146, 26 N. Y. Supp. 242; *People v. White*, 1 N. Y. Crim. 466; *Hall v. Earnest*, 36 Barb. 585; *Daniels v. Smith*, 54 Hun 639, 8 N. Y. Supp. 128; *Ottinger v. New York El. R. Co.*, 63 Hun 631, 17 N. Y. Supp. 912; *Stephens v. People*, 4 Park. Crim. 396; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *People v. Chacon*, 4 N. Y. Crim. 173, 6 N. E. 303, *affirming* 3 N. Y. Crim. 418; *Whitney v. Supreme Commandery*, 30 App. Div. 397, 51 N. Y. Supp. 617; *Lindeman v. Brooklyn Hts. R. Co.*, 69 App. Div. 442, 74 N. Y. Supp. 988; *Gray v. Brooklyn Hts. R. Co.*, 72 App. Div. 424, 76 N. Y. Supp. 20, 11 N. Y. Anno. Cas. 37; *National Radiator Co. v. Hull*, 79 App. Div. 109, 79 N. Y. Supp. 519; *Hornum v. McNeil*, 80 App. Div. 637, 80 N. Y. Supp. 728; *Walker v. McCormick*, 88 N. Y. Supp. 406.

Ohio.—*Hummel v. State*, 17 Ohio St. 628.

Oregon.—*Hodson v. Goodale*, 22 Or. 68, 29 Pac. 70.

Pennsylvania.—*Ashton v. Sproule*, 35 Pa. St. 492; *Oswald v. Kennedy*, 48 Pa. St. 9; *Montgomery v. Cunningham*, 104 Pa. St. 349; *Dallmeyer v. Dallmeyer*, 16 Atl. 72; *Lowrey v. Robinson*, 141 Pa. St. 189, 21 Atl. 513.

Rhode Island.—*McGarrity v. New York, N. H. & H. R. Co.*, 25 R. I. 269, 55 Atl. 718.

South Carolina.—*Lee v. Unkefer*, 58 S. E. 343.

Texas.—*Ft. Worth & R. G. R. Co. v. Andrews* (Tex. Civ. App.), 29 S. W. 920; *Gonzales v. State*, 30 Tex. App. 203, 16 S. W. 978; *Atchison, T. & S. F. R. Co. v. Bryan* (Tex. Civ. App.), 37 S. W. 234; *Western Union Tel. Co. v. Gibson* (Tex. Civ. App.), 53 S. W. 712.

Wisconsin.—*Manning v. School Dist. No. 6*, 124 Wis. 84, 102 N. W. 356.

In *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39, the court said: "No objection was made as to the competency of Mrs. Green when she was sworn. She was examined in her own behalf by her counsel, and cross-exam-

ined by plaintiff's counsel at length, without a suggestion that she was incompetent to testify because of Mrs. Hickman's death. After all the evidence was closed the plaintiffs moved the court to strike out, or disregard, all the evidence of Mrs. Green because the other party to the trade was dead, which motion the court overruled. It is apparent at a glance that, if Mrs. Green was incompetent for the reason assigned, plaintiffs were as well aware of it before she testified as afterwards. They cannot, then, urge that they had no opportunity to interpose an objection. Having permitted her to testify without objection, the subsequent motion to exclude came entirely too late. Such a practice is not tolerated in our courts."

In *Brown v. Cleveland*, 44 Neb. 239, 62 N. W. 463, the court said: "All this testimony was, however, introduced without an objection being interposed by the plaintiffs in error. After it had been fully detailed, and this witness dismissed, plaintiffs in error asked that all his testimony might be stricken out. This was not proper, for having permitted this evidence to go in without objection the plaintiffs in error were not entitled to have it stricken out, and the district court properly so ruled."

In *Hoyt v. Hoyt*, 112 N. Y. 593, 20 N. E. 402, the court said: "The contestant could not sit by during the examination of the physicians, and, after their evidence had been elicited by examination and cross-examination, upon finding it injurious to her case, claim as a legal right to have it stricken out. There are bounds to the enforcement of the statutory provisions, which will not be disregarded at the instance of a party who, being entitled to their benefit, has waived or omitted to avail himself of them. It is perfectly true that public policy has dictated the enactment of the Code provisions, by which the communications of patient and client are privileged from disclosure; but the privilege must be claimed and the proposed evidence must be seasonably objected to. The rule of evidence, which excludes the communications between physician and patient, must be invoked by an

objection at the time the evidence of the witness is given. It is too late, after the examination has been insisted upon and the evidence has been received without objection, to raise the question of competency by a motion to strike it out."

People v. Long, 43 Cal. 444. This was a prosecution on a charge of burglary. On the part of the prosecution the under sheriff testified as to the confession of the prisoner made to him. This testimony was admitted without objection. Counsel for defendant then moved that it be stricken out. The court said: "The evidence was not objected to when it was offered and given upon the part of the prosecution, and for that reason its admission could not be erroneous. Had objection been then made to its admission, the prosecution would doubtless have shown that the confession was voluntary, as was subsequently shown in answer to the motion of the prisoner to strike out the evidence of the confession. The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated."

In *United States v. Holmes*, 1 Cliff. 98, 26 Fed. Cas. No. 15, 382, the court said: "As a general rule it is not to be expected that the court will interfere *mero motu* to exclude testimony, otherwise competent, merely because the preliminary inquiry has not been made, unless the question is objected to on that ground by the other side; and if not objected to, and the testimony is received, it is not then competent for the court to strike it out if it is legal in form and pertinent to the issue. In the state courts the rule that the preliminary inquiry in such cases must first be made is never enforced, and if testimony is admitted without objection on that ground, in the federal courts, it would not be competent for the court afterward to strike it out merely on that account."

In *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810, the court said: "This was an action of replevin, brought by Jay Ward, to recover the possession

strike out evidence after it has been so received,³⁸ although there

of a book-case and some books, taken on attachment by Hughes, as constable, as the property of J. R. Myers, at the suit of Eagle & Knox against Myers Bros. Plaintiff claims that he purchased the property in controversy of J. R. Myers in satisfaction of a debt of \$250 owing him by Myers. The defendant claims that the pretended sale by Myers to the plaintiff was made for the purpose of defrauding the creditors of Myers. Plaintiff as a witness on his own behalf testified that the property in controversy was of the value of \$250. No objection was made to this testimony, but on the cross-examination it was shown that the plaintiff did not know the market value of the property, and of his own personal knowledge did not know its value. The defendant then moved to strike out all of the plaintiff's testimony in relation to the value of the property, which motion was overruled by the court. In this we see no error. If there had been no foundation laid for the plaintiff's testimony in regard to the value of the property, the defendant might for that reason have objected to it; but no objection having been made at that time, his motion came too late." See also *Moutfort v. Rowland*, 38 N. J. Eq. 181; *Rowland v. Rowland*, 40 N. J. Eq. 281; *Quin v. Lloyd*, 41 N. Y. 349.

Evidence Objectionable Because of Parol or Secondary Character. — No Objection — Will Not Lie. — In *Huey v. Drinkgrave*, 19 La. 482, the court said: "This action is brought to recover \$350, being the balance of a note of a larger amount drawn by defendant to the order of plaintiff. The defense set up is a plea in compensation of three hundred dollars for three hundred barrels of corn, alleged to have been sold and delivered to the plaintiff, at the rate of one dollar per barrel. . . . On the trial, several witnesses were offered to prove that on various occasions, after the sale, the defendant had acknowledged that the corn belonged to the plaintiff, and had not been sold to him; after this testimony had been taken down, the defendant's counsel

moved the court to strike it out, on the ground that it also appeared from the evidence that no subsequent contract had intervened between these parties; that it went to contradict or explain a written contract, and was inadmissible. The judge, in our opinion, correctly overruled this motion. It came too late; the party should have stated his objections to the testimony offered before it was taken down." See also *Langfitt v. Clinton & P. H. R. Co.*, 2 Rob. (La.) 217; *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528; *Daniels v. Smith*, 54 Hun 639, 8 N. Y. Supp. 128; *Ottinger v. New York El. R. Co.*, 63 Hun 631, 17 N. Y. Supp. 912; *Hummel v. State*, 17 Ohio St. 628; *Hodson v. Goodale*, 22 Or. 68, 29 Pac. 70.

38. *People v. Crounse*, 51 Hun 489, 4 N. Y. Supp. 266, 7 N. Y. Crim. 11; *New England Mtg. Security Co. v. Payne*, 107 Ala. 578, 18 So. 164.

In *State v. Williams*, 28 La. Ann. 604, the court said: "The defendant, convicted of an assault with intent to commit a rape, appeals from the judgment which sentenced him to imprisonment at hard labor for one year. On the trial he offered as a witness his wife, to establish the fact that at the time the offense charged against him was committed, he was in his own house and bed, at some distance from the house where the person upon whom the assault was made resided. The witness, it would appear, had answered the question before the district attorney could object. The evidence was, on motion of the district attorney, ruled out, on the ground that the wife could not testify for or against her husband. To this ruling of the court the defendant excepted. There was error in this ruling. The wife is not a competent witness for or against her husband. She could have been excluded from testifying. But the objection should have been made to her testifying at all. After testifying it was too late to have her testimony stricken out. We do not understand how 'the evidence went to the jury before the district attorney could object.' If the fact

are cases holding that a party has a remedy by motion to strike out even though he has failed to object.³⁹

be that the district attorney did not discover that the witness was the defendant's wife until after she had testified, the fact should have been stated in the bill. As it is, we see nothing except the fact that the witness testified, and that the evidence went to the jury before the district attorney could object."

39. Alabama.—*Edisto Phosphate Co. v. Standford*, 112 Ala. 493, 20 So. 613.

Indiana.—*Osburn v. State*, 164 Ind. 262, 73 N. E. 601.

Massachusetts.—*Selkirk v. Cobb*, 13 Gray 313.

New York.—*In re Lasak*, 131 N. Y. 624, 30 N. E. 112; *Griffin v. Barton*, 22 Misc. 228, 49 N. Y. Supp. 1021.

Pennsylvania.—*Pennsylvania Nat. Gas Co. v. Cook*, 123 Pa. St. 170, 16 Atl. 762.

South Carolina.—*State v. Adams*, 68 S. C. 421, 47 S. E. 676.

Tennessee.—*Carper v. Barnes*, 4 Sneed 450.

Texas.—*Burke v. State*, 15 Tex. App. 156; *Galveston, H. & S. A. R. Co. v. Scott*, 18 Tex. Civ. App. 321, 44 S. W. 589.

On the trial of an action to recover for personal injuries, the plaintiff's wife, who was not a competent witness, was sworn and testified on behalf of plaintiff. Defendant's counsel moved that her testimony be stricken out as he had inadvertently, and while suffering from a severe headache, consented to her being sworn. It was held that it should have been excluded. *South Covington & C. St. R. Co. v. McCleave*, 18 Ky. L. Rep. 1036, 38 S. W. 1055.

Blount v. Beall, 95 Ga. 182, 22 S. E. 52. This was an action to recover the value of a diamond. The court said: "During the progress of the case a witness testified that her uncle, the defendant's intestate, was well off, and that he left considerable property. This testimony was not objected to at the time, but the defendant afterwards moved to rule it out on the ground that it was not competent to prove the means or

wealth of the deceased. The court ruled that this could not be done, inasmuch as the testimony had come in without objection. While the plaintiff was being examined, her counsel proposed to show by her what the means or financial condition of the deceased was, and the defendant objected upon the ground that such testimony was incompetent; whereupon the court, in so ruling, remarked that there was some evidence in on that subject already without objection. Defendant's counsel then moved to rule it out, and the court remarked, 'Too late. The mill will never grind with the water that has passed.' A motion to rule out testimony illegally admitted even without objection is never too late until the cause is finally submitted to the jury. If the testimony is illegal, it should not be considered by the jury, and if it is not to be considered by the jury, it should not be admitted for their consideration."

The rule, that in a capital case the accused does not waive a right by not insisting upon it, entitles him to have proof which is prejudicial to his case, and is legally admissible, withdrawn from the jury, although he does not object to it when offered. *Rakes v. People*, 2 Neb. 157.

Where the Court Examines Witness.—*State v. Marshall*, 105 Iowa 38, 74 N. W. 763. Upon the trial of a prisoner charged with burglary, the court said: "It seems the trial judge propounded the questions to the witness, and the defendant's counsel, in an affidavit attached to the motion for new trial, excused himself for not making proper objections on the score of deference to the court. The authorities are agreed that the judge may ask questions leading in character. *Huffman v. Cauble*, 86 Ind. 591; *Com. v. Galavan*, 9 Allen 271. See *Sessions v. Rice*, 70 Iowa 306, 30 N. W. 735. But in other respects his examination of a witness is subject to the same legal objections as may be interposed when conducted by a party or his attorney. *People v. Lacoste*,

If the rule were otherwise, a hardship might be worked upon a party offering evidence; for if evidence at the time offered is objected to, the offering party has an opportunity to substitute other evidence in its place.⁴⁰

The Rule Is One of Practice and is applied in order to save the time of the court, which otherwise would be uselessly consumed in listening to testimony, and then striking it out; and also to prevent a party from obtaining an advantage by deliberately consenting that a witness may give evidence upon a certain point with the expectation or belief that it may be favorable to him, and then having it excluded when the evidence is not satisfactory.⁴¹

Where Counsel Withdraws an Objection.—It follows from the rule above stated that where counsel withdraws an objection to a question he thereby places himself in the same position he would have occupied had no objection been made, and deprives himself of the privilege which he might have had to a motion to strike out an answer.⁴²

37 N. Y. 192; Sparke v. State, 59 Ala. 82. But we think the rule which requires a party to make his objection to the questions when asked, and precludes him from awaiting the answer of the witness, and then moving to strike them out, ought not to prevail when the examination is conducted by the court. The jurors naturally assume the interrogatories of the presiding judge to be proper, as they are presumed to be, and objections made thereto by counsel in the nature of mere interactions. Often the character of the case is such that the attorney might otherwise be compelled to elect whether he will save his record or brook the ill will of the jury. Besides, it is always embarrassing to persist in interposing objections, especially in some courts, although one might believe the examination improper or irrelevant to the issues, and prejudicial to his client. It was the privilege of defendant to either make objections to the questions of the court when asked, or move to strike out the evidence elicited immediately upon the conclusion of the judge's examination." It seems that the motion to strike out was not made immediately upon the judge's examination, but at some time later and was therefore too late.

40. Rollins v. Chalmers, 51 Vt. 592. This was an action of trespass and case for debauching the plain-

tiff's daughter *per quod servitum amisit*. The plaintiff introduced, with other evidence, testimony relative to defendant's "financial condition," to which no objection was made by the defendant. After the testimony was all in on both sides, the defendant requested the court to charge that the plaintiff could not show his financial standing and that the jury should not consider the evidence on this point. The court said: "If the testimony, though not legitimately admissible, have a moral tendency to support the issue, and so would be likely to influence the jury, to rule it out and withdraw it from the consideration of the jury, when the objection is not made until after the testimony is closed on both sides, would often work great injustice to the other party, who might have supplied its place with legitimate testimony if it had been objected to when offered."

41. People v. Wallace, 89 Cal. 158, 26 Pac. 650.

42. *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624, the court said: "Fred Irwin was called as a witness for the proponent, and, after testifying to the preliminary facts, was asked: 'Now, Mr. Irwin, you will please proceed and relate in narrative form all that occurred between you and Joseph Anton Wax on the 18th day of January, 1893.' Counsel for contestants objected to the question

Exceptions.— But there are instances where the reason of the rule is not present, and in such cases counsel may successfully move to strike out an answer without previously having objected to the question, for instance where a witness' answer is unresponsive to the question,⁴³

upon the ground that it called for confidential communications between client and attorney, and the witness had no right to reveal them, and thereupon proceeded to question the witness further. At the conclusion of the questions the objection was renewed, when one of the attorneys for proponents stated that he wished to argue the question, and thereupon the attorney for contestants stated that rather than lose the time he would withdraw his objection. The witness then went on to testify at length on direct and cross-examination, and at the conclusion of his evidence contestants moved to strike it out upon the ground that the witness was acting as attorney for Wax at the time, and the statements he made were within the provisions of subdivision 2 of section 881 of the Code of Civil Procedure. The motion was denied, and an exception reserved. . . . As to the refusal to strike out the testimony of Fred Irwin, it is enough to say that when contestants withdrew their objection to the question propounded to him they effectually deprived themselves of the right to afterwards move to have his testimony stricken out."

⁴³ *Evans v. State*, 109 Ala. 11, 19 So. 535; *Farmers' & Traders' Nat. Bank v. Greene*, 74 Fed. 439, 20 C. C. A. 500, 43 U. S. App. 446; *Helmken v. New York*, 90 App. Div. 135, 85 N. Y. Supp. 1048; *Brown v. Brown*, 110 App. Div. 913, 96 N. Y. Supp. 1002.

In *People v. Dixon*, 94 Cal. 255, 29 Pac. 504, which was a prosecution for grand larceny, horses having been stolen as alleged by the information, the court said: "Otis Goodlow testified that Joshua Buckmaster and Henry Goodlow arrived at the ranch of witness's father in Oregon. The next morning he (the witness) went out into the field and saw the horses alleged by this information to have been stolen. 'Q. What did you do,—you drove them up? A. Yes, sir, and I asked Josh whose horses

them was, and he said they were Ellery Dixon's.' Counsel for appellant made no objection to the question, but moved to strike out the answer, as incompetent and hearsay, which motion the court denied. This ruling was error. Buckmaster's statements to the witness could not be admitted in evidence against the defendant, Dixon. It has been decided by this court that where no objection is made to an interrogatory, a motion to strike out the answer comes too late. (*People v. Long*, 43 Cal. 446; *People v. Samario*, 84 Cal. 485.) The rule is a salutary one, and should be upheld, unless good cause to the contrary appears. In this case the reason of the rule is not present, and appellant should have the benefit of his exception. The answer of the witness was not responsive to the question addressed to him, and for that reason the principle laid down in the foregoing cases has no application."

Wendt v. Chicago, St. P., M. & O. R. Co., 4 S. D. 476, 57 N. W. 226. This was an action to recover damages sustained by plaintiff for the loss of hay and grass destroyed and machinery damaged by a fire alleged to have been caused by the negligence of the defendant. The court said: "On the trial the plaintiff was called as a witness on his own behalf, and examined very fully as to the nature, character, and value of the hay and grass burned and the machinery damaged, by his own counsel. On cross-examination the appellant's counsel examined him upon the same subjects, and asked him as to certain conversations between himself and one Haffey, a section foreman on the defendant's road on which the fire was alleged to have originated, and as to statements made by him to Haffey as to the amount and value of the hay and grass destroyed and machinery injured, the value of which plaintiff was seeking to recover. The wit-

or where it is volunteered,⁴⁴ or where the answer is insufficient.⁴⁵

Where Question Does Not Indicate Nature of Answer. — So also when a question put to a witness does not indicate the inadmissible nature of the answer expected, it is not necessary that opposing counsel should have objected to such testimony when offered in order that

ness testified as to the conversation between himself and Haffey as to the amount and value of the hay and grass, machinery, etc., but denied making certain statements to Haffey in reference thereto, called to his attention by the counsel for appellant. Upon his re-examination by counsel for the respondent he was asked and answered the following question: 'Q. Mr. Keith asked you in regard to a conversation that took place between you and Mr. Haffey? A. Yes, sir. Q. You have not stated the whole of that conversation, have you? A. No, sir; I guess not. Q. Just detail the whole conversation. A. Well, he came there to my house, and wanted me to go along with him, and went past the stack there; and he wanted to know how much I thought was there, and I gave him my idea. Q. How much did you tell him there was in the stack? A. I told him I thought eleven ton. And we went on to the railroad track, to see and satisfy ourselves where the fire started. I was not sure where the fire started, for the fire had got a big headway. Q. You went to the railroad track for what purpose? A. Well, he hadn't been down there. He was dissatisfied as to where the fire originated, and then he says, "Certain it was started right there." "Now," he says, "I will catch hell." Says I, "Why?" "Well," he says, "because of the fire getting away." Says I, "They cannot say nothing as long as they keep you." Defendant's counsel objected to the conversation detailed with Mr. Haffey, and moved to strike out the answer of the witness in regard thereto, upon the ground that it is incompetent, immaterial, and not binding in any way upon the defendant in this action; and there is no proof that Mr. Haffey had any authority from the company, or could make any statement to bind it;

that this conversation occurred some time after the fire, and was no part of the *res gestae*, and is not responsive to the question. The counsel for appellant contends that in denying appellant's motion the court erred, and for this error appellant is entitled to a new trial. The cross-examination of the witness was confined to the conversation between himself and Haffey as to the amount and value of the hay and grass destroyed and the machinery injured. No question was asked him by counsel for appellant in reference to the place where the fire originated, or as to conversations in regard thereto. It is insisted by counsel for the respondent that the counsel for appellant should have objected to the question, and that by his failure to do so he was precluded from moving to strike out the answer. But it will be noticed that the question itself did not call for the answer given by the witness. It was not responsive. The question is, 'You went to the railroad track for what purpose?' The question calls for no conversation, and makes no reference to the fire, or the place where it started. The proper answer to the question would have been to state the purpose for which they went there, and not the conversation had there. The question itself seems to be a preliminary one, and does not appear to be objectionable, or calculated to attract the attention of the counsel. A responsive answer could not have been very material to the case. We are of the opinion, therefore, that the failure of appellant's counsel to object to it did not preclude him from moving to strike out the answer as not responsive to the question, and as incompetent evidence in the case."

⁴⁴. *Davis v. Mendenhall*, 19 Minn. 149.

⁴⁵. *Boland v. New York City R. Co.*, 48 Misc. 523, 96 N. Y. Supp. 262.

he may be entitled to a motion to strike out; he may after the testimony is given, move that it be stricken out.⁴⁶

When Acquiescence Will Be Presumed. — Where testimony has been given without objection, and no motion to strike out has been made, acquiescence in its introduction will be presumed.⁴⁷

Entitled Only to Instruction. — The courts hold almost universally that a party failing to object to evidence when offered is entitled only as a matter of right to an instruction from the court to disregard such evidence,⁴⁸ but even this has been denied.⁴⁹

46. *People v. Williams*, 127 Cal. 212, 59 Pac. 581; *People v. Lawrence*, 143 Cal. 148, 76 Pac. 893; *Territory v. Smith*, 12 N. M. 229, 78 Pac. 42; *Waddell v. Metropolitan St. R. Co.*, 113 Mo. App. 680, 88 S. W. 765.

In *Nichols v. Howe*, 43 Minn. 181, 45 N. W. 14, the court said: "As to all the foregoing matters the action of the court below was correct, but it committed an error in the matter of evidence. The fact of authority from defendant to plaintiff to sell the wheat was in issue, not only in the pleadings, but in the evidence. The error we refer to consisted in allowing to stand, against a motion to strike out, an answer of a witness giving, in effect, the contents of a telegram claimed to have been sent by defendant to plaintiff, containing an order to sell the wheat. The telegram was not produced, nor was it shown to have been lost or destroyed. The question answered did not indicate that the answer might give, in effect, the contents of the telegram; so that the defendant had no opportunity to make the objection until the question was answered. For this reason there must be a new trial."

47. *Alabama*. — *Higdon v. Kennermer*, 112 Ala. 351, 20 So. 470; *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159.

Florida. — *Bishop v. Taylor*, 41 Fla. 77, 25 So. 287.

Illinois. — *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218, affirmed 33 Ill. App. 479.

Indiana. — *Sims v. Givan*, 2 Blackf. 461.

Maine. — *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23.

Missouri. — *Chouteau v. Jupiter Iron Wks.*, 94 Mo. 388, 7 S. W. 467;

Wilkins v. St. Louis, I. M. & S. R. Co., 101 Mo. 93, 13 S. W. 893.

Nebraska. — *Kissinger v. Staley*, 44 Neb. 783, 63 N. W. 55.

New Jersey. — *Fath v. Thompson*, 58 N. J. L. 180, 33 Atl. 391.

New York. — *Van Doren v. Jelliffe*, 1 Misc. 354, 20 N. Y. Supp. 636; *Mackey v. Locke*, 55 Hun 604, 8 N. Y. Supp. 210.

South Dakota. — *Warder, Bushnell & Glessner Co. v. Ingli*, 1 S. D. 155, 46 N. W. 181.

48. *Roberts v. Johnson*, 5 Jones & S. (N. Y.) 157; *Hatch v. Attrill*, 118 N. Y. 383, 23 N. E. 549; *Parker v. Paine*, 37 Misc. 768, 76 N. Y. Supp. 942; *McCoy v. Munro*, 76 App. Div. 435, 78 N. Y. Supp. 849.

49. In *Flanagan Co. v. Adams Grain Co.*, 115 Mo. App. 542, 90 S. W. 1035, the court said: "Defendant insists that the trial court erred in refusing its instructions three and four, wherein the jury was directed not to consider the oral testimony to which we have already referred. That testimony was not objected to by defendant and it, therefore, can not complain of the refusal of the instructions. 'To allow a party to permit, without objection, the admission of evidence, and for the first time make his objection in instructions would be intolerable practice.' (*Maxwell v. Railway*, 85 Mo. 95; *Hollenbeck v. Railway*, 141 Mo. 97.) When a party litigant fails to object, he, in effect, concedes the competency of the evidence. If he would object in season, the opposite party might be able to supply proper evidence on the point at issue. It is unfair to let in improper evidence by tacit consent and then, when too late to supply proper evidence, ask that it be excluded by instruction."

Court's Discretion. — However, it has been held to be discretionary with the trial court whether or not to strike out, on motion, evidence which has been admitted without objection.⁵⁰ But it is not his duty to do so, except in cases where the ground of objection

50. *Alabama*. — *Billingsley v. State*, 96 Ala. 126, 11 So. 409; *Allen v. Smith*, 22 Ala. 416; *Jarvis v. State*, 138 Ala. 17, 34 So. 1025; *Tutwiler Coal, Coke & Iron Co. v. Nichols*, 39 So. 762.

California. — *Spotswood v. Spotswood* (Cal. App.), 89 Pac. 362.

Iowa. — *Cronk v. Wabash R. Co.*, 123 Iowa 349, 98 N. W. 884.

Minnesota. — *Russell v. Schurmier*, 9 Minn. 28; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333; *Brady v. Brennan*, 25 Minn. 210; *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Larson v. Kelly*, 72 Minn. 116, 75 N. W. 13.

Nebraska. — *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *Clark v. Douglas*, 58 Neb. 571, 79 N. W. 158; *McCormick Harv. Mach. Co. v. Carpenter*, 95 N. W. 617.

New York. — *Pontius v. People*, 82 N. Y. 339; *Stokes v. Johnson*, 57 N. Y. 673; *Meigs v. City of Buffalo*, 7 N. Y. St. 855; *Provost v. New York*, 15 Daly 87, 3 N. Y. Supp. 531; *Hatch v. Attrill*, 118 N. Y. 383, 23 N. E. 549; *Doyle v. Manhattan R. Co.*, 59 Hun 625, 13 N. Y. Supp. 536; *Westervelt v. Burns*, 27 Misc. 781, 57 N. Y. Supp. 749; *Pescia v. Societa Co-Operativa Corleonese Francesco Bentivegna*, 91 App. Div. 506, 86 N. Y. Supp. 952.

North Carolina. — *State v. Efler*, 85 N. C. 585.

Pennsylvania. — *Robinson v. Snyder*, 25 Pa. St. 203.

Wisconsin. — *Proper v. State*, 85 Wis. 615, 55 N. W. 1035.

In *State v. Johnson*, 23 Minn. 569, the court said: "The defendant was indicted for larceny, in stealing wheat, alleged in the complaint to have been committed on December 19, 1875. On the trial the state offered evidence which tended to prove a larceny committed on the 26th of December. This evidence was objected to on the ground of the variance in dates, but was admitted. There can be no question that this

was right. The time of the commission of an offense, alleged in the indictment is, as a general rule, immaterial, and does not confine the proofs to the exact time alleged. As the trial proceeded, the evidence of the state tended to prove a similar larceny on the 19th. This was not objected to, as it might have been; but the defendant thereupon moved to strike out all evidence showing a larceny on any day but the 19th; which was denied, and the state asked leave, and was allowed, to elect for which of the two larcenies it would proceed, and it elected to proceed for that on the 26th. In both of these rulings the court was right. The defendant then moved to strike out the evidence of larceny on the 19th, which motion was denied. The objection to a part of this evidence was as apparent when it was offered as after it was in, and, by not objecting to it when offered, defendant lost his strict right to have it excluded. If a party does not object to evidence offered, it is discretionary with the trial court to grant or refuse his motion, after it is received, to strike it out, upon an objection that was apparent to him, and which he might have made, when the evidence was offered."

Kilpatrick v. Dean, 15 Daly 182, 4 N. Y. Supp. 708. Action by Walter F. Kilpatrick, as general assignee of Peter Haulenbeck, against R. J. Dean & Co., to recover for the conversion of 184 bags of coffee. The defendants were warehousemen, and Henry A. Morris, the general owner of the coffee, had stored it with them, and received certain advances upon it. Afterwards Morris gave to Haulenbeck an order for the delivery of the coffee, subject to said advances. The conversion was predicated on the sale by the defendants of the coffee to satisfy claims owing to them by Morris, without notice to him or to Haulenbeck. The Chief Justice said: "The learned counsel

was unknown to the adverse party at the time he consented to it, and where it is plain that his ignorance was not wilful; for if he could have seen its incompetency by the exertion of due diligence, it is the same as if he did see it.⁵¹

3. Insufficiency of Evidence.—The fact that evidence fails in itself to amount to proof of what was intended by the offering party is no ground for striking it out.⁵² Although the foregoing is the

further claims that the complaint should have been dismissed because there was not sufficient evidence, outside of the statement of a conclusion of law by plaintiff's witness Haulenbeck, to establish an assignment of the coffee from Morris to plaintiff's assignor. The testimony in question, in which Haulenbeck gives not strictly facts, was admitted without objection. It was not error for the trial judge to refuse to strike it out upon motion made at a subsequent stage of the case. Such a motion is always discretionary, and, moreover, it is quite probable that the justice who presided was influenced in his decision not to strike the evidence out by an opinion very readily to be formed from the record that the counsel's opposition to this evidence was an afterthought, and that when it was allowed to be given said counsel had no intention of disputing the existence and validity of the alleged assignment. The statements in question, and the delivery of the warehouse order, were quite sufficient to make out a *prima facie* assignment. The legal effect of testimony of this character is very much the same as that of stipulations in open court as to evidence. Every practitioner is familiar with the custom of entering a memorandum in the minutes that certain facts or certain conclusions of law shall, for the purposes of the trial, be considered established. No one would question the binding force of such a stipulation, or would claim that the matters so stipulated to be true were not adequately authenticated to support the verdict which follows. In the case at bar the witness testified that he received an assignment of certain coffee. This is undoubtedly a legal conclusion, and would have been incompetent. But, as it came into the case without the objection

of the learned counsel for defendants, it has the same force as if both counsel had stipulated that it should be taken for granted that Morris has assigned the coffee to Haulenbeck. Under this view it would follow that the assignment was properly made out, even if the delivery of the warehouse order did not *ipso facto* operate as a transfer, and that the motion to dismiss the complaint was properly denied."

51. *Robinson v. Snyder*, 25 Pa. St. 203.

52. *Metz v. Willits*, 14 Wyo. 511, 85 Pac. 380.

In *State v. Cardoza*, 11 S. C. 195, the court said: "The fourth objection on the motion for a new trial referred to the circumstance that the attention of Woodruff was called to an entry in the books already referred to, and inquiry made as to whether it related to the transactions in question, and which appears to have been negatively answered. The appellant's counsel moved to strike out the evidence, which was refused, but no exception appears to be noted. At all events the counsel for the state had the right to call the attention of the witness to any particular memorandum and inquire if it related to the transaction in question, and it was not competent to strike out what was said in reply thereto. It is no ground to strike out evidence that it fails to amount to proof of what was intended by the party introducing it. It does not appear that the memorandum was claimed or read as affording evidence of the matters noted, but was noticed for the purpose of attracting the attention of the witness to the matters referred to in it. This objection is groundless."

In *Maloy v. State* (Fla.), 41 So. 791, the court, speaking through Whitfield, J., said: "Upon an in-

general rule, the contrary has been held in at least one case.⁵³

Evidence More Than Sufficient.—And where evidence brought out by a witness proves more than was intended by counsel, this fact will not entitle opposing counsel to a motion to strike out.⁵⁴

4. Lack of Corroboration.—Where a party rests his case upon testimony relevant, pertinent and proper so far as it goes, but which, in the conception of his opponent, is insufficient to warrant the re-

dictment for the murder of William Boyett, the plaintiff in error was convicted of manslaughter in the circuit court for Santa Rosa county, and brings writ of error. At the trial the state attorney asked one of the witnesses for the state if he knew whether or not there had been any disturbance or litigation about land between the defendant and the deceased before the homicide. The witness answered that a lawsuit between them about some land was begun about a year before and had not been terminated. The defendant then objected to the question and moved to strike the answer on the ground 'that it was not shown that there was any personal feeling or words between them. The fact that there was litigation is not sufficient.' The court overruled the objection and motion to strike, and an exception was taken. The introduction of the testimony as to the existence of litigation between the deceased and the defendant at the time of the homicide was not improper for the purpose of showing the state of personal feeling between the parties and as disclosing a motive for the homicide. See *Johnson v. State*, 24 Fla. 162, 4 South. 535; *Smith v. State*, 48 Fla. 307, 37 South. 573; *Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48; *Underhill on Crim. Ev.* § 323; *Abbott's Trial Brief, Criminal Causes* (2d Ed.) 543. The motion to strike the testimony as to the litigation between the deceased and the defendant was not on the ground of irrelevancy, incompetency, legal inadmissibility, or impertinency, but on the ground that it was not sufficient. A motion to strike out evidence that has been introduced in a cause must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the

ground that it is not sufficient. This is the rule in civil causes and is applicable generally to criminal cases. See *Walker v. Lee* (Fla.), 40 South. 881; *Wilson v. Johnson* (Fla.), 41 South. 395; *Wilcox v. Stephenson*, 30 Fla. 377, 11 South. 659. Evidence will not be stricken out on motion on the ground that it is not sufficient proof of what was intended to be proven by the party introducing it."

53. *Boland v. New York City R. Co.*, 48 Misc. 523, 96 N. Y. Supp. 262.

54. *Brown v. Williams*, 4 Humph. (Tenn.) 22. This was an action of assumpsit. The court said: "On the trial below in this case the defendant asked a witness, introduced by the plaintiffs, what credit he had seen upon the books of the plaintiffs in favor of the defendant. The plaintiffs attorney objected to the testimony, unless a copy from the books were received, showing the debits as well as the credits on the defendant's account. The court directed the witness to answer the question. Whereupon the plaintiffs produced two papers containing the debits and credits of the defendant's account, and proved them to be true copies from the books. The defendant's counsel then moved the court to exclude from the jury said evidence; but the court decided that if the defendant so proved the credits by the witness, it was competent for the plaintiff to prove such examined copy of the books as evidence of the debits. Whereupon the defendant moved the court to withdraw from the jury said proof as to the debits and credits also; which was done by the court, and to which the plaintiffs excepted. The plaintiff's counsel now insists that the copy from the books had, by the action of the defendant, been made legal evidence, and as such had been placed before the jury,

covery claimed because of the absence of proof of other facts upon other issues necessary to be proved before recovery can legally be had, the general rule is that no remedy can be had by a motion to strike out,⁵⁵ although it is sometimes held to be discretionary with the trial court whether or not to strike out evidence under the foregoing conditions.⁵⁶ The proper way to avail one's self of such a defect is to request an instruction from the court to the jury to the effect that unless the unproved fact contended for is proven, then his opponent cannot recover,⁵⁷ or he may avail himself of such defect by demurring to the evidence.⁵⁸

Exception.—But where the evidence sought to be stricken out appears to the court to be clearly insufficient to support a verdict in favor of the party offering it, such evidence may on that ground be stricken out by the court on motion of the party against whom it is offered.⁵⁹ But the court should cautiously exercise this power, to

and that it was unlawful for the court afterwards to exclude it. And we think the argument is correct."

55. *McFarland v. Bellows*, 49 Mo. 311; *Hannibal & St. J. R. Co. v. Moore*, 37 Mo. 338; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558; *Murray v. Montana Lumb. & Mfg. Co.*, 25 Mont. 14, 63 Pac. 719; *Coulter v. Blatchley*, 51 W. Va. 163, 41 S. E. 133; *Nokken v. Avery Mfg. Co.*, 11 N. D. 399, 92 N. W. 487; *Walker v. Lee* (Fla.), 40 So. 881.

In *Wilcox v. Stephenson*, 30 Fla. 377, 11 So. 659, the appellee sued the appellant in the circuit court in assumpsit for an alleged balance due him upon a building contract, whereby the plaintiff agreed to construct a building for the defendant. The trial resulted in a verdict for the plaintiff. The defendant appealed. On the trial the plaintiff showed by his evidence that he constructed the building, but the defendant moved the court to strike out his testimony because, "1st, the plaintiff has not shown that he performed his work to the satisfaction of the architect, and, in fact, that he has shown that the architect did not certify the amount claimed in this suit to be due." This motion was overruled and the ruling excepted to, and is assigned as the third error. The court said: "There was no error in this ruling. Motions to strike out evidence that has been introduced in a cause, as we understand the practice, must be predicated upon some

feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself that is struck at. None of these are urged against this evidence by this motion, and could not have been, because it is open to none of these objections, being entirely relevant to the issue, and competent in every respect as far as it went towards sustaining the plaintiff's claim; but the motion was predicated solely upon the ground that, though entirely proper, relevant and pertinent so far as it went, yet it did not go far enough to warrant a recovery; that another fact should have been proven in addition thereto, viz: that the work was performed to the satisfaction of the architect, and that the architect had certified that the amount claimed was due."

56. *Walker v. Lee* (Fla.), 40 So. 881.

57. *Wilcox v. Stephenson*, 30 Fla. 377, 11 So. 659; *Hannibal & St. J. R. Co. v. Moore*, 37 Mo. 338; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558; *Nokken v. Avery Mfg. Co.*, 11 N. D. 399, 92 N. W. 487; *Wilson v. Johnson* (Fla.), 41 So. 395.

58. *Wilcox v. Stephenson*, 30 Fla. 377, 11 So. 659.

59. *Mississippi & Y. R. Packet Co. v. Edwards*, 62 Miss. 534. This was an action upon an open account. The defendants set up the defense of payment. To prove payment the defendants in the trial of the case introduced certain testimony which, upon the motion of the plaintiff, was

the end that the rights of parties litigant may not be jeopardized.⁶⁰

Striking Out Discretionary With Court.—Where evidence is admitted clearly incompetent at the time and over objection, it is discretionary with the court to deny a motion to strike out, since it is within the power of the court to regulate the order of proof, and the party offering incompetent evidence may be able during the trial to offer other evidence which will remove the incompetency of the former.⁶¹

5. Testimony Not Clear.—A party cannot have testimony stricken out merely because the party offering the same might have, but failed to make the testimony clearer and stronger than he did by offering additional evidence.⁶²

6. Witness Not Recalled After Contradictory Evidence Offered. There is no rule authorizing the exclusion of testimony on the ground that other facts having been developed by opposing witnesses the witnesses giving the former testimony were not recalled for further examination.⁶³

7. Witness' Memory Vague.—Where on cross-examination it appears that a witness' memory is weak or unreliable concerning the matter to which he has testified on direct examination, this fact will not warrant a motion to strike out, but goes merely to the credibility or sufficiency of the testimony.⁶⁴ And where it appears that

by the court excluded on the ground that "it neither proved nor tended to prove payment or any other defense to the claim sued on." Judgment rendered for plaintiff, and defendant appealed. On appeal the Chief Justice said: "The only evidence of the defendant (appellant) was so plainly insufficient to sustain a verdict in its favor if rendered that the court properly excluded the evidence. This practice is to be commended in cases in which it is manifest that a verdict resting upon the evidence proposed to be excluded could not stand."

60. In *Mississippi & Y. R. Packet Co. v. Edwards*, 62 Miss. 534, the Chief Justice after having used the language as quoted in note 59, *ante*, continued: "The power to exclude should be cautiously exercised, but in plain cases of insufficiency of evidence, accepted as absolutely true, to maintain an issue, there should be no hesitation to employ it. It saves time and the useless intervention of a jury—useless because in the case supposed its finding would be set aside, and the result had better be anticipated."

61. *Ferguson v. McBean* (Cal.), 35 Pac. 559.

62. *Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433; *State v. Magers*, 36 Or. 38, 58 Pac. 892; *Harvey v. Chester*, 211 Pa. St. 563, 61 Atl. 118.

63. *Sorenson v. Northern Pac. R. Co.*, (C. C.) 36 Fed. 166.

64. *Maybin v. Webster*, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373; *Hampton v. State*, 50 Fla. 55, 39 So. 421.

New Orleans, J. & G. N. R. Co. v. Echols, 54 Miss. 264. This was an action for the breach by a railroad company of a contract to pay forty dollars per month for water, in consideration that the plaintiff would build and keep a tank. On the trial in the lower court, the plaintiff to show damage incurred, testified as to the cost of some of the appliances of said tank. On cross-examination it appeared that witness' memory was rather vague as to the cost of said appliances. Defendant's counsel then moved to exclude the witness' testimony, "because he did not possess sufficient knowledge as a basis of his testimony." The motion,

the testimony of a witness on re-examination is in some particulars contradictory to that given by him on his first examination, a motion to strike out his testimony as first given will not be available, because it is a question of fact to be determined from the whole of the witness' testimony which of his contradictory statements is true.⁶⁵

8. Testimony Modified on Cross-Examination. — Where testimony is so modified on cross-examination as to render it of little value, a motion to strike out testimony of the witness given on direct examination is properly denied, since it is within the province of

was overruled, and the defendant excepted. The court said: "The cross-examination was directed to the point that Echols did not have knowledge or memory accurate enough to speak as to the value of these articles, and that upon all his disclosures his testimony should be excluded. Certainly he was competent to depose as to the cost of the articles and their present value. He had stated the cost, or about the cost, from memory. When pressed, on cross-examination, it turned out that he could not, on inspecting the bill of particulars, state from recollection the cost of the articles. That response may very properly have had the effect of weakening his previous statements in chief, and of depreciating the value of his testimony. It is legitimate and daily practice to inquire into the source of a witness's knowledge, and the accuracy and reliability of his memory, not for the purpose of excluding the evidence, but to expose its weakness: whether his recollection was distinct or vague would go, not to its competency, but to its value."

65. *Cohen v. Metropolitan St. R. Co.*, 63 App. Div. 165, 71 N. Y. Supp. 268.

Stockwell v. Holmes, 33 N. Y. 53. One of the plaintiff's causes of action was founded upon a contract of the defendant to deliver two tons of hay to one Darly. The court said: "The hay was not delivered and Darly assigned the demand to the plaintiff. The finding of the referee as to this cause of action states that the defendant contracted to sell to Darly a farm for \$3,000; and afterwards, these parties entered into an oral agreement by which the defendant was to deliver to Darly two tons of hay on a day and at a place

named, and that he made default in delivering the hay. This agreement is found to have been made upon a good consideration. The finding shows a right in the plaintiff to recover the value of the hay. But the defendant on the trial, took an exception to the evidence by which the bargain for the hay was proved, and moved to have that evidence stricken out. The point was, that it was parcel of the contract for the sale of the farm, which was in writing, and that it could not, therefore, be established by parol, being merged in the writing. The testimony of Darly, by which this cause of action was sustained, was somewhat obscure; and, by one part of it, it would appear that the agreement was made prior to the signing of the written contract on the farm, and was a part of that bargain. If this were so, it would have been merged, and the defendant's position would have been well taken. But on a re-examination by the plaintiff's counsel he said that the agreement about the hay and some personal property was made after the contract was signed. It was, so far as the hay was concerned, upon a consideration distinct from the price which was to be paid for the farm. The testimony seems to have been given in the first instance without objection. The defendant then moved to have it stricken out, on the ground mentioned, and he excepted to the ruling denying that motion. There would have been no propriety in striking it out. It was a question for the referee to decide upon the whole of Darly's testimony, whether it was a subsequent independent transaction or a part of the bargain for the farm."

the jury to determine what weight, if any, should be given it.⁶⁶ But where evidence given on cross-examination is directly contradictory to that given on direct, it is error to refuse to strike it out.⁶⁷

9. Evidence Destroyed by Other Evidence. — Where evidence has been properly received, the party against whom it has been introduced has no absolute right to have it stricken out when its effect has been destroyed by other evidence.⁶⁸ The proper practice upon a jury trial is for such party to request the court to charge that such evidence is not to be considered by them, and in case of refusal he will have a good exception.⁶⁹

10. To Strike Out Cross-Examination Because Direct Struck Out. Where an answer to a proper question on direct examination has been stricken out, this action on the part of the court does not furnish ground for striking out testimony given on cross-examination if the latter is competent and relevant.⁷⁰

11. Evidence Introductory in Character. — It is not error to refuse to strike out evidence given by a witness which although im-

66. *Niendorff v. Manhattan R. Co.*, 4 App. Div. 46, 38 N. Y. Supp. 690; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190.

67. *Tyler S. E. R. Co. v. Hitchins*, 26 Tex. Civ. App. 400, 63 S. W. 1069.

68. *Gawtry v. Doane*, 51 N. Y. 84.

69. *Gawtry v. Doane*, 51 N. Y. 84.

70. In *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499, error was assigned upon the refusal of the court to strike out the testimony of a certain witness for plaintiff, given upon his cross-examination. The examination and cross-examination of the witness had been made and embodied in a deposition prior to the trial in the lower court. At the trial when the deposition was offered in evidence, defendant's counsel objected to the interrogatory therein and moved to strike out the answer thereto as being irrelevant. The objections were overruled and the question and answer were read. The defendant's counsel then read the cross-examination in evidence. Later in the trial the court did strike out the answer to the main question. Thereupon the defendant moved to strike out the whole cross-examination of the witness, which was refused. The motion was based exclusively upon the fact that the answer of the witness to the direct or main question had been stricken

out. The court said: "The correctness of this ruling must depend, not upon the result of the prior motion, but upon the question whether the testimony given upon his cross-examination was relevant to the issue. It has been settled by this court that testimony given upon a legitimate cross-examination of a witness is treated as evidence given in behalf of the party calling him. *Wilson v. Wager*, 26 Mich. 458; *Campau v. Dewey*, 9 Id. 381, 417, 418; *Schratz v. Schratz*, 35 Id. 485; *Bennett v. Smith*, 40 Id. 211. It follows from this that, if the testimony elicited upon cross-examination is pertinent to the issue, it is properly in the case, and it would be improper for the trial court to exclude it. If it makes for the party producing the witness, and is his testimony, it is difficult to see what right the trial judge has to strike it out, against his objection. The fact that a portion of a party's testimony is stricken out does not authorize the trial court to strike out other testimony which is relevant, no matter by whom called out. . . . It is therefore no reason for rejecting or striking out the cross-examination of a witness that he has not given any testimony in chief, or that his testimony in chief has been stricken out."

material is simply introductory of what the witness proposes to swear to, not raising irrelevant issues.⁷¹

12. Testimony Not Positive. — Testimony of a witness based on the best of his recollection and belief will not be stricken out because not positive.⁷²

13. Admissions Against One of Several Defendants. — In an action brought against two or more defendants, admissions made by one of them cannot be struck out on motion of the others; their proper and only remedy is by a request for instructions to the jury limiting its effect.⁷³

14. Evidence Admissible But For One Purpose. — In cases where evidence is offered which is competent, but admissible for one purpose only, it cannot be stricken out on motion; a charge should be made to the jury limiting its scope.⁷⁴

15. Motion Not Available on Ground of Disconnection. — Where a party moves to strike out an entire statement of a witness and the court strikes out a part, and the part left is objectionable to the moving party because of its disconnection, his remedy is not by a motion to strike out, but that the whole be restored subject to his objection.⁷⁵

16. Pertinent Evidence in Reply to Question Improperly Framed. Pertinent and relevant testimony should not be excluded because the question which elicited it was not properly framed, and may, in itself, have been objectionable, unless it plainly appears that injustice was thereby done to the other party by way of a surprise upon him, or otherwise.⁷⁶

IV. WHEN MOTION TO STRIKE OUT NECESSARY.

1. In General. — When objectionable evidence is given, upon failure to move the court that such evidence be stricken out, the party failing to do so will have no ground of complaining on appeal as to the admission of the evidence.⁷⁷

⁷¹. *Brown v. Prude*, 97 Ala. 639, 11 So. 838.

⁷². *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450.

⁷³. *Lewis v. Lee County*, 66 Ala. 480.

⁷⁴. *Guice v. Thornton*, 76 Ala. 466.

⁷⁵. *State v. Wideman*, 68 S. C. 119, 46 S. E. 769.

⁷⁶. *Burke v. Claughton*, 12 App. D. C. 182.

⁷⁷. *California*. — *Fox v. Fox*, 25 Cal. 587.

Illinois. — *Chicago City R. Co. v. O'Donnell*, 114 Ill. App. 359; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492.

Indiana. — *Flint & Walling Mfg. Co. v. Beckett*, 70 N. E. 503.

Iowa. — *Patton v. Sanborn*, 133 Iowa 650, 110 N. W. 1032; *Britton v. Des Moines, O. & S. R. Co.*, 59 Iowa 540, 13 N. W. 710; *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341.

Michigan. — *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 438.

Missouri. — *Weir v. Metropolitan St. R. Co.*, 103 S. W. 583.

New York. — *In re Palmer's Will*, 52 Hun 612, 5 N. Y. Supp. 213.

South Carolina. — *Keys v. Winnsboro Granite Co.*, 76 S. C. 284, 56 S. E. 949.

2. After Unsuccessful Objection.—When upon objection to evidence it is admitted by the court, subject to exception, the party objecting to it should at some subsequent stage of the trial, apply

Wisconsin.—*Tebo v. Augusta*, 90 Wis. 405, 63 N. W. 1045.

Harrington v. City of Hamburg, 85 Iowa 272, 52 N. W. 201. This was an action to recover for personal injuries sustained by the plaintiff in falling into a ditch. The court said: "Soon after the accident occurred, Dr. Bogan was called to attend the plaintiff as a physician. On the trial he was produced as a witness for the plaintiff, and asked the following questions: 'What statement, when you went in, did he make to you, in connection with your examination, as a part of your professional examination of him?' To this the defendant objected on the ground that it was immaterial and incompetent, but the objection was overruled, and the witness was permitted to answer as follows: 'He simply made a statement of falling off in a ditch on the night before or previous night; that he fell off the ditch, coming up home.' This answer was not competent. It may have been the duty of the physician to inquire into the history of the case, in order that he might treat it understandingly; but statements of the character of those given were not necessary to enable the witness to explain to the jury the nature of the injuries received, and were merely hearsay evidence in regard to an issue in the case. The answer given, however, was not indicated by the question which drew it out, and no attempt was made to suppress it. Moreover, the fact that the plaintiff received the injuries in question by falling into the ditch was fully shown by other testimony which was not contradicted. Therefore the answer was without prejudice, and the defendant has no sufficient grounds to complain of it."

Irresponsive Evidence.—"The complaint of defendant relates to the answer given by the witness which, in part, was not responsive to the question, but which contained statements that were unresponsive and of no evidentiary value. The record

does not disclose that defendant moved to strike out the improper portion nor made objection to it of any kind. Had counsel for defendant moved to strike out this unresponsive matter thus injected by the witness, we must assume the trial court would have sustained the motion. An objection to a question asked a witness possesses no other function than to advise the court that the propriety of the question and of an answer responsive thereto is put in issue by the objector. It does not reach unresponsive statements included in the answer. Such statements may be put in issue only by motion to strike out or its legal equivalent, and, if the answer is suffered to pass unchallenged, the right to complain is waived. *Waddell v. Railway*, 113 Mo. App. 680, 88 S. W. 765. As defendant failed to complain to the trial court in proper and timely manner, it now cannot be heard." *Murphy v. Metropolitan St. R. Co. (Mo.)*, 102 S. W. 64.

Evidence Brought Out on Cross-Examination.—In *Little Rock & S. W. R. Co. v. Cross*, 78 Ark. 220, 93 S. W. 981, which was an action brought against a railway company for injuries received while unloading a car in consequence of it being struck by another car, one Page, a witness for plaintiff, testified that plaintiff was injured and as to other matters pertaining to the transaction. The court said: "The testimony was competent, relevant, and material. But it was discovered on cross-examination that Page only found out that the boy was injured when he took him to the doctor's two or three days after the accident, and he only knew about how it was done from what the boy told him. This rendered that part of his testimony incompetent, and too remote and hearsay evidence, and it was prejudicial. But appellant, after thus bringing out these facts, did not ask the court to exclude the evidence. It elicited the evidence itself on cross-examination, and it waived all

to the court by motion or prayer to strike it out, and upon failure to do so he cannot raise the question of its admissibility on appeal.⁷⁸

objection to its incompetency by not moving the court to exclude it after such incompetency was discovered."

78. Jacksonville, T. & K. W. R. Co. v. Peninsular L. T. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661, 7 L. R. A. 33, 65; Jenney Elec. Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Coates & Glenn v. Sangton, 5 Md. 121; Metropolitan L. Ins. Co. v. Ethier, 34 Mich. 277; Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Summers v. Darne, 31 Gratt. (Va.) 791.

In *Basshor & Co. v. Forbes*, 36 Md. 154, which was an action brought on a promissory note, defendant in the court below introduced parol evidence relative to the transaction which was objected to by plaintiff but admitted by the court subject to exception. *Quere*. Could the question as to the admissibility of this evidence be brought before the appellate court for review. The court of appeals, speaking through Alvey, J., said: "The question as to the admissibility of the parol evidence offered by the defendant in the court below, and which was objected to at the time by the plaintiffs, but admitted by the court subject to exception, is not before this court for review, inasmuch as the court was not at any subsequent stage of the trial invoked to exclude such evidence, and exception taken to its refusal so to do. Whether the evidence was really admissible, the court below does not appear to have definitely decided. All that was done by the court was to allow the evidence to be given, subject to the exception of the plaintiffs, which might be insisted on at some later period in the course of the trial, when the question of the admissibility or inadmissibility of the evidence could be better understood than at the moment when offered. This course is frequently pursued, in order to facilitate the trial, and as a means of more fully understanding the relation and bearing of the proffered evidence to and upon the issue involved, than can be well seen in

the early progress and development of the cause. The practice in this respect is most generally regulated by rule of court; but, in all such cases, if the party objecting to the evidence intends to insist upon his objection taken in the first instance, he should, before or at the close of the evidence, apply to the court, either by motion or prayer, to exclude the evidence objected to, and thus have the question of the admissibility of the evidence definitively disposed of, and to the final ruling on this latter application the exception, if desired, should be taken. If this is not done, the benefit of the original objection cannot be availed of here, for the obvious reason that there has been no final decision of the question in the court below; and the mere statement in the bill of exception that certain evidence was offered and objected to, but admitted subject to the objection, to be disposed of at a subsequent stage of the trial, does not by any means raise the question here as to the admissibility of such evidence."

United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729. This action was brought by plaintiff, a corporation organized under the laws of Illinois, to recover an unpaid subscription to its stock by defendant, who was a resident of the state of New York and was one of plaintiff's incorporators and original subscribers to its capital stock. The defendant set up these defenses which were inconsistent with each other, *viz*: first, that the plaintiff was incorporated for an illegal purpose, and secondly, that it had not been incorporated at all. To controvert this the plaintiff introduced in evidence certain documents from the office of the secretary of the state of Illinois. The court said: "The plaintiff's corporate character was, therefore, *prima facie* established, and, as nothing was shown by the defendant in contradiction, there was no question on that issue to submit to the jury. The documents from the office of the secretary of state of

3. After Objection Delayed.—Where no objection to evidence has been made until after its admission, a further objection in the form of a motion to strike out is necessary in order that the objection may be available on appeal.⁷⁹

4. Where Court Defers Ruling Upon Motion.—Where the court, over objection, admits certain evidence, with the statement that the objection will be passed upon at a later stage of the trial, it is incumbent upon the objecting party, if the evidence be inadmissible, to direct the court's attention thereto either before or at the close of the testimony, and to move to exclude it; and upon his failure to do this he will be held to have waived his objection.⁸⁰

5. Evidence Admitted by Agreement.—When at the time irrelevant evidence is introduced it is agreed by the offering party that he will subsequently render it relevant by the introduction of further evidence, upon failure to do so, it is necessary that the opposite party move the court to strike out the evidence in order that he may complain of its admission, on appeal.⁸¹

Illinois were received in evidence against the defendant's objection and exception. In order to give them proper effect they should have been supplemented by proof of the law of that state, but they were competent as part of the chain of proof on the issue. When the plaintiff failed to follow them up by proof of the law which gave them efficacy, a motion to strike out was the defendant's remedy, and no such motion was made. When evidence tending to prove a material fact in issue is received under objection, and which requires proof of other facts to make it complete, which have not been supplied, its presence in the record is no ground for reversal in the absence of a motion subsequently to strike it out. The failure of the plaintiff to supplement the documentary evidence with proof of the law should have been raised by such a motion, as the ruling admitting the papers was correct when made."

79. *Kehoe v. Hanley*, 95 Ga. 321, 22 S. E. 539; *Totten v. Burhans*, 103 Mich. 6, 61 N. W. 58; *Hollenbeck v. Missouri Pac. R. Co. (Mo.)*, 34 S. W. 494; *Wilson v. Boasberg*, 1 Misc. 436, 21 N. Y. Supp. 915; *Sternwald v. Siegel*, 7 Misc. 70, 27 N. Y. Supp. 375; *Kelly v. Cohoes K. Co.*, 8 App. Div. 156, 40 N. Y. Supp. 477; *Collins v. Cook*, 40 Tex. 238.

80. *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897.

"Exhibit A was a photograph of the Alton crossing. It showed a semaphore there. Defendant objected to the photograph only so far as the semaphore was concerned, and that on the ground it was not the same semaphore. Plaintiff insisted it was the same. The court admitted it with the statement that if it turned out it was not the same semaphore, a motion to exclude would be entertained. No such motion to exclude was made, but during the closing argument defendant objected to the use plaintiff's counsel was making of it. Plaintiff's counsel then insisted the proof showed it was the same semaphore, and the court permitted him to proceed, but he made no further reference to the photograph of the semaphore so far as it appears from his further remarks set out in the bill of exceptions. Under these circumstances we are unable to say the court erred. If, after the close of the evidence, defendant claimed it had not been shown to be the same semaphore, he should have moved to exclude the photograph. Not having made that motion, the photograph was in evidence and a proper subject of comment." *Chicago & A. R. Co. v. Vipond*, 112 Ill. App. 558. Judgment affirmed, 212 Ill. 199, 72 N. E. 22.

81. *Heilman v. Shanklin*, 60 Ind.

V. WHEN UNNECESSARY.

1. **Evidence Admitted Over Repeated Objections.**—Where testimony is before the court, having been admitted over repeated objections and exceptions, a motion to strike out is not necessary in order that the party failing to move the striking out may be protected in an appellate court.⁸²

2. **Evidence Already Struck Out.**—Where the court has already of its own motion excluded evidence and stated to the jury that it had nothing to do with the case, it is not error, on the part of the court, to refuse to strike out the aforesaid evidence, since its effect has already been annulled.⁸³

VI. WHO MAY CAUSE EVIDENCE TO BE STRICKEN.

1. **Party Against Whom Evidence Is Offered.**—As a matter of practice the party against whom evidence is offered is usually the one who avails himself of a motion to strike out to nullify the effect of illegal evidence.⁸⁴

2. **Party by Whom Evidence Is Adduced.**—The general rule is that where a party, by his own questions, elicits testimony irrele-

424; *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938; *Bayliss v. Cockcroft*, 81 N. Y. 363.

Williams v. City of Grand Rapids, 53 Mich. 271, 18 N. W. 811. The plaintiff brought suit against the city of Grand Rapids in the superior court of that city for damages for injuries he claimed to have sustained from a fall, occasioned by a defective crosswalk which it was the duty of the city to keep in repair. On appeal the plaintiff urged as error the admission of certain evidence. The court said: "Counsel for defendant was permitted by the court, against the objection of irrelevancy and immateriality, to make proof of the condition and appearance of the premises where the accident occurred, six months after the plaintiff received his injuries, upon the condition stated, that he would subsequently show that they were then the same as when the accident occurred. He failed to make the subsequent proofs and the testimony was allowed to stand, and we think properly. The objection remained good through the trial, and it was the duty of the court to see to it that the testimony was made relevant as pro-

posed, or to strike it out, had his attention been called to the failure to make the promised proof. Plaintiff's counsel having failed to do so, it cannot now be urged as error."

82. *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612; *Bryce v. Chicago, M. & St. P. Co.*, 129 Iowa 342, 105 N. W. 497.

83. *Rollins v. O'Farrel*, 77 Tex. 90, 13 S. W. 1021.

84. *California*.—*Kiler v. Kimbal*, 10 Cal. 267.

Georgia.—*Blount v. Beall*, 95 Ga. 182, 22 S. E. 52; *Turner v. Fuhring*, 67 Ga. 161.

Illinois.—*Hulick v. Scovil*, 9 Ill. 159.

Maryland.—*Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689.

Michigan.—*Bennett v. Smith*, 40 Mich. 211; *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174.

Minnesota.—*Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295.

Ohio.—*Thayer v. Luce*, 22 Ohio St. 62; *Pross v. Bradstreet*, 8 Ohio Dec. 731.

Texas.—*Landa v. Obert*, 78 Tex. 33, 14 S. W. 297.

vant, illegal or adverse to himself, it is not such party's right to have the evidence given struck out or withdrawn.⁸⁵ In accordance with the above rule counsel will not be permitted to propound a question to a witness, have the witness furnish an answer responsive to the question and then demand of the court, as a matter of right, to strike out the answer given.⁸⁶

Documentary Evidence Introduced by Mistake.—Nor may a party put a document in evidence and afterwards withdraw it, upon the ground that he put it in by mistake. The evidence having been competent it has become a part of the case, and the court has a right to retain it.⁸⁷

Evidence Illegal—Not Responsive.—But it is held that where in answer to a proper question a witness gives illegal testimony, it may be stricken out on motion of the party adducing the same.⁸⁸

85. *Wright v. State*, 108 Ala. 60, 18 So. 941; *Billingslea v. State*, 96 Ala. 126, 11 So. 409; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469; *Speights v. State*, 1 Tex. App. 551; *Kelley v. State*, 1 Tex. App. 628; *Smith v. Com.*, 28 Ky. L. Rep. 1254, 91 S. W. 742; *Zipperer v. Mayor & Aldermen (Ga.)*, 57 S. E. 311.

In *Bryan v. Olsen*, 20 Misc. 604, 46 N. Y. Supp. 349, the court said: "The appellant contends that the motion as made at the close of the case to strike out 'what transpired between Todd and Bryan on the ground that it is immaterial, incompetent, and not connected with the defendant' was erroneously denied, but the point is found to be without merit, since the motion, as made, called for the striking out of testimony elicited by the defendant's counsel, as well as that adduced for the plaintiff, and it would thus appear that the defendant had consented to the introduction of this proof."

86. *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Dickens v. State*, 142 Ala. 49, 39 So. 14; *United States v. Francis*, 144 Fed. 520; *Hammond v. State (Ala.)*, 41 So. 761; *Cotton v. State*, 87 Ala. 75, 6 So. 396.

87. *Com. v. Carbin*, 143 Mass. 124, 8 N. E. 896.

88. "The action is covenant on a warranty of the soundness of a slave, sold by Morgan, the defendant, to Winston, the plaintiff. There was judgment for the plaintiff, and de-

fendant appealed in error. 1. The plaintiff took the deposition of Harris Hill, and asked the witness to state the appearance and condition of the slave; answer; 'a short time before her death her flesh wasted away very rapidly,' &c., 'she had such symptoms as I believe persons generally have, who die of secondary syphilis, which I suppose to be her disease.' At the trial, the plaintiff moved the court to strike the latter clause from the deposition, before it was submitted to the jury, which was done and defendant excepted. In this, there was no error. The evidence was illegal in itself, being a mere opinion of a non-professional witness. The illegality was not waived by the plaintiff, because it was no answer to his question. The question was proper, and a witness will not be permitted, in answer to a legal question, to state what is illegal as evidence, to the prejudice of the party that calls him, and not in answer to his question. In such case, the party is not bound or precluded by the answer, and may himself object to its competency, though the person be his own witness." *Morgan v. Winston*, 3 Swan (Tenn.) 472.

In *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644, which was an action brought by the appellee, F. M. Ryan, against the American Oak Extract Co. to recover an amount alleged to be due plaintiff for fifty cords of wood, under a contract which it was alleged the defendant

Evidence Unexpectedly Unfavorable.—The rule is that a party eliciting evidence either on direct or cross-examination cannot have it stricken out or withdrawn on the ground of its irrelevancy or incompetency, if contrary to his expectations it chances to be unfavorable to himself.⁸⁹

When Exception Not Taken.—It is held by some courts that the party offering illegal evidence may, when exception has not been

made with plaintiff, the court said: "On the cross-examination of the plaintiff by the defendant, he stated that his brother had given Judge Russell authority to contract for the wood. This answer, from what appears, was responsive and the defendant was bound by it, if a fact within the knowledge of the witness, and it could not move to exclude it; but the witness immediately stated that he knew nothing about the contract or Russell's authority except what his brother had told him. Thereupon the defendant moved to exclude the first statement made by the witness, that his brother had authorized Russell to make a contract with defendant, on the ground that it was hearsay. The court refused to exclude it. If a witness on cross-examination, by inadvertence or mistake states something as a fact, and he afterwards shows that the matter was not within his knowledge, but rested alone on hearsay, it should be excluded as illegal evidence, on the motion of him whom it tends to injure, unless he was at fault in calling it out. When one calls for illegal evidence, he cannot, of course, move to exclude it, but when in answer to a proper question, such evidence is replied, the party examining, whether on the direct or cross, may move to exclude it. The examiner is not experimenting in such an instance. And this rule does not contravene that other one, so well understood, that a party calling out illegal evidence had no right to have it excluded on his motion. There was error in this ruling of the court."

⁸⁹. *Alabama*.—*Hughes v. Taylor*, 52 Ala. 518; *East Tennessee, V. & G. R. Co. v. Turville*, 97 Ala. 122, 12 So. 63; *Central R. & B. Co. v. Ingram*, 98 Ala. 395, 12 So. 801.

Arkansas.—*Benton v. State*, 78 Ark. 284, 94 S. W. 688.

California.—*Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317.

Georgia.—*Birmingham L. Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437.

Illinois.—*Capen v. De Steiger Glass Co.*, 105 Ill. 185.

Indiana.—*McCarty v. Waterman*, 96 Ind. 594.

Iowa.—*Reeves v. Harrington*, 85 Iowa 741, 52 N. W. 517.

Kentucky.—*Gray v. Gray*, 3 Litt. 465.

Michigan.—*Barry v. Davis*, 33 Mich. 515.

Montana.—*Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969.

New York.—*Vibbard v. Staats*, 3 Hill 144; *People v. Chacon*, 102 N. Y. 669, 6 N. E. 303, *affirming* 3 N. Y. Crim. 418; *Decker v. Bryant*, 7 Barb. 182; *Clinton v. Rowland*, 24 Barb. 634.

North Carolina.—*Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761.

Tennessee.—*State v. Becton*, 7 Baxt. 138.

Texas.—*Smith v. Oldham*, 26 Tex. 533; *May v. State*, 23 Tex. App. 146, 4 S. W. 591.

In *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594, the court, after having used the language as quoted in note 32, *post*, said: "The motion embraced some matter brought out by responsive answers to questions propounded by appellant's counsel, as indicated above. Appellant, having quizzed the witness in the hope of receiving favorable testimony, will not be heard on a motion to strike it out when it turned out to be unfavorable. *Ellinger v. Rawlings* (1895), 12 Ind. App. 336; *Jones, Evidence*, § 898; *Underhill, Evidence*, § 368."

Evidence Elicited on Cross-Examination.—"The defendant then cross-examined the witness at length, and at the conclusion of his cross-examination the defendant 'moved to

taken by his opponent, move that the same be stricken out or excluded.⁹⁰ Other courts deny counsel this privilege.⁹¹

When Evidence Has Been Excepted To, it may, in the discretion of

exclude all the evidence relative to this accident, which defendant had asked about.' It was not proper for the defendant to speculate with the witness on a cross-examination, and then move to exclude the evidence he had drawn out by his cross-examination." *Southern Coal & Coke Co. v. Swinney* (Ala.), 42 So. 808. See also *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

90. *Montgomery v. Miller*, 3 Redf. Sur. (N. Y.) 154; *Roberts v. Johnson*, 5 Jones & S. (N. Y.) 157.

In *Carpenter v. Ward*, 30 N. Y. 243, the court said: "The other exception was to the ruling of the referee allowing, on the application of the plaintiffs, certain testimony to be stricken out which the plaintiffs had themselves offered, and which the referee had received under objection, but not under exception. This testimony related to the *declarations* of the defendant's agent that he had paid for certain bills of lumber procured on a former occasion by Hanbold on the authority of such agent. Strictly speaking, perhaps, such declarations, not being within the direct scope of the agency, nor made in the execution of the agency, might be regarded as of doubtful propriety. But no exception was taken to the decision of the referee allowing them to be introduced in evidence. They were therefore not open to review in this court. But the plaintiff supposing them to be incompetent subsequently asked to have them struck out, and the referee granted the motion, and the defendant excepted to the decision. I do not think this was error."

91. *Toliver v. State*, 94 Ala. 111, 10 So. 428; *Byrne v. Reed*, 75 Cal. 277, 17 Pac. 201; *Bryan v. Olsen*, 20 Misc. 604, 46 N. Y. Supp. 349.

In *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317, the court said: "John Montgomery was called as a witness on behalf of plaintiff, and stated that he was a physician; had

been in practice as such for 17 years; testified as to attending Wheelock as a physician from January, 1888, to October of the same year, when he died; gave his opinion as to his ailments; and described his death as being due to progressive paralysis, etc. . . . Upon the close of the testimony on behalf of the plaintiff, his counsel moved the court to strike out substantially all the testimony of Dr. John Montgomery upon the ground that he was a licensed physician, in attendance as such upon Wheelock, who was his patient, and that the information possessed by him was acquired while attending his patient, and was necessary to enable him to prescribe for Wheelock, and hence was incompetent, under subdivision 4 of section 1881 of the Code of Civil Procedure of this state. The motion was denied by the court, and the ruling excepted to by plaintiff.

. . . The question, then, presents this proposition: Can a party to an action introduce testimony which, in the face of an objection, would be incompetent, and, upon discovering that it militates against him, strike it out without the consent of the opposite party? The question must be answered in the negative. By offering the witness, and eliciting testimony from him, he in effect declared the witness was competent and the testimony proper. In the absence of objections by defendants, it was the equivalent of consent, and was as binding upon them as a written stipulation agreeing to the competency of the witness to testify to the given facts would have been."

It is not admissible for counsel to be quiet and allow the evidence to come out and take advantage of it, if favorable, and, if not, to ask that it be stricken out, and not considered. *McRae v. Malloy*, 93 N. C. 154. "Still less can he complain when it comes out in response to his own inquiries." *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

the court, be stricken out on motion of the offering party or withdrawn from the consideration of the jury,⁹² and the party excepting certainly should not be heard to object to its withdrawal.⁹³

But a party cannot be allowed even as a matter of discretion to withdraw material evidence from the jury during the argument of the cause, since at this stage of the proceedings the opposite party would not have an opportunity to get the benefit of the evidence in question independently.⁹⁴

Evidence Admitted by Agreement Subject to Exception. — Where evidence is admitted by agreement between the parties, subject to exception, the party having offered evidence may, after its admission, successfully move that it be stricken out, if it is in fact inadmissible.⁹⁵

Evidence Favorable to Moving Party. — Evidence offered by a party may be stricken out on his own motion or withdrawn if favorable to himself and not affirmatively favorable to his opponent.⁹⁶

92. *Kopetzky v. Metropolitan El. R. Co.*, 14 Misc. 311, 35 N. Y. Supp. 766; *State v. Towler*, 13 R. I. 661; *Bell v. Clarion*, 120 Iowa 332, 94 N. W. 907.

93. *Providence Life Ins. & Inv. Co. v. Martin*, 32 Md. 310; *Sittig v. Bickestack*, 38 Md. 158; *Sherwood v. Chicago & W. M. R. Co.*, 88 Mich. 108, 50 N. W. 101; *Bell v. Clarion*, 120 Iowa 332, 94 N. W. 907.

In *Livingston v. Heerman*, 9 Mart. (O. S.) 656, the court said: "The defendant excepted to a plan offered in evidence by the plaintiff at the trial. The judge overruled the exception; but the plaintiff thought it safer to withdraw his plan, and not let it be taken as testimony. By thus withdrawing the instrument, we complied with the defendant's wish. We acceded to his exception—could he demand or expect more? Yes, he now contends, that he ought to have had the advantage of commenting upon and arguing against the very deed which, in the same breath, he contends was inadmissible in evidence. Is not this a preposterous inconsistency? Can he be allowed to maintain that the plan is bad as evidence, and good for the purpose of being argued upon, as if it were evidence, that is, both good and bad at one and the same time? But, says the learned counsel, a party cannot withdraw any deed or writing which he has once filed or offered in court. We should not have withdrawn the plan in question, if he had withdrawn

his exception to it. We could not, with safety, have suffered it to remain, while his exception to it stood on record. This would have been to risk the remanding of the cause for a second trial. But if the counsel really wanted to avail his client of anything which that plan might prove, he should have withdrawn his exception to it in the court below. We have no objection that he shall do this now, and make any use of that plan which he may think fit. But he must not complain that he had no opportunity of arguing on that plan before the jury, when he himself deprived himself, by his own act, of the opportunity afforded him of doing so."

94. *Mayor v. Nichol*, 3 Baxt. (Tenn.) 338.

95. *Schaefer v. Baltimore Marine Ins. Co.*, 33 Md. 109.

96. *Nelms v. State*, 123 Ga. 575, 51 S. E. 588; *Boyd v. State*, 17 Ga. 194; *Armstrong v. Gay*, 1 Stew. (Ala.) 175; *In re More's Estate*, 121 Cal. 609, 54 Pac. 97.

In *Clark v. Boston & M. R. Co.*, 164 Mass. 434, 41 N. E. 666, which was an action for personal injuries occasioned to the plaintiff by being struck by a train at a grade crossing of a highway by the defendant's railroad, through the alleged negligence of the defendant, the plaintiff offered in evidence a document setting forth the rules of the defendant relative to the operation of its road, the plaintiff contending that

3. Court of Its Own Motion. — A. IN GENERAL. — Evidence improperly admitted may be stricken out or withdrawn by the court on its own motion.⁹⁷ But it is error for the trial court to strike out or withdraw from the consideration of the jury evidence which is relevant and competent and not objected to by either party.⁹⁸

B. WHEN RIGHT TO OBJECTION LOST. — Though a party may have lost his right to object to incompetent evidence by reason of his failure seasonably to do so, the court itself may and should on its own motion, strike out such evidence where such incompetent evidence is repugnant to the policy of the law and dangerous to the administration of justice.⁹⁹

C. WHEN EVIDENCE INSUFFICIENT TO SUSTAIN VERDICT. Where it is clear beyond doubt that the court should not permit a verdict to stand on the state of facts proved by the plaintiff, assuming the truth of the testimony, and giving full force to every just inference from it, the court should not wait for a verdict, but should

such rules were in effect at the time his injuries were received. Afterwards during the trial the defendant offered in evidence another document containing the rules of the road, which were slightly different from those introduced by plaintiff, and contended that these and not those introduced by plaintiff were in effect at the time of the occurrence in question, whereupon plaintiff moved that the rules introduced by himself be excluded. This the court did.

97. See note 2, *ante*.

98. *Lewars v. Weaver*, 121 Pa. St. 268, 15 Atl. 514; *State v. O'Connor*, 105 Mo., 121, 16 S. W. 510; *Rhodes v. Rhodes*, 18 Pa. Super. Ct. 231.

In *Ferguson v. Davidson*, 147 Mo. 664, 49 S. W. 859, it was held that the testimony of a witness should not be withdrawn from the jury, where only a part is incompetent.

99. *Jarvis v. State*, 138 Ala. 17, 34 So. 1025; *Low v. State*, 108 Tenn. 127, 65 S. W. 401.

In *Monfort v. Rowland*, 38 N. J. Eq. 181, the court declares: "The court is not bound to accept anything but legal evidence, and should seldom, if ever, allow its judgment to be influenced or controlled by anything else. The parties are at liberty to make such agreements respecting the evidence as they may see fit, but the court is not bound

by them. The court may recognize them if it thinks proper to do so, but it should in no case sanction them if they are against the policy of the law, or dangerous to the safe administration of justice. The parties cannot, by any agreement they may make, compel the court to disregard or overthrow the law."

In the case of *Parker v. Smith*, 4 Cal. 105, it was held that the court might of its own motion strike out and instruct the jury to disregard the illegal testimony of a witness, although given without objection from the opposing party. The court there say: "On the trial of this cause one of the witnesses deposed to a state of facts which upon his cross-examination proved to be hearsay evidence, and wholly inadmissible; whereupon the court ordered the testimony of the witness to be stricken out, and instructed the jury to disregard it. The appellant assigns this as error . . . because the court of its own motion ruled it out. . . . The right of the court to interfere is also undoubted. The testimony was clearly improper. The duty of the court was not confined to passing upon such portions of the testimony as may be excepted to, but extends to the preservation of the rights of the litigants, and a proper disposition of the matters in controversy."

exclude the evidence¹ or instruct the jury as to its insufficiency.²

D. WHEN EVIDENCE APPARENTLY ADMISSIBLE. — When evidence is apparently admissible when offered but afterwards found upon cross-examination to be inadmissible because hearsay, the court may, on its own motion, strike out such evidence; and to warrant this action on the part of the court it is not necessary that the evidence should have been objected to when offered.³

VII. TIME WHEN MOTION SHOULD BE MADE.

The general rule is that a motion to strike out evidence should be made as soon as practicable and convenient after its incompetency is fully developed,⁴ which usually means immediately upon delivery,⁵ but which may mean as soon as a witness' testimony on direct examination is completed,⁶ or during cross-examination,⁷ or after

1. Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977.

2. Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977.

3. People v. Wallace, 89 Cal. 158, 26 Pac. 650; Parker v. Smith, 4 Cal. 105.

4. Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; MacFeat v. Philadelphia, W. & B. R. Co. (Del.), 62 Atl. 898; Wilkins v. Nassau Newspaper Delivery Exp. Co., 98 App. Div. 130, 90 N. Y. Supp. 678; Dyson v. Baker, 54 Miss. 24.

Professor Jones, in his work on Evidence, declares that "it is a matter of right, on proper motion, to have testimony stricken out which is irresponsive and prejudicial, and the error of the court in this respect is subject to review by the appellate court. If no such motion is made, the reception of such testimony is not error; and if the motion to strike out is not promptly made the *right is waived*." 3 Jones on Evidence § 898.

"Courts do not regard with favor motions to strike out evidence unless promptly made, for they are not willing to allow parties to take the chances of favorable responses to questions from the witnesses, and if disappointed, then move to strike out." Falvey v. Jackson, 132 Ind. 176, 31 N. E. 531.

In People v. McMahon, 2 Park. Crim. (N. Y.) 663, incompetent evidence was received without objec-

tion, both parties laboring under a misapprehension as to the facts on which its admissibility depended. It was held that at a subsequent stage of the trial when the facts were proved which rendered the evidence incompetent, a motion to strike out could be made.

5. Goldman v. State, 75 Md. 621, 23 Atl. 1097; Gilmore v. Pittsburg, V. & C. R. Co., 104 Pa. St. 275; Phelan v. Bonham, 9 Ark. 389; Rhea v. Crunk, 12 Ind. App. 23, 39 N. E. 879; Capps v. State, 40 Tex. Crim. 103, 48 S. W. 517; McKeown v. Dyniewicz, 83 Ill. App. 509; Simon v. State, 125 Wis. 439, 103 N. W. 1100.

6. State v. Marshall, 105 Iowa 38, 74 N. W. 763; Wilkins v. Nassau Newspaper Delivery Exp. Co., 98 App. Div. 130, 90 N. Y. Supp. 678.

7. In Theodore Land Co. v. Lyon (Ala.), 41 So. 682, a witness testified as to a certain fact. On the cross-examination of this witness it was developed that the only way he knew anything about the matter concerning which he had testified was that somebody told him so. The cross-examiner thereupon moved the court to strike out the witness' testimony on the ground of its being hearsay. Held, that the evidence was clearly hearsay and that the cross-examiner had availed himself of the first opportunity to have it excluded. The motion should have been sustained.

cross-examination,⁸ or as soon as the party offering the illegal evidence has closed his case.⁹ A motion should not be prematurely

8. *Defguard v. New York & L. B. R. Co.* (N. J.), 67 Atl. 609.

Missouri, K. & T. R. Co. v. Renfro (Tex. Civ. App.), 83 S. W. 21. This suit was brought for alleged injury to a certain lot owned by plaintiff situated in the city of Greenville. The plaintiff's allegations were that the city entered into a contract with the railroad in which it was agreed that the company would open and keep open a street along its right of way which passed in front of plaintiff's property; that the company did open the street but failed to keep it open, thereby cutting off ingress and egress to and from the plaintiff's property, thus damaging the same. The court said: "We are of the opinion the court erred in overruling the motion to strike out the testimony of plaintiff's witness, F. Traub, wherein he testified as to the contents of an agreement between the city of Greenville and the railway company. On direct examination the witness testified to an agreement made between the city of Greenville and the railway company, whereby the company agreed to open up a street on the west side of its right of way, running south from Washington street, and passing in front of the property in controversy. On cross-examination he testified he never saw the agreement, and had never heard it read; only knew of the agreement from hearsay. It was shown that his information was obtained from talking with different persons, who were members of the city council at the time the agreement is alleged to have been made. Thereupon the defendant made a motion to strike out all the testimony of the witness in reference to the contents of the agreement, on the ground it was hearsay. The motion was overruled, and defendant took a bill of exception. This action of the court was error. The testimony was hearsay, which fact was developed on cross-examination, and the motion to strike out, having been timely made should have been sustained."

Not Necessary to Move on Mere Suspicion.

— A party is not bound to interrupt the examination of a witness called by his adversary in respect to a material matter, on a mere suspicion that the witness may be debarred by his position from testifying; he may await the cross-examination to bring out the facts, and, if it appears thereby that the witness is incompetent, make his motion to have the testimony struck out. *Loveridge v. Hill*, 96 N. Y. 222.

9. *Dyson v. Baker*, 54 Miss. 24. This was an action on an open account. On the trial, the plaintiffs, to prove the account sued on, introduced two witnesses, clerks of the plaintiffs, who testified as to the general correctness of their mercantile books, and that the accounts were faithfully transcribed therefrom. The defendant moved to exclude their whole testimony, upon the ground that the books should have been produced, or their loss established. The motion was overruled, and as contended by plaintiff, properly so, because it was too late. The court said: "We cannot agree, however, with the suggestion of the appellee's counsel, that the motion was properly overruled because it came too late. It was made as soon as the testimony of the two clerks was closed, which was simultaneous with the closing of the plaintiff's case. It has been repeatedly held in this State, that objections to testimony must be made when it is offered, and that it is too late after verdict to raise them on a motion for a new trial. We do not understand by this, however, that objection must be made the very instant the testimony is delivered. Frequently it will occur that testimony which appears inadmissible when offered is made competent by that which follows; and, as a party is allowed to introduce his proof in his own order, his adversary may well wait until he has fully developed his case, and then move to

made, *i. e.*, before incompetency is fully shown.¹⁰ In accordance with the general rule as above stated it has been held that where counsel fails to move that testimony of an opponent's witness be stricken out until after his cross-examination of such witness,¹¹ or until three days after cross-examination,¹² or after the witness had retired,¹³ or after the witness had been discharged from attendance on the trial,¹⁴ it is too late.¹⁵

exclude such as seems incompetent after hearing the whole. Of course, when such motion is sustained, the party should ordinarily be allowed, by the introduction of further competent evidence, to replace that which has been excluded. This question has been frequently before the courts, and is discussed at some length in the recent case of *Storm v. Green*, 51 Miss. 103. While no invariable rule can be laid down, it will perhaps meet the ordinary requirements of justice to say, that objections to testimony should be seasonably made as soon as practicable and convenient after its incompetency is fully developed; and that within this rule much should be left to the discretion of the presiding judge. It may frequently happen that the most advantageous period will be when the party offering the illegal testimony has closed his case."

10. *Freese v. State*, 159 Ind. 597, 65 N. E. 915; *Ward v. Wheeler*, 18 Tex. 249.

11. *State v. Lehman*, 175 Mo. 619, 75 S. W. 139; *Poindexter & Orr Livestock Co. v. Oregon Short Line R. Co.*, 33 Mont. 338, 83 Pac. 886.

12. *Newman v. Buzzard*, 24 Wash. 225, 64 Pac. 139.

13. *Shorb v. Webber*, 89 Ill. App. 474, affirming 58 N. E. 949; *Toledo, St. L. & W. R. Co. v. Stevenson*, 122 Ill. App. 654.

14. *District of Columbia v. Dietrich*, 23 App. D. C. 577.

15. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 525; *Wynn v. Central Park N. & E. R. Co.*, 14 N. Y. Supp. 172; *Dugger v. McKesson*, 100 N. C. 1, 6 S. E. 746; *Brown v. Morrill*, 45 Minn. 483, 48 N. W. 328; *Capps v. State*, 40 Tex. Crim. 103, 48 S. W. 517.

King v. Haney, 46 Cal. 560, 13 Am. Rep. 217. This was an action of

ejectment, in which plaintiff had judgment in the lower court. A new trial was granted on application of defendants, and the plaintiff appealed from the order. The court said: "The defendant Louderback claimed title to the premises in controversy, through a deed made to him by one Judson Baldwin, who, it was admitted, died July 19th, 1863. Upon the trial, the plaintiff King was called as a witness in his own behalf, and, having stated that he first became interested in the property in December, 1857, was asked whom he found on the property in possession at that time, if anyone. Counsel for defendants then 'objected to any testimony from Mr. King as to any transactions that occurred previous to 1863, on the ground that the defendant Louderback is the representative of a deceased person, one Judson Baldwin, who died in 1863, which fact he offered to prove, he being the person from whom defendants claim.' The court replied: 'We will take the evidence now and the defendant may move to strike it out.' No exception was taken to this ruling, and the witness then testified, without further objection, to transactions occurring both before and after 1863. At the close of his examination-in-chief no motion was made to strike out any portion of his testimony, but counsel proceeded to cross-examine the witness at length. When the testimony was all in on both sides, and the trial, which was protracted, was about to be concluded, counsel for defendants moved the court 'to strike out all the evidence of plaintiff King, as to facts that transpired previous to the 19th of July, 1863. . . . We think the motion to strike out in this case was made too late. It should have been made as soon as the direct examination was closed. By cross-examining the witness generally the defendants

Likewise a motion to strike out is held to be unseasonable which is made after all of a party's testimony in chief is in,¹⁶ or after the evidence is closed,¹⁷ or after the case is partially argued¹⁸ (although the contrary is held),¹⁹ or after an adjournment taken for a special purpose,²⁰ or after a party's case is closed²¹ (but the contrary has been held),²² or after the trial is closed,²³ or on appeal.²⁴ But where evidence is illegal or irrelevant it may, according to some authorities, be stricken out at any stage of the trial.²⁵

Discretion of the Court as to Time of Motion. — It is within the discretion of the trial court to grant a motion to strike out incompetent evidence at any time before the close of the trial,²⁶ and even though no objection was made to the evidence at the time when offered, if

waived the objection, and the court properly overruled their motion."

16. *Warden v. Philadelphia*, 167 Pa. St. 523, 31 Atl. 928; *Olansky v. Berlin*, 37 Misc. 775, 76 N. Y. Supp. 945.

17. *East Tennessee, V. & G. R. Co. v. Turvaville*, 97 Ala. 122, 12 So. 63; *Carlton v. King*, 1 Stew. & P. (Ala.) 472, 23 Am. Dec. 295; *Falvey v. Jackson*, 132 Ind. 176, 31 N. E. 531; *McInroy v. Dyer*, 47 Pa. St. 118; *United States v. Graff*, 14 Blatchf. 381, 26 Fed. Cas. No. 15,244; *Illinois Cent. R. Co. v. Com.*, 25 Ky. L. Rep. 297, 74 S. W. 1097; *Patton v. Bank of LaFayette*, 124 Ga. 965, 53 S. E. 664.

18. *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65; *Newsom v. Huey*, 36 Ala. 37; *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138.

19. *Selkirk v. Cobb*, 13 Gray (Mass.) 313.

20. *Bruns v. Capstick*, 46 Mo. App. 397.

21. *Smith v. New York City R. Co.*, 90 N. Y. Supp. 1061.

22. *Dyson v. Baker*, 54 Miss. 24.

23. *Yetzer v. Young*, 3 S. D. 263, 52 N. W. 1054; *Stroup v. State*, 70 Ind. 495; *Haverly v. Elliott*, 39 Neb. 201, 57 N. W. 1010.

Contrary Held Where Trial Completed in Single Day. — In *Moody v. Dillemath*, 119 Iowa 372, 93 N. W. 360, it was held that although possibly a delay in presenting a motion to strike out until the parties have rested might in some cases be objectionable, yet when a trial is completed in a single day, and permission to substitute other evidence is not re-

fused, a party is not prejudiced by the court's striking it out at that time.

24. *Bays v. Herring*, 51 Iowa 286, 1 N. W. 558.

25. *Alabama*. — *Toliver v. State*, 94 Ala. 111, 10 So. 428; *Edisto Phosphate Co. v. Standford*, 112 Ala. 493, 20 So. 613; *Pearsall v. McCartney*, 28 Ala. 110.

Illinois. — *Wilborn v. Odell*, 29 Ill. 456.

Massachusetts. — *Selkirk v. Cobb*, 13 Gray 313.

Michigan. — *Pennsylvania Min. Co. v. Brady*, 14 Mich. 260.

Tennessee. — *Creed v. White*, 11 Humph. 549.

Texas. — *Galveston, H. & S. A. R. Co. v. Scott*, 18 Tex. Civ. App. 321, 44 S. W. 589.

Pool v. Devers, 30 Ala. 672. This was an action brought by plaintiff to recover damages for the false and malicious speaking of certain words by the defendant charging plaintiff with a crime. Upon the trial the plaintiff proved that he was a poor man. The defendant did not, at the time when this evidence was introduced, make any objection, but afterwards moved the court to exclude it. This evidence was illegal. The right of recovery, in an action of slander, cannot be determined, nor can the amount of the recovery be measured, by reference to the pecuniary condition of the plaintiff. *Held*, that it is the duty of the court at any stage of a cause to exclude from the jury illegal proof, and that the testimony under consideration is within the rule.

26. *Judge of Probate v. Stone*, 44 N. H. 593.

the omission to object is shown to have been because of mistake or inadvertence,²⁷ or because the evidence was irresponsive to a question,²⁸ or because the grounds of objection did not appear until brought out on cross-examination,²⁹ such discretion on the part of the court should be carefully exercised so that no harm will come to the parties.³⁰ The court may, in its discretion, withdraw incompetent evidence from the jury at any time before verdict.³¹

VIII. WHAT THE MOTION SHOULD SPECIFY.

1. Evidence Sought To Be Stricken Out. — A motion to strike out evidence should be clear and specific, definitely indicating the portion; if it is so general and indefinite that the mind is at a loss readily to understand the evidence which it is intended to cover, the motion should be overruled.³²

27. *Miller v. Montgomery*, 78 N. Y. 282; *South Covington & C. St. R. Co. v. McCleave*, 18 Ky. L. Rep. 1036, 38 S. W. 1055.

28. *Delamater v. Prudential Ins. Co.*, 52 Hun 615, 5 N. Y. Supp. 586.

29. In *Comes v. Chicago M., & St. P. R. Co.*, 78 Iowa 391, 43 N. W. 235, which was an action for setting out fire by sparks from an engine, whereby plaintiff's hay was burned, the court said: "On the trial, plaintiff was called as a witness and testified in chief: 'I was owner of some hay that was in stack on south half of section 32,' etc. On cross-examination he stated that the hay was cut on the ground where it was stacked — upon open prairie land. 'I was not the owner of that land. I leased the land of Mr. Dahlgren. The lease is in my office. It was a written lease.' Upon the witness being excused, defendant moved to exclude his statement as to Mr. Dahlgren being the owner of the land, as being immaterial and incompetent, and to exclude his testimony as to his being the owner of the hay, it appearing that his title thereto was based upon written evidence not produced. The court, after stating that the objection came too late, announced: 'I will let the ruling stand for the present.' There does not seem to have been any further ruling on the subject. Appellant's first contention is that the court erred in not excluding said testimony. Appellee contends that the objection was made too late, and

that plaintiff's ownership of the hay was not in issue, and hence that the failure to exclude the testimony was without prejudice. The grounds upon which appellant asked to exclude the testimony were made to appear by the cross-examination, and this was followed by the motion. We think the objection was made in time."

30. *Miller v. Montgomery*, 78 N. Y. 282.

31. *Birchfield v. Russell*, 3 Coldw. (Tenn.) 228.

32. *Alabama*. — *Glover v. Millings*, 2 Stew. & P. 28; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Newton v. Jackson*, 23 Ala. 335; *Preferred Acc. Ins. Co. v. Gray*, 123 Ala. 482, 26 So. 517; *Raines v. State*, 40 So. 932.

California. — *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Swafford v. Board of Education*, 127 Cal. 484, 59 Pac. 900; *Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722.

Colorado. — *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70; *Kelly v. People*, 17 Colo. 130, 29 Pac. 805.

Illinois. — *Chicago & A. R. Co. v. American Strawboard Co.*, 91 Ill. App. 635; *City of Chicago v. Powers*, 117 Ill. App. 453.

Indiana. — *Wysor Land Co. v. Jones*, 24 Ind. App. 451, 56 N. E. 46; *Southern R. Co. v. State*, 165 Ind. 613, 75 N. E. 272; *Pittsburg, C., C. & St. L. R. Co. v. Collins*, 80 N. E. 415.

Iowa. — *Ledward v. Kuder*, 103

Iowa 739, 72 N. W. 545; Jeffries v. Snyder, 110 Iowa 359, 81 N. W. 678.

Minnesota.—Towle v. Sherer, 70 Minn. 312, 73 N. W. 180.

Montana.—Dorais v. Doll, 33 Mont. 314, 83 Pac. 884.

New Mexico.—Murray v. Silver City, D. & P. R. Co., 3 N. M. 337, 9 Pac. 369.

New York.—People v. Schooley, 89 Hun 391, 35 N. Y. Supp. 429; Kahn v. New York El. R. Co., 7 Misc. 53, 27 N. Y. Supp. 339; Tobias v. Wierck, 21 Misc. 763, 48 N. Y. Supp. 146; Whitney v. Supreme Commandery, 30 App. Div. 397, 51 N. Y. Supp. 617.

Texas.—Travelers' Ins. Co. v. Hunter, 30 Tex. Civ. App. 489, 70 S. W. 798.

Virginia.—Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226.

West Virginia.—Vale v. Suiter & Dunbar, 58 W. Va. 353, 52 S. E. 313.

Wisconsin.—Buel v. State, 104 Wis. 132, 80 N. W. 78.

"A general motion to strike out cannot be granted, nor will the court, upon such general motion, search the whole evidence, with a view to ascertain if any testimony was improperly admitted. The motion should be specifically confined to the objectionable evidence." *Webber v. Emerson*, 3 Colo. 248.

This rule of practice is well sustained on principle, and is fully recognized by the supreme court of the United States, in the case of *Elliott v. Peirsol*, 26 U. S. 328. There the defendant's counsel had moved the court to exclude the whole of the plaintiff's evidence, (consisting of several pieces or parts), or to instruct the jury that the whole was insufficient to sustain the plaintiff's title. On this point the court remarks: "The motion could not prevail on the ground of incompetency, unless the whole was incompetent, which is not pretended; the court was not bound to do more than respond to the motion in the terms in which it was made. Courts of justice may, but are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection."

When a witness had completed his testimony, opposing counsel to the one calling him moved that it be stricken from the record on the ground that the testimony constituted a privileged communication, but did not specify any particular part which he wished stricken out. The court was of the opinion that some of the testimony was material and competent and that as the motion did not specify the parts which it was claimed should be excluded, but was directed to all of it, the motion should be overruled for that reason. *City of Ft. Dodge v. Minneapolis & St. L. R. Co.*, 87 Iowa 389, 54 N. W. 243.

In *Warden v. Philadelphia*, 167 Pa. St. 523, 31 Atl. 928, plaintiff's witnesses, upon direct examination, expressed opinions of the value of certain land, if it were cut up into lots and streets opened through it. These witnesses were called and examined without objection, and elaborately cross-examined. After the trial had progressed for two days and all of plaintiff's testimony in chief consisting of one hundred and fifty printed pages had been received, and he had rested, defendant moved "that the court order that the testimony produced by the plaintiff as to what might have been the value of this property cut up into lots, opening streets, giving frontages, making it entirely different on a plan which did exist there and does not exist, except in the scheme of the witnesses and the claimants, be stricken from the record." *Held*, that the motion was properly overruled; for, if the motion had been granted and the order made, it would have been very difficult, if not impossible, for the parties in interest to know how much of the one hundred and fifty pages of plaintiff's testimony had been stricken out.

In *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594, which was a suit for partition, the court said: "In the progress of the trial, Mrs. Shepley, sister of Margaret Jennings, the widow, as a witness for appellees, testified that in 1872 and 1873 she (witness) and her sister, Margaret Jennings, each inherited from their

Admissible and Inadmissible Evidence Intermingled—Motion Should Distinguish.—Where evidence is admitted, some of which is admissible and intermingled with that which is inadmissible, a motion to strike out should be directed with such precision to the portion attacked that it can be readily seen what evidence is challenged.³³

father, a resident of Fayette county, Indiana, about \$2,000, as follows: \$200 in personal property, \$200 from rents, \$1,400 from the sale of real estate received in partition, which she and her sister conveyed to Beeson in February, 1873, and \$200 interest accrued on purchase-money notes. On cross-examination the witness said that she did not see any money paid to her sister, but her sister told her that she received it, and she knew that she and her sister had the same interest, and sold to the same man, and that she (witness) received \$1,400 principal for her share in the land, and her sister got the same. And the cross-examination proceeded: 'Did she tell you that she got the money? A. Yes, sir.' Appellant's counsel moved that the court 'strike out all the testimony of the witness in relation to the fact that her sister received any amount of money.' The motion was properly overruled, for at least two reasons: (1) Because it was too general. Such a motion, to be entertained, should point out to the court with reasonable certainty the particular matter, or answer, or part of answer to which it is addressed. The trial judge should not have been expected to hunt through the long examination and sift out all expressions of the witness that related to the fact that the witness's sister received the money. *Wysox Land Co. v. Jones* (1900), 24 Ind. App. 451; *Underhill*, Evidence, § 368, 2 Elliott, Evidence, §§ 832, 884; 3 Jones, Evidence, § 898."

33. *United States*.—*American Exp. Co. v. Lankford*, 93 Fed. 380, 35 C. C. A. 353.

Alabama.—*Hrabowski's Exrx. v. Herbert*, 4 Ala. 265; *Longbridge v. Thompson*, 20 Ala. 828; *Wyatt's Admr. v. Steele*, 26 Ala. 639; *Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773; *McGill v. Monnette*, 37 Ala. 49; *Roberts v. Burgess*, 85 Ala.

192, 4 So. 733; *Buford v. Shannon*, 95 Ala. 205, 10 So. 263; *Commercial Bank v. King*, 107 Ala. 484, 18 So. 243; *Alabama M. R. Co. v. Darby*, 119 Ala. 531, 24 So. 713; *Brown v. Fowler*, 133 Ala. 310, 32 So. 584; *Nicholas v. Sands*, 136 Ala. 267, 33 So. 815; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469; *Birmingham R. Light & Power Co. v. Livingston*, 144 Ala. 313, 39 So. 374.

Arkansas.—*Gracie v. Robinson*, 14 Ark. 438; *Harvey v. Caldwell*, 35 Ark. 156.

California.—*Chester v. Bower*, 55 Cal. 46; *Hunt v. Swynce*, 33 Pac. 854; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *People v. McFarlane*, 138 Cal. 481, 72 Pac. 48; *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 79 Pac. 961.

Colorado.—*Colorado Mtg. & Inv. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Colorado Farm & Livestock Co. v. York*, 88 Pac. 181.

Connecticut.—*Town of Waterbury v. Waterbury Tract. Co.*, 74 Conn. 152, 50 Atl. 3; *Appeal of Spencer*, 77 Conn. 638, 60 Atl. 289.

Florida.—*Hoodless v. Jernigan*, 41 So. 194.

Georgia.—*Birmingham Lumb. Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437.

Illinois.—*McKeown v. Dyniewicz*, 83 Ill. App. 509; *Chicago & A. R. Co. v. American Strawboard Co.*, 91 Ill. App. 635; *Illinois Steel Co. v. Hanson*, 97 Ill. App. 469, *affirmed* 62 N. E. 918; *Fitzsimons & Connell Co. v. Braun*, 199 Ill. 390, 65 N. E. 249.

Indiana.—*Wolfe v. Pugh*, 101 Ind. 293; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Binford v. Young*, 115 Ind. 174, 16 N. E. 142; *Waymire v. Lank*, 121 Ind. 1, 22 N. E. 735; *Evansville & R. R. Co. v. Swift*, 128 Ind. 34, 27 N. E. 420; *Snideman v. Snideman*, 118 Ind. 162, 20 N. E. 723; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.

Iowa.—*Schultz v. Ford Bros.*, 133

The rule, as just stated, is the same in criminal as in civil causes.⁸⁴

Iowa 402, 109 N. W. 614; *Hollingworth v. Ft. Dodge*, 125 Iowa 627, 101 N. W. 455; *Randolph Bank v. Armstrong*, 11 Iowa 515; *Sullivan v. Nicoulin*, 113 Iowa 76, 84 N. W. 978.

Kansas.—*Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444; *Elliott v. Missouri Pac. R. Co.*, 8 Kan. App. 191, 55 Pac. 490.

Kentucky.—*Worthley's Admr. v. Hammond*, 13 Bush 510; *Wicks v. Dean*, 103 Ky. 69, 44 S. W. 397.

Maryland.—*Carroll's Lessee v. Granite Mfg. Co.*, 11 Md. 399; *Wilson, Close & Co. v. Pritchett*, 99 Md. 583, 58 Atl. 360; *Baltimore & O. R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

Michigan.—*Totten v. Burhans*, 103 Mich. 6, 61 N. W. 58; *Larkin v. Mitchell & R. L. Co.*, 42 Mich. 296, 3 N. W. 904.

Minnesota.—*Bennett v. Minneapolis & P. R. Co.*, 42 Minn. 245, 44 N. W. 10; *Smith v. Library Board*, 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280; *Roeller v. Hall*, 62 Minn. 241, 64 N. W. 559; *Witzel v. Zuel*, 90 Minn. 340, 96 N. W. 1124; *Einolf v. Thomson*, 95 Minn. 230, 103 N. W. 1026, judgment affirmed on re-argument s. c. 104 N. W. 547, and rehearing granted 104 N. W. 290.

Mississippi.—*Magee v. State*, 21 So. 130.

Missouri.—*Hopkins v. Modern Woodmen of America*, 94 Mo. App. 402, 68 S. W. 226.

Nebraska.—*Garrison v. Murphy*, 89 N. W. 766.

Nevada.—*State v. Hymer*, 15 Nev. 49.

New York.—*McCabe v. Brayton*, 38 N. Y. 196; *Tuomey v. O'Reilly, S. & F. Co.*, 3 Misc. 302, 22 N. Y. Supp. 930; *Gundlin v. Hamburg-American Packet Co.*, 8 Misc. 292, 28 N. Y. Supp. 572, 31 Abb. N. C. 437; *Stock v. LeBoutillier*, 19 Misc. 112, 43 N. Y. Supp. 248; *Bartnik v. Erie R. Co.*, 36 App. Div. 246, 55 N. Y. Supp. 266; *Westervelt v. Burns*, 27 Misc. 781, 57 N. Y. Supp. 749; *Webb v. Yonkers R. Co.*, 51 App. Div. 194, 64 N. Y. Supp. 491; *In re Woodward*, 69 App. Div. 286, 74 N. Y. Supp. 755; *Powell v. Hudson Val. R.*

Co., 88 App. Div. 133, 84 N. Y. Supp. 337.

North Dakota.—*Minneapolis, St. P. & S. S. M. R. Co. v. Nester*, 3 N. D. 480, 57 N. W. 510.

Ohio.—*City of Circleville v. Sohn*, 20 Ohio C. C. 368.

Oregon.—*Jennings v. Gardner*, 30 Or. 344, 48 Pac. 177.

Pennsylvania.—*Miller v. Windsor Water Co.*, 148 Pa. St. 429, 23 Atl. 1132; *Wilson v. Equitable Gas Co.*, 152 Pa. St. 566, 25 Atl. 635; *Eifert v. Lytle*, 172 Pa. St. 356, 33 Atl. 573; *Hamilton v. Pittsburg, B. & L. E. R. Co.*, 194 Pa. St. 1, 45 Atl. 67.

Tennessee.—*Knoxville, C. G. & L. R. Co. v. Beeler*, 90 Tenn. 548, 18 S. W. 391.

Virginia.—*Friend v. Wilkinson*, 9 Gratt. 31; *Olinger v. Shepherd*, 12 Gratt. 462; *Hughes v. Kelley*, 30 S. E. 387.

Washington.—*Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17; *City of Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652.

Wyoming.—*Metz v. Willitts*, 14 Wyo. 511, 85 Pac. 380.

Where a party rests till his adversary has gone through a mass of testimony and then moves for the first time to exclude the whole, the court is not bound to regard his motion in case that any part of the testimony is competent to go to the jury. *Camp v. Gullett*, 7 Ark. 524; *Johnson v. Ashley*, 7 Ark. 470.

Where a defendant is put on the stand as a witness and is then examined, without objection, touching matters in respect to which he is not competent to testify, and, after the examination is closed, a motion is made to strike out all the testimony of the said party, the motion should be denied if it would include any testimony which it was competent for the party to give. *Spaulding v. Hallenbeck*, 35 N. Y. 204.

⁸⁴ *Alabama*.—*Pressley v. State*, 111 Ala. 34, 20 So. 647; *Marks v. State*, 87 Ala. 99, 6 So. 377; *Davis v. State*, 131 Ala. 10, 31 So. 569; *Kirby v. State*, 139 Ala. 87, 36 So. 721; *Tagert v. State*, 143 Ala. 88, 39 So. 293.

Where Relevant Evidence Is Merely Incidental. — But the overruling of a motion to strike out certain testimony cannot be justified on the ground that part of the testimony was relevant and material, where that part was a mere incident to the testimony and was undisputed.³⁵

Testimony Given More Than Once. — Where a motion is made to strike out a question asked and an answer brought out on redirect examination, if the same matter as that sought to be stricken out was previously brought out by the moving party on his cross-examination, the motion should also include that which was brought out on cross-examination.³⁶

2. Grounds Upon Which Motion Is Based. — Counsel must state the grounds upon which a motion to strike out is based.³⁷ This

California. — *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098.

Colorado. — *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272.

Florida. — *Higginbotham v. State*, 42 Fla. 573, 29 So. 410; *Richard v. State*, 42 Fla. 528, 29 So. 413; *Fields v. State*, 46 Fla. 84, 35 So. 185; *Baldwin v. State*, 46 Fla. 115, 35 So. 220; *Cook v. State*, 46 Fla. 20, 35 So. 665; *Alford v. State*, 47 Fla. 1, 36 So. 436; *Markey v. State*, 47 Fla. 38, 37 So. 53; *Freeman v. State*, 50 Fla. 38, 39 So. 785; *Johns v. State*, 46 Fla. 153, 35 So. 71; *Thompson v. State*, 41 So. 899.

Illinois. — *Mash v. People*, 220 Ill. 86, 77 N. E. 92.

Iowa — *State v. Crouch*, 130 Iowa 478, 107 N. W. 173.

Michigan. — *People v. Stanley*, 101 Mich. 93, 59 N. W. 498.

Mississippi. — *Turney v. State*, 8 Smed. & M. 104, 47 Am. Dec. 74.

Nevada. — *State v. Hymer*, 15 Nev. 49.

New Jersey. — *Delaney v. State*, 51 N. J. L. 37, 16 Atl. 267.

New York. — *People v. Schooley*, 89 Hun 391, 35 N. Y. Supp. 429.

Oregon. — *State v. Magers*, 36 Or. 38, 58 Pac. 892.

Pennsylvania. — *Com. v. Razmus*, 210 Pa. St. 609, 60 Atl. 264.

"It is well settled that it is not error to overrule a motion to strike out evidence where part of the evidence embraced in the motion is competent. Counsel must sift the incompetent from the competent and not impose that work upon the court."

Jones v. State, 118 Ind. 39, 20 N. E. 634.

In *People v. Munroe* (Cal.), 33 Pac. 776, a part of an answer given by a witness was not responsive to the question, and a part was directly so. The answer was entirely relevant, material and competent. It was held proper to refuse to strike out on motion the whole answer as being irrelevant, immaterial and incompetent, since as stated above, a part was responsive.

35. *Antle v. Craven*, 109 Iowa 346, 80 N. W. 396.

36. *Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. 16.

37. *United States.* — *Central Vermont R. Co. v. Ruggles*, 75 Fed. 953, 21 C. C. A. 575.

California. — *Temple v. Frank*, 28 Cal. 519; *People v. Eckman*, 72 Cal. 582, 14 Pac. 359.

Florida. — *Ortiz v. State*, 30 Fla. 256, 11 So. 611.

Illinois. — *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767.

Indiana. — *Aetna Ins. Co. v. Le Roy*, 15 Ind. App. 49, 43 N. E. 570; *Lankford v. State*, 144 Ind. 428, 43 N. E. 444; *Bernhamer v. Dawson*, 124 Ind. 126, 24 N. E. 743; *Vannatta v. Duffy*, 4 Ind. App. 168, 30 N. E. 807; *Southern R. Co. v. State*, 165 Ind. 613, 75 N. E. 272.

Iowa — *Smith v. Dawley*, 92 Iowa 312, 60 N. W. 625; *Stevenson v. Chicago & N. W. R. Co.*, 94 Iowa 719, 61 N. W. 964; *State v. Wright*, 98 Iowa 702, 68 N. W. 440; *Germinder v. Machinery Mut. Ins. Assn.*, 120 Iowa 614, 94 N. W. 1108.

rule rests on the theory that a motion to strike out is in the nature of an objection to testimony, and the courts hold with respect to

Michigan.—*Runnells v. Village of Pentwater*, 109 Mich. 512, 67 N. W. 558.

Minnesota.—*Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180; *Smith v. Kingman*, 70 Minn. 453, 73 N. W. 253.

New York.—*Riche v. Martin*, 1 Misc. 285, 20 N. Y. Supp. 693; *Caldwell v. Central Park, N. & E. R. Co.*, 7 Misc. 67, 27 N. Y. Supp. 397; *Lippitt v. St. Louis Dressed Beef & Prov. Co.*, 27 Misc. 222, 57 N. Y. Supp. 747; *Jones v. New York Cent. & H. R. R. Co.*, 46 App. Div. 470, 61 N. Y. Supp. 721.

Washington.—*Guarantee Loan & Tr. Co. v. Galliher*, 12 Wash. 507, 41 Pac. 887.

In *State v. Wilson*, 8 Iowa 407, which was an indictment for larceny in stealing a horse, the court said: "A witness called for the state, testified that the general character of William H. Miller for truth and veracity, was good. On cross-examination, the witness stated, 'that the only grounds on which he testified that Miller's character was good, was that a majority of the people he had heard speak on the subject, spoke in favor of his character being good.' The defendant thereupon moved the court to rule out the testimony of the witness. The court refused the motion. The objection to the testimony was not stated. All that appears by the record, is the motion to rule out the testimony, the refusal of the court, and the exception of the defendant. The ground of the objection should have been distinctly stated; and the fact that it was not so stated was a sufficient reason for overruling the motion."

"We have had occasion before to consider the importance of the rule of practice that a mere general objection is not sufficient to raise any question which could have been obviated had it been specifically pointed out, but no case has hitherto arisen in this state calling for its enforcement. We shall in all cases strictly enforce this highly just rule. A suitor should be fairly apprised by the language of the objection or the motion, as the

case may be, just what point is made against his evidence, or what defect in proof is claimed by his antagonist, to the end that he may then and there, if possible, save himself from the consequences of error." *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558.

Proper Grounds Must Be Stated.

In *Flannery v. Central Brew. Co.*, 70 N. J. L. 715, 59 Atl. 157, which was an action brought for personal injuries, the court said: "At the trial, and immediately after opening the case, the plaintiff's attorney, to maintain the issue on his part, offered in evidence the deposition of John B. Flannery, as taken at his home on September 18th, 1903. There was no objection made to this offer and the same was admitted in evidence. On the second day of the trial, when Dr. William F. Payson was upon the stand, there appears, in parentheses, in the record of the stenographic notes of the evidence sent up, the following paragraph: 'The plaintiff is brought in in a chair, carried by men, and is placed in front of the jury; his clothing is opened in front, exposing his abdomen.' . . . The next incident in relation to the plaintiff's having appeared in court occurs after the plaintiff rested. At this point the record is as follows: 'Mr. Speer—On behalf of the Jersey City, Hoboken and Paterson Street Railway Company, I move for a nonsuit, on the ground that no negligence has been shown against this defendant.

'Mr. Garrison—I move to strike out the testimony of the plaintiff, on the ground that the plaintiff having attending (?) in court, cannot have the benefit of the testimony given by him in the deposition.

'The Court—I will grant Mr. Speer's motion. I deny Mr. Garrison's motion. . . . The plaintiff's deposition was taken by consent; its contents was known to the defendant's attorney, and it was admitted after formal offer in open court and without objection. Good reason must be assigned on a motion to strike it out. The fact that the plaintiff had

an objection that even though there are grounds therefor, if they are not stated, the court is not required to sustain the objection.³⁸

Statement of Grounds Must Be Specific.— Counsel must state specifically the grounds for his motion to strike out evidence.³⁹ A motion founded upon the ground that evidence desired to be stricken out is "illegal" is too general.⁴⁰ The omnibus motion is also too general,⁴¹ although the contrary has been held.⁴² So, too, a party

been carried into court during the progress of the trial was not of itself such a reason as would make it error for the court to refuse to strike out a deposition previously legally admitted. If, when the plaintiff was brought into court, or as soon thereafter as proper opportunity had presented itself in the orderly conduct of the cause, the motion had been made to strike out the deposition and it had been alleged as a ground for the motion, surprise at the plaintiff's ability to attend and capacity to testify, or that defendant had been misled in not objecting to the deposition when originally offered because of the information or belief that the plaintiff was still unable to attend in court, then a timely question would have been raised requiring judicial action; and if it then appeared that the plaintiff possessed the capacity to give oral testimony a refusal to strike out would have been reviewable. No such legal situation is presented in the record and the motion to strike out was therefore rightly denied."

38. *Smith v. Dawley*, 92 Iowa 312, 60 N. W. 625; *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa 282, 44 N. W. 548; *Downey v. State*, 115 Ala. 108, 22 So. 479.

In *Sill v. Reese*, 47 Cal. 294, 341, the court said: "The next error assigned is the refusal of the District Court to strike out the answer of the witness Rose, to the question found at folio 212 of the transcript. The answer was responsive to the question, and counsel did not specify the points on which they rested the motion. In such cases the moving party should specify his objection to the answer, with the like particularity as is required in pointing out an objection to a question. The same reasons render this proper."

39. *Grisell v. Noel Bros. F. F. Co.*, 9 Ind. App. 251, 36 N. E. 452; *Mis-*

souri Pac. R. Co. v. Shumaker, 46 Kan. 769, 27 Pac. 126; *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308; *Marsh v. Webber*, 16 Minn. 418; *State ex rel. Friedman v. Purcell*, 131 Mo. 312, 33 S. W. 13; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107.

40. *Moore v. Brewer*, 94 Ga. 260, 21 S. E. 460.

41. *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283; *Loveridge v. Evans*, 114 Iowa 240, 86 N. W. 283.

42. In *Chicago City R. Co. v. Miller*, 111 Ill. App. 446, which was an action for personal injuries, the court said: "Appellee was asked what expenses, if any, he had incurred in his endeavors to get his 'leg cured with physicians and surgeons.' An objection to the question, that no proper foundation was laid, and that it was incompetent, irrelevant and immaterial, was overruled. The plaintiff then asked, 'You mean my whole expenses?' to which his attorney responded 'Yes'; the witness answered, 'Oh, \$1500.' A motion was made to strike out the answer, which the court overruled. No evidence was introduced tending to show what the services were for which appellee had incurred this amount of expense, nor whether such services were reasonable, customary or usual, and the motion to strike out the answer under consideration was properly made in accordance with what is said in *Chicago City Ry. Co. v. Menely*, 79 Ill. App. 679, 682. 'The proper measure was the usual and reasonable charge of the profession generally.' *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411, 416. No such testimony appears in this record, and there is nothing to show the nature of the alleged expenses to which appellee testifies in this off-hand matter, nor how they were incurred. The question called in the nature of things for hearsay

cannot by a general motion to exclude evidence from the jury raise the question of variance between the pleadings and the proof—it should be pointed out wherein the variance consists.⁴³

Where Evidence Both Irresponsive and Incompetent is sought to be stricken out, a motion to that end should specify both grounds.⁴⁴

Grounds For Motion and Objection Must Be Same.—A motion to strike out evidence should be based upon the same objections as those raised when the evidence was offered.⁴⁵

testimony. We are of opinion that the objection was sufficiently specific and that the motion to strike out should have been allowed."

43. *McCormick Harv. Mach. Co. v. Burandt*, 37 Ill. App. 165, *affirmed* 136 Ill. 170, 26 N. E. 588; *Alabama Midland R. Co. v. Darby*, 119 Ala. 531, 24 So. 713; *Harding v. Elliott*, 47 App. Div. 624, 62 N. Y. Supp. 293.

In *City of Chicago v. Seben*, 62 Ill. App. 248, *affirmed* 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245, the appellee while walking on the streets of the city of Chicago, fell into a sewer inlet or a catch basin and suffered a fractured leg. One of the defenses relied upon by the city was that there was a complete variance between the allegations in the plaintiff's declaration and the proof in that the declaration alleged that the plaintiff stumbled and fell into a catch basin, and the proof offered showed that the plaintiff was injured by stepping in a sewer inlet, situated several feet from the catch basin. At the conclusion of appellee's testimony, counsel for the city moved to strike out appellee's testimony, "on the ground of variance between the declaration and the proof," but did not point out wherein the variance consisted, and the motion was overruled. *Held*, on appeal no error.

44. *People v. Spiegel*, 75 Hun 161, 26 N. Y. Supp. 1041.

45. *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664.

In *Lane v. State*, 151 Ind. 511, 51 N. E. 1056, *Lane*, having shot and killed one Thomas Good, was tried and convicted of murder. He appealed. On appeal the court said: "During the progress of the trial, one Warren, a witness for the state, testified to certain statements made to him by the deceased after

he received the fatal wound, concerning who shot him, and the circumstances immediately connected therewith. Appellant objected to the evidence on the ground that it had not been shown that the deceased, when he made said statements to the witness, had abandoned all hope of recovery, and believed that death was near at hand. We cannot say the preliminary proof was not sufficient to authorize the trial court to find that the deceased, when he related to the witness Warren the circumstances immediately connected with his injury, believed that his death from the wounds received was not only certain, but that it was near at hand. Under such circumstances, dying declarations are admissible in evidence. *Underhill on Ev.*, § 103; *Gillett's Indirect & Col. Ev.*, § 195. After the witness Warren had testified, and left the witness stand, and a number of other witnesses had testified, appellant moved the court 'to strike out and withdraw the evidence of said Warren as to the dying declaration of Good, the deceased, and direct the jury to disregard the same, for the reason that the statement of the deceased, testified to by Warren, was prior and anterior to the one afterwards made by the deceased, which latter statement was reduced to writing and signed by the deceased, and was read to the jury as the dying declaration of the deceased.' This motion was overruled by the court. It is settled that a motion to strike out and withdraw the evidence, or any part of the evidence of a witness, for reasons different from those interposed when the evidence was offered and introduced, is properly overruled. . . . If the objection to said evidence

When Objection Waived. — If a court is asked to strike out evidence for a cause to which the evidence is not obnoxious, the court may conclude that all other objections are waived.⁴⁶

IX. EFFECT OF STRIKING OUT OR WITHDRAWAL.

1. Error Cured by Striking Out or Withdrawal. — In some cases it is held that an error in admitting improper evidence is cured by its being withdrawn or struck out, providing no prejudice has been caused, since it is assumed that an average jury will understand that evidence after being struck out or withdrawn is no part of the case and ought to have no influence on their findings.⁴⁷ The striking

presented by said motion had been made when the evidence was offered, the motion was properly overruled, because if dying declarations are made at different times all are admissible, and the fact that the dying declaration made at one of the times was reduced to writing and signed by the declarant will not render those made at other times inadmissible."

46. *Morrison v. Wright*, 7 Port. (Ala.) 67.

47. *Alabama*. — *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268.

California. — *Banning v. Marleau*, 133 Cal. 485, 65 Pac. 964.

District of Columbia. — *Throckmorton v. Holt*, 12 App. D. C. 552.

Georgia. — *Orr v. Garabold*, 85 Ga. 373, 11 S. E. 778.

Illinois. — *O'Halloran v. Kingston*, 16 Ill. App. 659; *McFarlane v. Piereson*, 21 Ill. App. 566; *Chicago & G. T. R. Co. v. Gaeinowski*, 155 Ill. 189, 40 N. E. 601; *Ide v. Fratcher*, 194 Ill. 552, 62 N. E. 814; *Brown v. Illinois, I. & M. R. Co.*, 209 Ill. 402, 70 N. E. 905.

Indiana. — *Houser v. State*, 93 Ind. 228; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Reiny v. Lilly*, 22 Ind. 109, 53 N. E. 387.

Iowa. — *Phillips v. Runnels*, 1 Morris 391, 43 Am. Dec. 109; *Rea v. Scully*, 76 Iowa 343, 41 N. W. 36; *Burns v. Chicago, Ft. M. & D. R. Co.*, 102 Iowa 7, 70 N. W. 728; *Curd v. Wisser*, 120 Iowa 743, 95 N. W. 266; *Gray v. Central Minnesota Immig. Co.*, 127 Iowa 560, 103 N. W. 792.

Kansas. — *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. 781.

Kentucky. — *Louisville & N. R. Co. v. Montgomery*, 17 Ky. L. Rep. 807, 32 S. W. 738; *Louisville & N. R. Co. v. Mattingly*, 22 Ky. L. Rep. 489, 57 S. W. 620.

Massachusetts. — *Davis v. Mills*, 163 Mass. 481, 40 N. E. 852; *Barker v. Mackay*, 175 Mass. 485, 56 N. E. 614.

Michigan. — *Sherwood v. Chicago & W. M. R. Co.*, 88 Mich. 108, 50 N. W. 101; *Willett v. Goetz*, 125 Mich. 581, 84 N. W. 1071; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576; *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622; *Varty v. Messmore*, 132 Mich. 314, 93 N. W. 611; *Smith v. Smith*, 144 Mich. 139, 107 N. W. 894.

Missouri. — *Siebert v. Supreme Council of Order of Chosen Friends*, 23 Mo. App. 268; *Harrison v. Kansas City Elec. L. Co.*, 195 Mo. 606, 93 S. W. 951; *Scharff v. Southern Ill. Const. Co.*, 115 Mo. App. 157, 92 S. W. 126.

Nebraska. — *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744; *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81.

New York. — *Brown v. Cowell*, 12 Johns. 384; *Ganiard v. Rochester City & B. R. Co.*, 50 Hun 22, 2 N. Y. Supp. 470; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Morrison v. Broadway & S. A. R. Co.*, 55 Hun 608, 8 N. Y. Supp. 436; *People v. Upton*, 55 Hun 612, 9 N. Y. Supp. 684; *Barney v. Fuller*, 61 Hun 618, 15 N. Y. Supp. 694; *O'Day v. Chaffee*, 64 Hun 637, 19 N. Y. Supp. 559; *Yale v. Curtiss*, 71 Hun 436, 24 N. Y. Supp. 981;

out or withdrawal must emanate from the court; counsel's statement alone that he withdraws evidence previously elicited is not

Pettee v. Pettee, 77 Hun 595, 28 N. Y. Supp. 1067; *Rock v. White*, 86 Hun 501, 33 N. Y. Supp. 769; *King v. Second Ave. R. Co.*, 75 Hun 17, 26 N. Y. Supp. 973; *Haffner v. Schmuck*, 49 App. Div. 193, 63 N. Y. Supp. 55; *In re Grade-Crossing Comrs.*, 64 N. Y. Supp. 1074; *In re Hopkin's Will*, 35 Misc. 702, 72 N. Y. Supp. 415.

North Carolina. — *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610; *Parrott v. Atlantic & N. C. R. Co.*, 140 N. C. 546, 53 S. E. 432.

Pennsylvania. — *Miller v. Miller*, 4 Pa. St. 317; *Ewing v. Alcorn*, 40 Pa. St. 492; *Harvey v. Coal Co.*, 201 Pa. St. 63, 50 Atl. 770.

South Carolina. — *Du Rant v. Du Rant*, 36 S. C. 49, 14 S. E. 929.

Texas. — *Willis v. McNeill*, 57 Tex. 465; *Schoolher v. Hutchins*, 66 Tex. 324, 1 S. W. 266; *Galveston, H. & S. A. R. Co. v. Garteiser*, 9 Tex. Civ. App. 456, 29 S. W. 939.

Washington. — *Brown v. Pierce County*, 28 Wash. 345, 68 Pac. 872; *Hart v. Cascade Timber Co.*, 39 Wash. 279, 81 Pac. 738.

West Virginia. — *State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

In *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13, the court said: "Some other evidence was objected to, and some illegal evidence was admitted over objection. Of this all that was the least material was withdrawn from the jury. It is complained that though ruled out, the court erred in not instructing the jury in the general charge not to consider or regard it. Doubtless, the better practice is to give such instructions, plainly and distinctly, at some timely stage of the proceedings, and it seems that some authorities elsewhere require it to be done. . . . But we believe an average jury in this state would always understand that evidence, after being ruled out or withdrawn, is no part of the case and ought to have no influence on the finding. There is no suggestion in the record that the act of the court in withdrawing this evidence was not open and public; distinct and unqualified, or that there was anything

special to prevent the jury from comprehending it. There was no material evidence admitted illegally, except that which was withdrawn from the jury before the charge of the court was delivered, and the fact of withdrawal plainly implying that it was not to be considered, there was no error in omitting to warn the jury in the general charge not to consider it. In a civil case, if not in all cases, the evil done by suffering the jury to hear illegal evidence is sufficiently corrected, as a general rule, by merely withdrawing the evidence or ruling it out."

Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. This was an action for malicious prosecution. Plaintiff for the purpose of refreshing the memory of a witness was permitted, against the objection of defendant, to read to the witness a portion of his testimony on a former trial, and to ask him if he so testified. The witness did not answer this question, and what was so read as his former testimony was afterwards stricken out by the court. *Held*, that if it were error to allow the reading of the witness' former testimony, it was not reversible under the circumstances since the testimony which was read contained nothing prejudicial to the defendant which defendant did not admit in his own testimony.

Evidence Considered Struck Out by Both Parties. — In *Hicks v. New York, N. H. & H. R. Co.*, 164 Mass. 424, 41 N. E. 721, evidence was admitted with the belief that other evidence would be given, but such evidence not being given the former was subsequently withdrawn by the court. It appeared that both parties, in their arguments, considered it as withdrawn. *Held*, that the admission of the evidence under these circumstances was not reversible error. See also *Louisville & N. R. Co. v. Simpson*, 23 Ky. L. Rep. 1044, 64 S. W. 733.

No Withdrawal. — In *Williams v. Deen*, 5 Tex. Civ. App. 575, 21 S. W. 536, it was held that no cure was effected for the erroneous admission

sufficient.⁴⁸ But where it does not appear that a jury was aware of a withdrawal of evidence and where it does appear that such evidence was considered in rendering their verdict, an erroneous admission of improper evidence is not cured by a withdrawal.⁴⁹

Evidence Introduced for Prejudicial Purposes.—Where evidence is improper and it is apparent that counsel's purpose in introducing the same was to prejudice the jury, the erroneous admission of such evidence is not cured by its being struck out or withdrawn.⁵⁰

Generally Speaking, the erroneous admission of evidence grossly prejudicial will not be cured by a striking out or withdrawal.⁵¹

of hearsay evidence on a material point by a mere promise of counsel that he would subsequently prove the same facts by competent testimony or by a statement that such evidence is mere matter of inducement.

48. In *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170, which was a prosecution for an assault with intent to kill, the court said: "In the cross-examination of the same witness, she having testified that she had made a complaint against a young man for bastardy, she was asked: 'How long before you left *Goodwin's* did you make that complaint?' and again, 'Did you have a child after you went away?' These were objected to, the objection overruled, and the evidence admitted only as to credibility of the witness. No authority is cited to us that the fact of a woman's illegitimate pregnancy or of her making complaint for bastardy is admissible as bearing upon her credibility. It is not authorized by sec. 4073, Stats. 1898. The admission of such questions and such inquiry, tending, as it must, to defame the witness before the jury, is error and highly prejudicial. . . . The error was not cured by the fact that after the ruling and admission of the evidence, and on a suggestion of doubt by the court as to the course of the cross-examination, counsel for the state withdrew the question. The evidence was already in, and had had its effect upon the minds of the jury, and there was no instruction by the court to disregard it. Specific and prejudicial error having been committed, something more than the remark of counsel that the question was withdrawn was necessary after it had been ruled on and answered."

49. *Irlbleck v. Bierl*, 101 Iowa 240, 67 N. W. 400, 70 N. W. 206.

50. *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Tumalty v. Parker*, 100 Ill. App. 382; *Chicago City R. Co. v. White*, 110 Ill. App. 23; *Wojtylak v. Kansas & T. Coal Co.*, 188 Mo. 260, 87 S. W. 506.

Rule Applies Particularly Where Evidence Has Remained Before Jury Until Close of Arguments.—*Gattis v. Kilgo*, 131 N. C. 199, 42 S. E. 584. It appeared that the defendant Kilgo, a college president, had been tried by the board of trustees on charges publicly made of immorality and incompetency. During this trial he delivered a speech in which he made defamatory remarks concerning Gattis, who was one of the witnesses therein. Afterwards defendant in conjunction with some of the trustees caused the whole proceedings to be published. For such publication this action of libel was brought. This was the second trial of the cause and on it the issue was reduced to that of malice. Plaintiff introduced, among other matters, testimony concerning circumstances attending the trial which did not in any way tend to show malice in the publication, but which did appear to be introduced for the sole purpose of prejudicing the jury. Before argument was commenced the court informed counsel in the jury's presence that he would have to take from the latter all the foregoing evidence. At the close of the argument the court attempted to withdraw this objectionable evidence from the jury. *Held*, that the erroneous admission of this evidence and the allowing of it to remain with the jury for so long could not be cured by such withdrawal.

51. *Wojtylak v. Kansas & T. Coal*

2. Withdrawal or Striking Coupled With Instruction. — A much more satisfactory rule is this: that ordinarily the erroneous admission of improper evidence is cured where it is subsequently withdrawn or struck out and an instruction given to the jury to disregard it. The trial of a case is not to be suspended, the jury discharged, a new one summoned and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it.⁵²

Co., 188 Mo. 260, 87 S. W. 506; *Manzer v. Phillips*, 139 Mich. 61, 102 N. W. 292; *Elliott v. Ferguson* (Tex. Civ. App.), 83 S. W. 56; *Tingley v. Long Island R. Co.*, 109 App. Div. 793, 96 N. Y. Supp. 865.

52. *United States*. — *Hopt v. Utah*, 120 U. S. 430; *New York, L. E. & W. R. Co. v. Madison*, 123 U. S. 524.

Alabama. — *Florey v. Florey*, 24 Ala. 241; *Alabama, G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303.

California. — *Baker v. Joseph*, 16 Cal. 173; *Ward v. Preston*, 23 Cal. 469.

Colorado. — *Kansas Pac. R. Co. v. Miller*, 2 Colo. 443; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Corbin v. Dunklee*, 14 Colo. App. 337, 59 Pac. 842.

District of Columbia. — *Coughlin v. Poulson*, 2 MacArthur 308.

Georgia. — *Orr v. Garabold*, 85 Ga. 373, 11 S. E. 778.

Illinois. — *Paris & D. R. Co. v. Henderson*, 89 Ill. 86; *Indiana, I. & S. R. Co. v. Dooling*, 42 Ill. App. 63; *Spear v. Bull*, 49 Ill. App. 348.

Indiana. — *Zehner v. Kepler*, 16 Ind. 290; *Wishmier v. Behymer*, 30 Ind. 102; *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. Rep. 61; *Blizzard v. Applegate*, 77 Ind. 516; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Citizens' St. R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446; *Shepard v. Goben*, 142 Ind. 318, 39 N. E. 506; *Baltimore & O. R. Co. v. Countryman*, 16 Ind. App. 139, 44 N. E. 265.

Indian Territory. — *Missouri, K. & T. R. Co. v. Truskett*, 2 Ind. Ter. 633, 53 S. W. 444.

Iowa. — *Bardwell v. Clare*, 47 Iowa 297; *Bauer v. Dubuque*, 122 Iowa 500, 98 N. W. 355; *Blumenthal v. Union Elec. Co.*, 129 Iowa 322, 105 N. W. 588; *Baker v. Oughton*, 130 Iowa 35, 106 N. W. 272.

Kansas. — *Brown v. School Dist.*

No. 41, 1 Kan. App. 530, 40 Pac. 826.

Kentucky. — *Louisville & N. R. Co. v. Lucas' Admr.*, 30 Ky. L. Rep. 359, 98 S. W. 308.

Massachusetts. — *Hawes v. Gustin*, 2 Allen 402; *Costello v. Crowell*, 133 Mass. 352.

Michigan. — *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112, 51 N. W. 188; *Harris v. Cable*, 113 Mich. 192, 71 N. W. 531; *McNaughton v. Smith*, 136 Mich. 368, 99 N. W. 382.

Minnesota. — *Williams v. Wood*, 55 Minn. 323, 56 N. W. 1066.

Missouri. — *Sparr v. Wellman*, 11 Mo. 230; *Griffith v. Hanks*, 91 Mo. 109, 4 S. W. 508; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 10 S. W. 484; *Stavinow v. Home Ins. Co.*, 43 Mo. App. 513; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. 503; *Fowles v. Bebee*, 59 Mo. App. 401; *Cochran v. People's R. Co.*, 131 Mo. 607, 33 S. W. 177; *Anderson v. Union Terminal R. Co.*, 161 Mo. 411, 61 S. W. 874; *Buckman v. Missouri, K. & T. R. Co.*, 100 Mo. App. 30, 73 S. W. 270; *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582, 82 S. W. 126.

Nebraska. — *American Bldg. & L. Assn. v. Mordock*, 39 Neb. 413, 58 N. W. 107; *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521.

Nevada. — *Gotelli v. Cardelli*, 26 Nev. 382, 69 Pac. 8.

New York. — *Mandeville v. Guernsey*, 51 Barb. 99; *Lawrence v. Mycenian Marble Co.*, 1 Misc. 105, 20 N. Y. Supp. 698; *Van Ingen v. Mail & Express Pub. Co.*, 14 Misc. 326, 35 N. Y. Supp. 838; *Travis v. Barger*, 24 Barb. 614; *Sakolski v. Schenkel*, 50 Misc. 151, 98 N. Y. Supp. 190.

North Carolina. — *Toole v. Toole*, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479, 2 L. R. A. 465.

Erroneous Admission Not Cured by Withdrawal Coupled With Instruction.—There is a line of cases holding that where objectionable evidence is before a jury its erroneous admission cannot be cured by a withdrawal coupled with an instruction. But such cases are exceptional and the ruling is laid down where such strong impressions are made upon the minds of the jury by illegal and improper evidence that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the original objection may avail on appeal or writ of error.⁵³ The curative effect of the cor-

North Dakota.—*Bishop v. Chicago, M. & St. P. R. Co.*, 4 N. D. 536, 62 N. W. 605.

Ohio.—*Cleveland Provision Co. v. Limmermaier*, 8 Ohio C. C. 701.

Pennsylvania.—*Lester v. McDowell*, 18 Pa. St. 91; *Hood v. Hood*, 2 Grant Cas. 229; *Warren v. Steer*, 112 Pa. St. 634, 5 Atl. 4; *Cadwallader v. Brodie*, 13 Atl. 483; *Rathgebe v. Pennsylvania R. Co.*, 179 Pa. St. 31, 36 Atl. 160.

Tennessee.—*Yeatman v. Hart*, 6 Humph. 375.

Texas.—*Galveston, H. & S. A. R. Co. v. Duellin*, 86 Tex. 450, 25 S. W. 406; *Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 25 S. W. 821; *San Antonio Tract Co. v. White* (Tex. Civ. App.), 60 S. W. 323, judgment reversed (Tex. Civ. App.), 61 S. W. 706; *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300, 81 S. W. 1052.

Vermont.—*Randolph v. Woodstock*, 35 Vt. 291.

Virginia.—*Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

Washington.—*Lyts v. Keevey*, 5 Wash. 606, 32 Pac. 534; *Smith v. Buckman*, 22 Wash. 299, 61 Pac. 31.

Wisconsin.—*Beggs v. Chicago, W. & M. R. Co.*, 75 Wis. 444, 44 N. W. 633.

In *Dykes v. Wyman*, 67 Mich. 236, 34 N. W. 561, the court said: "Some testimony was received by the court, and afterwards stricken out. It is contended that the striking out did not cure the error of allowing it to be heard by the jury. At first the court refused to receive it. Upon further argument it was admitted, under objection, the circuit judge expressing doubts as to its competency. Afterwards, upon reflection, and upon his own motion, he ordered it stricken from the case.

We find no error in this action. It must be that a trial court can take time to consider evidence introduced, and, finding error in its admission, correct it by removing the testimony from the case, and cautioning the jury against giving it any weight or consideration in their deliberations. This was done here. It must be held, we think, that jurymen are ordinarily honest and intelligent enough to obey the admonitions of the court, and to discard from their minds all thought or influence of the rejected testimony. It is not the habit of the courts of last resort, in civil cases, to reverse judgments on this account, unless fully satisfied that prejudicial error has occurred."

53. *Colorado.*—*Tourtelotte v. Brown*, 4 Colo. App. 377, 36 Pac. 73.

Illinois.—*Lafayette, B. & M. R. Co. v. Winslow*, 66 Ill. 219; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Howe Mach. Co. v. Rosine*, 87 Ill. 105; *Dencer v. Parsons*, 8 Ill. App. 625; *Cumins v. Leighton*, 9 Ill. App. 186; *Peck v. Cooper*, 13 Ill. App. 27; *Chicago v. Wright & Lawther Oil & Lead Mfg. Co.*, 14 Ill. App. 119; *Rollins v. Duffy*, 18 Ill. App. 398; *City of Chicago v. Brennan*, 61 Ill. App. 247.

Michigan.—*Taylor v. Adams*, 58 Mich. 187, 24 N. W. 864.

Mississippi.—*Englehard v. Sutton*, 7 How. 99.

Missouri.—*Glascock v. Chicago & A. R. Co.*, 69 Mo. 589; *Cobb v. Griffith & Adams S. G. & Transp. Co.*, 12 Mo. App. 130; *Meyer v. Lewis*, 43 Mo. App. 417; *Mueller v. Weitz*, 56 Mo. App. 36.

Montana.—*Nelson v. Spears*, 16 Mont. 351, 40 Pac. 786.

New York.—*Penfield v. Carpenter*, 13 Johns. 350; *Irvine v. Cook*, 15 Johns. 239; *Green v. Hudson River*

rection in any particular instance seems to depend upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury, despite the correction of the court.

In an extreme case it was held that unless it can be shown that a verdict was not affected by evidence erroneously admitted, the judgment will be reversed.⁵⁴

3. Erroneous Admission Cured by Instruction Alone.—There are cases holding that an instruction by the court, in its charge, to disregard evidence on the trial, is equivalent to striking out. Therefore, if it does not appear that the evidence illegally admitted had any influence in producing the verdict, an instruction to disregard will cure the error. The presumption should be that a jury acts only upon the legal evidence submitted to them and not upon that which they have been told to disregard.⁵⁵ But unless from the whole case

R. Co., 32 Barb. 25; *Newman v. Goddard*, 3 Hun 70; *O'Sullivan v. Roberts*, 7 Jones & S. 360; *Allen v. James*, 7 Daly 13; *Wersebe v. Broadway & S. A. R. Co.*, 1 Misc. 472, 21 N. Y. Supp. 637; *Eldredge v. Eldredge*, 79 Hun 511, 29 N. Y. Supp. 941.

Vermont.—*Connecticut & P. R. Co. v. Baxter*, 32 Vt. 805; *Hall v. Jones*, 55 Vt. 297; *Norton v. Perkins*, 67 Vt. 203, 31 Atl. 148.

Wisconsin.—*State Bank v. Dutton*, 11 Wis. 371.

54. "When illegal evidence properly excepted to has been received during a trial, it must be shown that the verdict was not affected by it or the judgment will be reversed. If the evidence may have affected the verdict, the error cannot be disregarded. The rights of parties can only be preserved by adhering to this rule. It would be vain to observe the rules prescribed by law to secure an impartial jury, if their minds are to be subjected to the influence of illegal evidence after they are impaneled. It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence." *Erben v. Lorillard*, 19 N. Y. 299.

55. *California.*—*Liverpool, L. & G. Ins. Co. v. Southern Pac. Co.*, 125 Cal. 434, 58 Pac. 55.

Georgia.—*Rowland v. Carmichael*, 77 Ga. 350; *McLean v. Hattan*, 127 Ga. 579, 56 S. E. 643.

Illinois.—*Champaign v. Patterson*, 50 Ill. 61; *Adams v. Russell*, 85 Ill. 284; *Jacksonville S. E. R. Co. v. Southworth*, 32 Ill. App. 307, affirmed 135 Ill. 250, 25 N. E. 1093; *Chicago City R. Co. v. Hyndshaw*, 116 Ill. App. 367.

Indiana.—*Indianapolis Water Co. v. Harold* (Ind. App.), 79 N. E. 542.

Indian Territory.—*Perry v. Cobb*, 4 Ind. Ter. 717, 76 S. W. 289.

Iowa.—*Cook v. Robinson*, 42 Iowa 474; *Aultman, Miller & Co. v. Roemer*, 112 Iowa 651, 84 N. W. 668; *Osborne & Co. v. Ringland & Co.*, 122 Iowa 329, 98 N. W. 116.

Kansas.—*Townsdin v. Nutt*, 19 Kan. 282; *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. 874; *Woods v. Hamilton*, 39 Kan. 69, 17 Pac. 335; *St. Paul F. & M. Ins. Co. v. Haskin*, 77 Pac. 106.

Kentucky.—*Illinois Cent. R. Co. v. Stewart*, 23 Ky. L. Rep. 637, 63 S. W. 596; *South Covington & C. St. R. Co. v. McHugh*, 25 Ky. L. Rep. 1112, 77 S. W. 202; *Southern R. Co. v. Steele*, 28 Ky. L. Rep. 764, 90 S. W. 548.

Maryland.—*Consolidation Coal Co. v. Shannon*, 34 Md. 144.

Massachusetts.—*Tapley v. Forbes*, 2 Allen 20; *Smith v. Whitman*, 6 Allen 562; *Priest v. Groton*, 103 Mass. 530.

Michigan.—*Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803; *Butler v. Detroit, Y. & A. A. R. Co.*, 131 Mich. 617, 92 N. W. 101.

Missouri.—Hahn *v.* Sweazea, 29 Mo. 199; Whitmore *v.* Supreme Lodge Knights & Ladies of Honor, 100 Mo. 36, 13 S. W. 495; Larimore *v.* Chicago & A. R. Co., 65 Mo. App. 167; Metropolitan St. R. Co. *v.* Walsh, 197 Mo. 392, 94 S. W. 860.

Nebraska.—Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085; Mueller *v.* Parcel, 71 Neb. 795, 99 N. W. 684.

New Hampshire.—Hamblett *v.* Hamblett, 6 N. H. 333; Deerfield *v.* Northwood, 10 N. H. 269; State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083; Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736.

New York.—Meyer *v.* Clark, 2 Daly 497; Mortimer *v.* New York El. R. Co., 25 Jones & S. 244, 6 N. Y. Supp. 898; Doyle *v.* Manhattan R. Co., 15 Daly 475, 8 N. Y. Supp. 324; Holmes *v.* Moffat, 120 N. Y. 159, 24 N. E. 275; Newman *v.* Ernst, 10 N. Y. Supp. 310; Yale *v.* Curtiss, 71 Hun 436, 24 N. Y. Supp. 981; Polak *v.* Metropolitan St. R. Co., 58 N. Y. Supp. 1133; Wynn *v.* Yonkers, 80 App. Div. 277, 80 N. Y. Supp. 257; M. Groh's Sons *v.* Groh, 80 App. Div. 85, 80 N. Y. Supp. 438, rehearing denied 177 N. Y. 554, 69 N. E. 1127.

North Carolina.—Livingston *v.* Dunlap, 99 N. C. 268, 6 S. E. 200; Mauney *v.* Hamilton, 132 N. C. 295, 43 S. E. 901.

Ohio.—L. S. & M. S. R. Co. *v.* Litz, 18 Ohio C. C. 646; Hoppe *v.* Parmalee, 20 Ohio C. C. 303.

Pennsylvania.—Unangst *v.* Kraemer, 8 Watts & S. 391; Delaware & H. Canal Co. *v.* Barnes, 31 Pa. St. 193; Cadwallader *v.* Brodie, 13 Atl. 483; Roche *v.* Wegge, 202 Pa. St. 169, 51 Atl. 738.

Rhode Island.—Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Tennessee.—East Tennessee, V. & G. R. Co. *v.* Humphreys, 12 Lea 200.

Texas.—Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581; Missouri, K. & T. R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096; Gulf, C. & S. F. R. Co. *v.* Cornell, 29 Tex. Civ. App. 596, 69 S. W. 980; Texas Portland Cement & Lime Co. *v.* Ross, 35 Tex. Civ. App. 597, 81 S. W. 94; Ft. Worth & R. G. R. Co. *v.* Hadley (Tex. Civ. App.), 86 S. W.

932; Houston & T. C. R. Co. *v.* Bath (Tex. Civ. App.), 90 S. W. 55.

Washington.—Wilson *v.* West & Slade Mill Co., 28 Wash. 312, 68 Pac. 716.

West Virginia.—Moore *v.* Harper, 42 W. Va. 39, 24 S. E. 633.

Wisconsin.—Remington *v.* Bailey, 13 Wis. 332; Sabine *v.* Johnson, 35 Wis. 185; Waterman *v.* Chicago & A. R. Co., 82 Wis. 613, 52 N. W. 247.

In *Pennsylvania Co. v. Roy*, 102 U. S. 451, which was an action brought for personal injuries, Mr. Justice Harlan, delivering the opinion of the court, said: "Upon the trial below, the plaintiff was allowed, against the objection of the defendant, to make proof as to his financial condition, and to show that, after being injured, his sources of income were very limited. This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation, and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned judge who presided at the trial subsequently recognized the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rule by which such loss should be ascertained, the court proceeded: 'But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being, how much his ability to earn money in the future has been impaired.' Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disre-

garding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider evidence which has been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury and commence anew. A rule of practice leading to such results cannot meet with approval."

Temple v. Goldsmith, 118 Mich. 172, 76 N. W. 324. This was an action to recover for a bill of lumber alleged to have been sold by plaintiff to defendant. Plaintiff was permitted to introduce in evidence his books of account, showing the amount of lumber and that it was charged to defendant. This was alleged as error. The court said:

"If this was error, it was cured by the instruction of the court that the fact that the charge was made to the defendant was only important in case they should find it was so charged by the authority or with the assent of the defendant."

The erroneous admission of evidence for an improper purpose is cured by an instruction that the jury cannot consider it except upon another issue in relation to which it is relevant. *Clement v. Skinner*, 72 Vt. 159, 47 Atl. 788.

Rule Applies Particularly Where Counsel Assents.—In *McLellan v. Richardson*, 13 Me. 82, improper evidence had been admitted, with the assent of counsel, the court suggesting that he further consider the question of the admissibility of the evidence. The jury was duly instructed in the charge that such evidence ought not to have been received, and that it should not be considered by them as evidence in the case. *Held*, that a cure had been effected for the admission of the improper evidence. See also *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370.

And When Evidence Is Subsequently Elaborated Upon.—*Parker v. Otis*, 130 Cal. 322, 62 Pac. 571, 927. This action was brought to recover money alleged to have been paid to defendants by plaintiff for the purchase of stocks on margin. The court said: "When Miss Parker was testifying for plaintiff counsel asked her: 'Do you owe Otis & Co. any money?' Defendants' objection was overruled and the witness answered: 'Yes, on a margin proposition.' Defendants moved to strike out the latter part of the answer as not responsive to the question and as being a conclusion. The court overruled an objection to the following question asked plaintiff: 'Did you delegate authority to your sister to act as your agent and to purchase or deal in stocks on the market with any broker?' The motion in the one case should have been granted and the objection in the other should have been sustained. A witness should be confined to facts, leaving conclusions to be drawn from these facts to the jury or court. De-

it is reasonably clear that the party objecting was not prejudiced, an instruction will not have any curative effect.⁵⁶ In cases where it is apparent that the objecting party was prejudiced by the admission of improper evidence, its effect will not be cured by an instruction to disregard.⁵⁷

fendants, however, were not injured, because the facts were fully stated during the examination of the witnesses, and the jury could and no doubt did draw its own conclusions from these facts under the instructions of the court as to what constituted margin contracts."

56. In *State v. Meader*, 54 Vt. 126, the court said: "But in all cases it is obvious that improper evidence, however it gets into the case, and with whatever motive it may be offered, is liable to work mischief to the adverse party. The motive with which it is offered only goes to the good faith of counsel; it does not change the character of the evidence itself. The court may attempt to destroy its mischievous effect, by instructing the jury to ignore it; but there is no certainty that the attempt will be successful. Accordingly, it is now the settled law in this state, that illegal evidence, if objected to, though admitted under an offer to so connect it with other proofs as to make it competent, will vitiate a verdict for the party offering it, if the proposed connection is not established, unless the court is able to say affirmatively, that such evidence worked no injury to the adverse party. . . . The late lamented Chief Justice, whose wisdom, as Lamartine said of Mirabeau, was 'the infallibility of good sense,' in the case of *Boyd et ux. v. Readsboro*, *supra*, in speaking of the futility of any attempt to charge improper evidence out of the case, made use of one of those simple illustrations, oftentimes equivalent to actual demonstration, for which he was so much noted. He said, the school boy uses his sponge to rub out the pencil marks on his slate. He eventually discovers that at some time—he never can tell when—his pencil has *scratched*, and learns to his sorrow, that the ugly evidence of the fact, however vigorously he may

apply his sponge, cannot be removed. The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence, but whether the court is *assured* that the jury has done so."

57. *Illinois*.—*City of Chicago v. Brennan*, 61 Ill. App. 247; *Miller v. Wabash R. Co.*, 123 Ill. App. 60.

Kentucky.—*Cheatham v. Leathers*, 20 Ky. L. Rep. 1475, 49 S. W. 534.

Michigan.—*Boydan v. Haberstumpf*, 129 Mich. 137, 88 N. W. 386.

Minnesota.—*Juergens v. Thom*, 39 Minn. 458, 40 N. W. 559.

Mississippi.—*Learned v. Ogden*, 80 Miss. 769, 32 So. 278.

Missouri.—*Naughton v. Laclede Gaslight Co.*, 123 Mo. App. 192, 100 S. W. 1104.

New York.—*Branch v. Levy*, 12 Jones & S. 507.

Texas.—*Gulf, C. & S. F. R. Co. v. Ryan* (Tex. Civ. App.), 72 S. W. 72; *Dallas Homestead & L. Assn. v. Thomas*, 36 Tex. Civ. App. 268, 81 S. W. 1041; *Houston E. & W. T. R. Co. v. Adams* (Tex. Civ. App.), 98 S. W. 222.

Vermont.—*Grout Bros. v. Moulton*, 79 Vt. 122, 64 Atl. 453; *Viles v. Barre & M. Tract & P. Co.*, 79 Vt. 311, 65 Atl. 104.

Virginia.—*Chesapeake & O. R. Co. v. Rogers' Admx.*, 100 Va. 324, 41 S. E. 732; *Singer Mfg. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320.

In *Miller v. Hoffman*, 135 Mich. 319, 97 N. W. 759, which was an action of replevin to recover the possession of swine belonging to plaintiff and distrained by defendant, it appeared that plaintiff and defendant owned and occupied adjoining farms. The swine in question strayed from plaintiff's premises onto the highway and thence onto defendant's premises. Defendant impounded the swine and notified plaintiff in writing, "Your hogs or shoters are on my premises, and you can get them by paying fifty cents a head for damages and trouble and feeding."

Instruction To Be Effectual Must Be Peremptory.—The admission of improper evidence is not cured by a charge from the court which leaves it discretionary with the jury as to whether they shall disre-

Plaintiff, thinking this charge extravagant, applied on the following day to a justice of the peace for appointment of appraisers. Two appraisers were appointed. They visited defendant's premises during his absence, and appraised the damages at \$1. Plaintiff tendered this amount, but defendant refused to deliver the swine; whereupon this action was commenced by plaintiff, who recovered a verdict in the court below. Defendant seeks a reversal of the judgment. The court said: "It is contended by the defendant that the court erred in admitting in evidence the award of the appraisers, because it was made without giving him an opportunity of being heard. The statute which authorizes the award (see Comp. Laws 1897, § 10,698) does not expressly provide that this opportunity shall be given. In our judgment, however, this is necessarily implied. It is repugnant to sound principles of constitutional law that one's rights shall be determined by a proceeding which does not afford him that opportunity. See *Matter of Empire City Bank*, 18 N. Y. 199; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Cooley*, Const. Lim. (6th Ed.) p. 431; *Gilson v. Munson*, 114 Mich. 671, 72 N. W. 994. The propriety of enforcing this principle is illustrated in this case. According to the testimony of one of the appraisers, there was included in the award no allowance whatever for feeding and caring for the hogs. Defendant was entitled to such an allowance (see sections 10,693, 10,694 Comp. Laws of 1897), and, according of his testimony it constituted the largest item of his claim. It is urged by the plaintiff that for the error in admitting the award in evidence the judgment should not be reversed, because the trial court correctly instructed the jury that the award was not a binding determination. We think this is not a sufficient answer. The trial court left to the jury the issue of whether the \$1 tendered was

sufficient to compensate all the claims of defendant. We are persuaded that the jury, in finding that it was, was largely influenced by the incompetent award. We conclude, therefore, that the admission of the award in evidence was reversible error."

Where, in a libel suit, incompetent evidence of malice was introduced which was the only evidence thereof and which apparently brought about the verdict, its erroneous admission is not cured by the court's instruction to the jury at the termination of the trial after the evidence had remained with them over night, to disregard it, since on reflection, he thought it was improper. *Illinois Cent. R. Co. v. Ely*, 83 Miss. 519, 35 So. 873.

In *Russell v. New York Cent. & H. R. R. Co.*, 96 App. Div. 151, 89 N. Y. Supp. 429, an employe of the defendant as brakeman, while descending a ladder on the side of a moving freight car, was hit by the projecting roof of a toolhouse, and brought this action because of injuries received thereby. The court said: "We are constrained to reverse the judgment, however, because of an error in the admission of evidence. The plaintiff was permitted, against the defendant's objection and exception to show that the defendant, since the accident, had moved the toolhouse farther away from the track. It is true that the evidence was stated to be offered for the purpose of showing that it was feasible for the defendant to locate it at a different place, because it had in fact done so. The court, too, charged the jury that they were not to take this evidence into consideration in determining the negligence of the defendant, but only upon the question of the feasibility of the removal of the building. Notwithstanding the announcement of the purpose of the evidence and the instruction of the court, the evidence was so radically wrong, and of such a dangerous character, that we think it must be assumed that the defendant was injured by it."

gard evidence,⁵⁸ or which is so ambiguous or uncertain that it is impossible to determine its force.⁵⁹ But a charge which instructs a jury in effect, notwithstanding improper evidence, to find for the

58. *Winter v. Phelan*, 27 Ala. 649; *Luizzi v. Brady's Estate*, 140 Mich. 73, 103 N. W. 574.

Carlisle v. Hunley, 15 Ala. 623. This was an action of detinue, for the recovery of a slave, and was instituted by plaintiff in error, against one. Wiliam Hunley, who died pending the action, and of whose estate defendant in error is administratrix. The bill of exceptions states, that the defendant offered evidence, tending to prove, that the slave in controversy, was not the property of the plaintiff, but of one Robert Carlisle, who had authorized one Henry Horn to sell him to defendant. To rebut this proof, the plaintiff introduced the said Robert Carlisle, as a witness to prove that the slave was the property of the plaintiff, and that he had never authorized Horn to sell him. On the cross-examination of this witness, he was asked by defendant's counsel, "if he had never told Mr. Shaffer, that he had authorized said Horn to sell said slave?" To which the witness answered, "that he never had so told him." Mr. Shaffer was then introduced, and asked by the counsel of defendant, if the witness Carlisle had not so told him; the plaintiff objected to the witness answering the question, but the court overruled the objection, and the witness answered the question in the affirmative. The plaintiff's counsel asked the court to charge the jury, that the testimony of Carlisle should be considered by them as uncontradicted, the evidence of Shaffer having been permitted improperly to go to the jury; the court in reply, stated to the jury, that they might take the testimony of the witness Carlisle for whatever it was worth, unaffected by the testimony of the witness Shaffer. To the above ruling of the court, and to its charge to the jury, the plaintiff excepted, and now assigns them as error. The court said: "The subsequent instruction of the court, 'that the jury *might* consider the testimony of Carlisle for what it was worth, and as

unaffected by Shaffer's testimony, did not cure the error, in admitting Shaffer to testify as to the statements of Carlisle, which conflicted with his evidence. Every one, familiar with the practice, knows how difficult it is to eradicate from the mind of a jury an injurious impression thus created, (*McCurry v. Hooper*, 13 Ala. Rep. 823) by permitting illegal proof to be submitted to them, and in such case, nothing short of a direct and unequivocal charge to them, to disregard the illegal proof, would be likely to erase the impression. In the case before us, the charge of the court was, that they might disregard the illegal proof; thus giving them a discretion as to whether they should do so or not, whereas the law makes it peremptory upon them to lose sight of it. The court having failed so to instruct them, as to render the first error harmless, the judgment must be reversed, and the cause remanded."

59. *Henne v. J. T. Steeb Shipping Co.*, 37 Wash. 331, 79 Pac. 938.

Austin v. Carswell, 67 Hun 579, 22 N. Y. Supp. 478. This was an action to recover the penalties fixed by law for violation of the excise law in selling liquors without a license. On the trial in the lower court defendant was allow to testify over plaintiff's objection, that she had previously been indicted and fined \$100 after she had been refused a license by the excise board. The Supreme Court speaking through Putnam, J., said: "I think an error was committed upon the trial in overruling plaintiff's objections to the evidence offered by defendant, to show that she had been taken to Sandy Hill, and fined \$100. This evidence was irrelevant to the case on trial, and may have had some influence upon the jury. It is held that illegal evidence tending to excite the passions, arouse the prejudices, awaken the sympathies, or influence the judgment of jurors may not be considered harmless. *Hutchins v. Hutchins*, 98 N. Y. 56. Although this evidence

party against whose objection it was admitted, as to the single point on which it could have any possible bearing, cures the error of its admission.⁶⁰

Improper Evidence Must Be Separable.—Where proper and improper evidence are intermingled and an instruction shows no means of dividing the one from the other, such an instruction intending to cure the erroneous admission of the improper evidence will fail of its purpose.⁶¹

was improperly received, the error could have been cured had the court afterwards struck out such evidence, or directed the jury to disregard it. The remark of the judge, that 'whether there had been prosecutions of criminal nature for offenses of this character or not . . . is no concern of yours,' cannot be deemed a striking out of the evidence in question, or a direction to the jury to disregard it. The above quoted instruction of the trial judge is ambiguous, and does not come up to this requirement."

Southern R. Co. v. Evans' Admr., 23 Ky. L. Rep. 568, 63 S. W. 445. This action was brought to recover damages for the death of plaintiff's intestate. The court said: "Appellant also contends that the court erred in permitting the plaintiff to prove that decedent left a wife and four children, the ages ranging from about 16 or 17 to 4 or 5; also that the income of the wife was not sufficient to support her, and that she was having to use the principal right along. It is evident that this testimony ought not to have been permitted, as has been repeatedly decided by this court. It is, however, contended for appellee that the testimony complained of did not prejudice the appellant, for the reason that the court, in effect, excluded it from the consideration of the jury as to the question of damages; and we are referred to instruction No. 2, as, in effect, telling the jury that they should not consider the question as to the family of decedent. Said instruction reads as follows: 'By "compensatory damages" is meant such a sum in damages as will reasonably compensate plaintiff for the loss sustained by the death of said J. O. Evans, not exceeding \$30,000; and in fixing the amount, if any, the

jury should take into consideration alone the power of decedent to earn money, and the probable duration of his life.' It is the contention of appellant that this instruction is of itself prejudicial and erroneous. It may be that the court intended by the instruction to prevent the jury from taking into consideration the fact of decedent having left a family, but we are not inclined to think that such was the necessary result. It is probable that the fact allowed to be proven in regard to the family of decedent would have some effect upon the jury, even if they sought to free themselves from it. It has often been decided by this court that the criterion of recovery is the damage to the estate of the decedent by the destruction of his power to earn money, and that the jury might, in arriving at that amount, take into consideration his earning capacity, coupled with the probable duration of his life. It seems to us that the instruction in question is not as clear as it ought to be as to the criterion of recovery."

60. *Winter v. Phelan*, 27 Ala. 649; *Driver v. King* (Ala.), 40 So. 315; *Goodwin v. Mitchell* (Miss.), 38 So. 657.

61. *Moore v. Palmer*, 132 N. C. 969, 44 S. E. 673.

Washington Gaslight Co. v. Lansden, 172 U. S. 534. This was an action brought against the above named corporation, together with several of its officers to recover damages for an alleged libel. It was held that evidence of the wealth of one of the defendants was inadmissible as a foundation for computing or determining the amount of such damages against all. Further, it was held that in a case of this character, where the line between compensatory and punitive damages is quite vague it is

Instructions to Disregard in Effect Though Not in Terms.—The erroneous admission of evidence to establish a particular issue is cured where such issue is subsequently taken from the consideration of the jury by the court in its instructions,⁶² or where counsel states to the jury that he abandons an issue upon which improper evidence

utterly impossible to say that by merely charging the jury that punitive damages cannot be recovered, the effect of the incompetent evidence as to the wealth of one of the defendants is thereby removed, or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case.

In *Herring v. The District, 2 Mackey (D. C.) 87*, the court said: "The plaintiff alleges that the District of Columbia had constructed a sewer and afterwards had made a dam across the stream of running water, so that in connection with the defective sewer it caused the overflow of the plaintiff's property. It appeared that this construction had been made some ten years before the suit had been brought and the statute of limitations was pleaded. At the trial a witness was asked what injury was done to the property. That question was objected to because it covered injuries done during the time excluded by the statute of limitations. This objection was overruled, and the witness answered that the house was injured to the extent of about one thousand dollars, and that he had lost the use and occupation of certain parts of his property, which were worth certain sums per month. The court afterwards instructed the jury that the recovery could only be had for injuries accruing within the last three years. That cured the error in allowing testimony as to injuries before that time, so far as the rents were concerned. The rent falling within the three years could easily be found by calculation. But the error of admitting proof that the house had been injured to the extent of about one thousand dollars, without showing when that injury accrued, and without showing any means of dividing the injury suffered within the last three years, from the injury suffered before, was not cured by this

ineffectual instruction. On such testimony as that, it was impossible for the jury to find out the amount of injury suffered within the last three years, and to that extent the admission of the testimony furnished them a false basis; and manifestly misled them."

62. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068; *Torrey v. Peck*, 13 S. D. 538, 83 N. W. 585; *Blalock & Co. v. Clark & Bros.*, 137 N. C. 140, 49 S. E. 88.

Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395. This action was brought to recover damages for the alleged negligence of the defendant, causing the death of his intestate, who was employed as a brakeman by the defendant. Plaintiff's intestate was killed while in the act of coupling two cars of the defendant. The court said: "A number of the exceptions taken were on objection to evidence offered on the issues as they existed at the time, made up under the seventh count of the complaint. These rulings need not be considered, since, upon the conclusion of all the evidence in the case, at the request of the defendant the court gave the general charge in its favor on this count. So, if there was any error in any of the court's rulings on the introduction of evidence under the seventh count, it was error without injury. This evidence related to the kind and condition of the couplers used on the cars, which the deceased attempted to couple together when he received his injury. The couplers were not the automatic couplers, but were the Miller link and pin couplers, which required the person making the coupling to do so by hand. We are unable to see wherein this evidence could prejudice the defendant after the seventh count, under which it was offered, was charged out."

has been admitted.⁶³ Although the contrary doctrine has been held,⁶⁴ the general rule is that the erroneous admission of evidence is cured if subsequently the court clearly charges the jury as to what the issue is, thus impliedly instructing that evidence not relating to that issue be disregarded.⁶⁵ But this is not the rule where

63. *Mobile Light & R. Co. v. Walsh* (Ala.), 40 So. 560.

64. *Moravec v. Grell*, 78 App. Div. 146, 79 N. Y. Supp. 533; *Berg v. Humptulips Boom & River Imp. Co.*, 38 Wash. 342, 80 Pac. 528; *Jones v. Cooley Lake Club*, 122 Mo. App. 113, 98 S. W. 82.

In *Gulf, C. & S. F. R. Co. v. Ryon* (Tex. Civ. App.), 72 S. W. 72, which was an action brought to recover for damages to land, the court said: "Two witnesses for the plaintiff, on direct examination, gave estimates of the damage caused to the land by the increased flow of water over it. On cross-examination it was developed that in making their estimates the witnesses took into consideration improper elements of damage. The defendant thereupon filed motions to strike out the said estimates. The motions were overruled, and the defendant excepted. The estimates having been made upon a wrong basis, the defendant was entitled to have the same withdrawn from the jury. The method proposed by the defendant would have effected that object, and, as the court did not resort to any other means of counteracting the incompetent testimony which had been inadvertently admitted, it was error to overrule the motions to strike out. While the court gave in charge to the jury the correct measure of damages, we cannot say that the charge was so worded as to exclude from the consideration of the jury the improper evidence. The testimony concerning the amount of the damage sustained by the plaintiff is not such that we can say that the error was harmless."

65. *Missouri*. — *Taussig v. Wind*, 98 Mo. App. 129, 71 S. W. 1095; *Sanders v. North End Bldg. & L. Assn.*, 178 Mo. 674, 77 S. W. 833; *Harrison v. Lakenan*, 189 Mo. 581, 88 S. W. 53.

Nebraska. — *Jerabek v. Kennedy*, 61 Neb. 349, 85 N. W. 279.

New York. — *Dunford v. Interurban St. R. Co.*, 84 N. Y. Supp. 865.

North Carolina. — *Cheek v. Oak Grove Lumb. Co.*, 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

Texas. — *Colorado Canal Co. v. McFarland & Southwell* (Tex. Civ. App.), 94 S. W. 400; *Pacific Express Co. v. Needham* (Tex. Civ. App.), 94 S. W. 1070.

An action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. Plaintiff had a verdict and from the judgment entered thereon, as well as from an order denying a motion for a new trial, defendant has appealed. The court said: "It also urged that the judgment should be reversed because the learned trial justice erred in allowing the plaintiff to prove special damages in the nature of permanent injuries which were not alleged in the complaint. It is true, the complaint did not allege permanent injuries, and upon the trial the plaintiff's physician was asked the following question: 'Q. Doctor, how long, in your judgment, will the effect of these injuries remain?' He answered, against defendant's objection and exception: 'A. I think they will be permanent.' A motion was made to strike out the answer on the ground of the objection, and this was denied. The objection should have been sustained, and the motion to strike out should have been granted. In the absence of proper allegations in the complaint to the effect that the plaintiff had sustained permanent injuries, she could not prove such facts upon the trial. *Clark v. Railway Co.* (Sup.) 74 N. Y. Supp. 267. But we do not think the defendant could have been injured by this answer. At the close of the trial the jury were specifically told for what injuries damages could

there are reasonable grounds for belief that the verdict rendered was affected by the improper evidence.⁶⁶

be awarded, and those enumerated did not include permanent injuries. At the conclusion of the charge, plaintiff's counsel requested the court to charge that the jury could award damages for future pain and suffering. This request was denied, the court saying, 'I think evidence upon that subject is so doubtful that it would not be right to say there are any consequences in the future, considering her present age, for which the railroad company is liable.' This was equivalent to telling the jury to disregard the evidence as to permanent injuries, inasmuch as they could not award damages therefor." *Crow v. Metropolitan St. R. Co.*, 70 App. Div. 202, 75 N. Y. Supp. 377, affirmed 174 N. Y. 539, 66 N. E. 1106

Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188. "This action was instituted by the defendant in error, who owned and was in possession of a house and lot on Magazine street, in Nashville, to recover damages claimed to have been done to her property by the plaintiff in error by the alleged improper location of its roundhouse, and in its operation or management, in that the locomotives housed in it from day to day greatly annoyed her by their incessant noise, and also cast off dense volumes of smoke and great quantities of gases, cinders and soot, which were blown into and upon the premises of the defendant in error, inflicting serious injury upon her household furniture, destroying vegetation in her yard, and impregnating the atmosphere, so as to make her property practically uninhabitable. . . . The trial judge improperly let to the jury certain testimony as to the effect of the alleged nuisance upon the value of the property or of the fee; but this testimony was practically excluded from the consideration of the jury by his charge, when he told them that in the assessment of damages, should they find for the plaintiff, they might look, among other things, to such as occurred to the use of her property as her residence or home, etc., taking

into consideration in such assessment the discomfort, annoyance, etc., which she may have suffered from smoke, etc." *Held*, that the admission of this erroneous evidence as to the value of the property and of the fee was cured by the court's instruction.

66. *Gulf, C. & S. F. R. Co. v. Ryon* (Tex. Civ. App.), 72 S. W. 72; *Flinders v. Bailey*, 133 Iowa 616, 111 N. W. 27; *Naughton v. Laclede Gas-light Co.*, 123 Mo. App. 192, 10 S. W. 1104.

"It appears from the record that the court below in its charge to the jury ignored the issues raised by the above stated testimony, and appellees contend that said testimony was thus withdrawn from the jury, and therefore its admission was harmless. We do not agree with this contention of the appellees. The admission of of illegal testimony is error, although afterwards withdrawn from the jury, if there is reason to believe the evidence may have improperly influenced them. In this case the legal evidence before the jury did not warrant their verdict; hence the illegal testimony improperly admitted must, necessarily, have been considered by them." *Dallas Homestead & L. Assn. v. Thomas*, 36 Tex. Civ. App. 268, 81 S. W. 1041.

In *Illinois Cent. R. Co. v. Trustees of Schools*, 212 Ill. 406, 72 N. E. 39, the court said: "This action on the case was brought by the appellees, the trustees of schools, for the use of School District No. 2, in the city of Murphysboro, against appellant, in the circuit court of Jackson county, for damages to a tract of land containing two acres, in said city, on which there is a two-story brick schoolhouse occupied for a graded school, alleged to have been damaged by the operation of appellant's railroad adjoining said tract. The declaration averred that defendant constructed its railroad track south of said premises, and was maintaining and operating a railroad thereon, and charged that, in passing, the locomotive engines emitted, discharged, and

X. EFFECT OF REFUSAL TO STRIKE OUT EVIDENCE.

1. **When Reversible Error.** — It is reversible error for the court to refuse to strike out irrelevant evidence where the effect of the evidence in question is to create, or tend to create, a prejudice against the moving party.⁶⁷

2. **When Harmless Error.** — The refusal or neglect of the court to strike out improper evidence is held to be harmless error where there appears to be sufficient proper evidence supporting the same question,⁶⁸ or where the improper evidence is, during the trial, ren-

threw out and stirred up great volumes of smoke, cinders, ashes, and dust, and cast the same over, upon, and into said premises, and that the rains caused loud and ominous noises, and made the ground tremble, vibrate, and shake, causing the school in said premises to be disturbed and frequently to suspend." Evidence was introduced which included improper elements of damage. The court further said: "The court, in instructing the jury, told them they could not allow any damages for cutting off the view, or danger to school children from getting on the track, but that the plaintiffs might recover for the casting of smoke, cinders, and ashes on the premises, and the vibration of the ground caused by passing trains, and loud and ominous noises disturbing the school. It is clear that these instructions did not cure the error of denying the motion to strike out the evidence which included improper elements of damage. The amount of the verdict conclusively demonstrates that fact. The \$2,500 damages allowed by the jury, and the judgment of \$1,800 entered after the remittitur, have no foundation in the legitimate evidence of damages for which an action could be maintained. The instruction authorizing a recovery for the vibration of the ground caused by passing trains was wrong for want of any evidence that the property was damaged in any manner thereby; and if the evidence would warrant an inference that there was any direct physical injury from smoke, cinders, or dust, and that the smoke and noise were special injuries to the property as herein explained, the jury could not have returned the verdict, or the court entered the judgment, without

considering and including the improper element testified to by the witnesses. The building was about 200 feet from the track, and was not used for a residence, but was devoted to school purposes, during certain hours from September to April, inclusive. Neither the verdict nor judgment can be accounted for without including the improper testimony as to damages which the court refused to strike out, and the error was not cured by the instructions."

⁶⁷. *Pennsylvania R. Co. v. Page* (Pa.), 12 Atl. 662; *Burnett v. Munger*, 23 Tex. Civ. App. 278, 56 S. W., 103; *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843; rehearing denied 62 Neb. 126, 86 N. W. 1074; *Gulf. C. & S. F. R. Co. v. Ryon* (Tex. Civ. App.), 72 S. W. 72; *Berg v. Hump-tulips Boom & River Imp. Co.*, 38 Wash. 342, 80 Pac. 528.

⁶⁸. *California*. — *Treat v. Reilly*, 35 Cal. 129.

Indiana. — *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169; *Snyder v. Snyder*, 50 Ind. 492.

Kansas. — *Robbins v. Sackett*, 23 Kan. 212; *Stevens v. Nebraska Loan & Tr. Co.*, 65 Kan. 859, 70 Pac. 368.

Michigan. — *Kendrick v. Towle*, 60 Mich. 363, 27 N. W. 567.

Missouri. — *Redman v. Peirsol*, 39 Mo. App. 173; *Kirby v. Wabash R. Co.*, 85 Mo. App. 345.

New York. — *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58; *Silsby v. Packer*, 9 N. Y. St. Rep. 112; *Atkinson v. Oelsner*, 57 Hun 592; 10 N. Y. Supp. 822; *Riss v. Messmore*, 26 Jones & S. 23, 9 N. Y. Supp. 320.

Texas. — *Chicago, R. I. & T. R. Co. v. Yarbrough* (Tex. Civ. App.), 35 S. W. 422; *Galveston, H. & S. A. R. Co. v. Eckles*, 25 Tex. Civ. App. 179, 60 S. W. 830; *Pacific Ex. Co. v.*

dered proper by the introduction of further evidence,⁶⁹ or where the

Needham (Tex. Civ. App.), 94 S. W. 1070.

Wisconsin. — *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 332, 15 N. W. 468.

In *Manning v. Den* (Cal.), 24 Pac. 1092, the court said: "This is an action to recover an amount claimed to be due upon a street assessment levied under proceedings had in pursuance of the provisions of the act of March 18, 1885, (St. 1885, p. 147.) Judgment for plaintiff, motion for new trial made and denied, and defendant appeals. The principal contention is that the evidence is insufficient to show that the proceedings resulting in the assessment and warrant were such as required by law, and sufficient to entitle the plaintiff to recover; in other words, that there was a failure to show a valid contract upon which to base the assessment and warrant. Section 12 of the act which authorizes the suit provides: 'The said warrant, assessment, and diagram, with the affidavit of demand and non-payment, shall be held *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action.' With the policy of this provision, the court has nothing to do, so it is written and adopted by the legislature. The assessment and diagram attached were offered and admitted in evidence without objection. Plaintiff then offered the warrant and affidavit, with the indorsement of record thereon. To this, defendant 'made the same objections as those offered to the assessment.' As he had offered no objections to the assessment, this objection was correctly overruled. This made out a *prima facie* case for the plaintiff. But, in addition to this, the plaintiff did introduce, without objection, the records of all the preliminary proceedings on the part of the city council prescribed and required by the statute, with the proof of publication, posting, etc., and in addition thereto

made, without objection, parol proof of the fact of contract. This last proof of the defendant subsequently moved to strike out, but as it was admitted without objection, and was unnecessary, since the warrant and assessment were *prima facie* proof of the same fact, the court denied the motion. We do not think that this ruling was erroneous, but, if it was, it was error without injury."

⁶⁹. *Hedlun v. Holy Terror Min. Co.*, 16 S. D. 261, 92 N. W. 31.

Conant v. Jones, 120 Ga. 568, 48 S. E. 234. This action was for breach of contract. The defendants, without admitting the contract as it was set out in the petition, pleaded a release of the contract into which they had entered with plaintiff. The court said: "Before the plaintiff had introduced any evidence whatever, the court allowed the defendants to open the case by examining Mr. Jake Moore, one of the witnesses for the defense. This was done over the objections of the plaintiff, and he complained of this ruling in the motion for new trial. He also complained of the overruling of his objections to portions of this witness' testimony on the ground that no sufficient foundation had been laid. The court certifies that Moore was allowed 'to be examined first that he might return to Atlanta to attend to pressing official business, his testimony being subject to objections in the light of plaintiff's testimony.' Usually evidence should not be received until the proper foundation has been laid, for the effort to lay the foundation may prove unsuccessful, and the effect of the evidence upon the jury might not be entirely removed by afterward ruling the evidence out. When the court does permit such a deviation from the usual and regular conduct of the trial, and the foundation is afterwards properly laid, no harm has been done and this court will not interfere. In the present case a proper foundation was afterwards laid for such of the evidence of Moore as would otherwise have been inadmissible. The admission of the evidence was, therefore, not error. The court, however, went

evidence is immaterial,⁷⁰ or where, in view of full instructions, it does not appear that the evidence admitted in any way prejudiced the party who objected to the admission thereof,⁷¹ or that it

further than merely allowing the defendants to introduce one part of their evidence in advance of another part which it should regularly have followed. They were allowed to open the case by examining one of their witnesses, although the plaintiff, upon whom rested the burden of proof, was entitled to the opening and conclusion. Except as to the testimony of this one witness, the regular order of the trial was followed in the introduction of evidence, and the plaintiff was given the opening and conclusion of the argument. The examination of a witness for the defense before the plaintiff has opened his case is not usual, except by consent, and unless the plaintiff consents it ought not to be allowed. At the same time we cannot see how the plaintiff could have been hurt in the present case. There was a square issue before the jury as to whether or not there had been a release. Moore's testimony was substantially that he had heard plaintiff acknowledge his signature to this release. Under the circumstances we think that the error was not such as to require that the case should be sent back for another trial."

70. *In re Lasak*, 57 Hun 417, 10 N. Y. Supp. 844; *Corbin v. Dunklee*, 14 Colo. App. 337, 59 Pac. 842; *Washington Life Ins. Co. v. Berwald* (Tex. Civ. App.), 72 S. W. 436; *Davis v. Alexander*, 99 Me. 40, 58 Atl. 55; *Lee v. Dow*, 73 N. H. 101, 59 Atl. 374; *Chicago & E. I. R. Co. v. Kimmel*, 221 Ill. 547, 77 N. E. 936; *McDonald v. City Electric R. Co.*, 144 Mich. 379, 108 N. W. 85.

71. *Alabama*.—*Tapscott v. Gibson*, 129 Ala. 503, 30 So. 23; *Louisville & N. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573.

Colorado.—*Corbin v. Dunklee*, 14 Colo. App. 337, 59 Pac. 842.

Georgia.—*Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948.

Illinois.—*Illinois Steel Co. v. Ostrowski*, 93 Ill. App. 57, affirmed 194 Ill. 376, 62 N. E. 822; *Henrietta*

Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902.

Indiana.—*Muncie Pulp Co. v. Martin*, 164 Ind. 30, 72 N. E. 882.

Iowa.—*Alexander v. Staley*, 110 Iowa 607, 81 N. W. 803; *Yeager v. Town of Spirit Lake*, 115 Iowa 593, 88 N. W. 1095; *Thompson v. Keokuk & W. R. Co.*, 116 Iowa 215, 89 N. W. 975; *Renshaw v. Dignan*, 128 Iowa 722, 105 N. W. 209.

Kentucky.—*Southern R. Co. v. Cooper*, 23 Ky. L. Rep. 290, 62 S. W. 858; *Tingle v. Kelly*, 29 Ky. L. Rep. 24, 92 S. W. 303.

Massachusetts.—*Wilcox v. Forbes*, 173 Mass. 63, 53 N. E. 146.

Michigan.—*Scholtz v. Freud*, 128 Mich. 72, 87 N. W. 130; *Schmidt v. St. Louis R. Co.*, 163 Mo. 645, 63 S. W. 834; *Cox v. Raider*, 138 Mich. 249, 101 N. W. 531.

New Hampshire.—*Stone v. Boston & M. R. Co.*, 72 N. H. 206, 55 Atl. 359.

New York.—*Dunn v. Parsons*, 66 Hun 635, 21 N. Y. Supp. 901; *Mattes v. Frankel*, 65 Hun 203, 20 N. Y. Supp. 145; *Wolf v. Third Ave. R. Co.*, 67 App. Div. 605, 74 N. Y. Supp. 336; *McCoy v. Munro*, 76 App. Div. 435, 78 N. Y. Supp. 849.

Pennsylvania.—*United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751; *Closser v. Washington*, 11 Pa. Super. Ct. 112; *Beard v. Heck*, 13 Pa. Super. Ct. 390; *McKee v. Crucible Steel Co.*, 213 Pa. St. 333, 62 Atl. 921; *McGunnegle v. Pittsburg & L. E. R. Co.*, 213 Pa. St. 383, 62 Atl. 988.

South Carolina.—*Stuckey v. Atlantic Coast-Line R. Co.*, 60 S. C. 237, 38 S. E. 416.

Texas.—*City of Dallas v. Jones* (Tex. Civ. App.), 54 S. W. 606; *Houston & T. C. R. Co. v. Craig* (Tex. Civ. App.), 92 S. W. 1033; *Mugg v. Texas & P. R. Co.* (Tex. Civ. App.), 91 S. W. 876.

Washington.—*Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68.

"In view of the manner in which the case was submitted to the jury, the admission of the evidence was

affected in any appreciable manner the general result of the trial.⁷²

3. How Error in Refusing To Strike Cured.—An error on the part of the court in refusing to strike out specific testimony is cured by its being stricken out subsequently.⁷³

harmless, even if it was erroneous. It is too well settled to require the citation of authority that a judgment will not be reversed for an error which could have done (or evidently did) the appellant no harm." *Brown v. Kolb*, 8 Pa. Super. Ct. 413.

In *Flanigan v. Guggenheim Smelt. Co.*, 66 N. J. L. 647, 44 Atl. 762, the plaintiff, a workman, sued his employer to recover damages for personal injuries. The ground of action alleged was the employer's failure to exercise reasonable care to provide the plaintiff with a ladder safe for use in his work. The court said: "The only remaining question that requires attention is raised by an exception to the admission, on cross-examination, of evidence that Mr. Acker, the chief engineer of the defendant, destroyed the ladder immediately after the accident. The objection was that such matter, being *ex post facto*, would not tend to show negligence on the part of the defendant, and that such an act of destruction would not be of itself an admission binding the defendant. Both these propositions are true. The evidence was admitted with another purpose. The trial judge said in his charge: 'I am required to charge you, and I do so charge, that the jury is not warranted in drawing any inference of negligence against the defendant, or that the ladder was broken or defective, from the fact that Mr. Acker destroyed the ladder after the occurrence of the accident. I charge you that you cannot infer anything against the defendant from that fact. I permitted the evidence on that subject, because it was the plaintiff's right to prove what had become of the ladder, and to show why he did not produce it. I do not say that you may not consider the fact of Acker's destruction of the ladder in reference to his own testimony, but you cannot, from the destruction of the ladder by Mr. Acker, draw any inference against the defendant.' This evidence was competent as tend-

ing to weaken the force of Mr. Acker's testimony in chief. It was competent, also, as accounting for the non-production of the ladder by the plaintiff. It is true that the plaintiff was not chargeable with the custody of the ladder. Nevertheless, if he could produce it he might do so. It was not error to permit him to show that this was out of his power. Moreover, in view of the guarded language of the charge, the admission of this testimony, even if erroneous, cannot be supposed to have prejudiced the defendant."

In *Spokane & P. R. Co. v. Lieuallen*, 2 Idaho 1101, 29 Pac. 854, which was an action brought by a railroad to condemn certain land belonging to defendant, the court said: "Several witnesses were examined on the part of plaintiff and defendant as to the value of the property sought to be condemned, and the damages. The testimony is conflicting, the witnesses varying in their estimates from \$300 or \$400 to \$2,000. It is urged by appellant, as a ground for reversal, that one of the witnesses for defendant, upon his cross-examination, testified that he based his estimate of damages upon the present value of the property, while the statute fixes the value of the property at the time it was taken as the rule. We think the court erred in allowing this testimony to stand against the plaintiff's motion to strike it out, but we think such error was rendered harmless by the reiterated charge of the court to the jury that they were to find from the evidence the value of the property on September 27, 1890, the time of the taking."

72. *Ross v. Manhattan El. R. Co.*, 25 Jones & S. 412, 8 N. Y. Supp. 495; *Chambers v. Emery*, 13 Utah 374, 45 Pac. 192.

73. *People v. Keefer*, 103 Mich. 83, 61 N. W. 338.

Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714. This was an action by plaintiff to recover for the loss of a hand cut off by the machin-

ery of the defendant while he was in the service of the company as a day laborer. It was held that the court erred in allowing plaintiff to testify that he was not careless at the time he received the injury in question. No objection was interposed to the question when it was asked, and on this ground the court denied a

motion to strike out the answer to the question. But conceding that the court erred in this regard, plaintiff's counsel allowed the answer to be stricken out, and as counsel obtained, by consent, all that they asked of the court by the motion, we do not see that they have any ground for complaint.

SUBORNATION.—See Perjury ; Presumptions.

SUBPOENA.—See Attendance of Witnesses ; Contempt, Witnesses.

SUBPOENA DUCES TECUM.—See Attendance of Witnesses ; Documentary Evidence.

SUBSCRIBING WITNESSES.—See Wills ; Witnesses ; Written Instruments.

SUBSCRIPTIONS.—See Parol Evidence.

SUBSTITUTED SERVICE.—See Service.

SUCCESSION.—See Descent and Distribution.

SUNDAY.—See Judicial Notice.

SUPPLEMENTARY PROCEEDINGS.

BY OSCAR STRAUSS.

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I. GENERAL NATURE OF SUCH PROCEEDINGS.

Proceedings supplementary to execution furnish a means whereby property of a judgment debtor, in his control or possession, or in the control or possession of another, which the creditor has been unable to reach by execution, may be discovered and subjected to the satisfaction of the judgment.¹ The proceedings are equitable in their nature² and the remedy grows out of the old creditor's bill in chancery,³ being probably influenced also by the equity proceeding by bill of discovery.⁴ Supplementary proceedings are purely statutory,⁵ and by the weight of authority are incidental and aux-

1. *Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352; *Vegelahn v. Smith*, 95 N. C. 254; *Gould v. Torrance*, 19 How. Pr. (N. Y.) 560; *Gerton Carriage Co. v. Richardson*, 6 Misc. 466, 27 N. Y. Supp. 625; *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653; *Murphy v. Wilson*, 84 Mo. App. 178.

"Proceedings auxiliary to execution as provided in the statute are extraordinary and are only to be resorted to when the ordinary processes of the law are not adequate. The purpose of that proceeding is rather for the discovery of property than for applying that which is already known." *Reardon v. Henry*, 82 Iowa 134, 47 N. W. 1022.

"They (supplementary proceedings) furnish a simple and summary method for the collection of a judgment from property which cannot be reached by execution." *Bryan v. Grant*, 87 Hun 68, 33 N. Y. Supp. 957.

2. *Estey v. Fuller Impl. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025; *Vegelahn v. Smith*, 95 N. C. 254; *Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352; *Gould v. Torrance*, 19 How. Pr. (N. Y.) 560; *Pope v. Cole*, 64 Barb. (N. Y.) 406.

"They (supplementary proceedings) are in the nature of an equitable action based upon a judgment and new facts in addition thereto." *Bryan v. Grant*, 87 Hun 68, 33 N. Y. Supp. 957.

3. *Rand v. Rand*, 78 N. C. 12; *Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352; *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 57 N. W. 244, 66 Am. St. Rep. 653; *McCullough v. Clark*, 41 Cal. 298;

Pope v. Cole, 64 Barb. (N. Y.) 406; *Davis v. Turner*, 4 How. Pr. (N. Y.) 190.

"Supplementary proceedings were inaugurated and regulated by the original Code of Procedure as a substitute for a creditor's bill in the old court of chancery." *Bryan v. Grant*, 87 Hun 68, 33 N. Y. Supp. 957.

"The very name supplementary proceeding implies that it is a proceeding in the same action, although it is to some extent, and in many cases perhaps, fully, a substitute for a creditor's bill under the old practice." *Barker v. Dayton*, 28 Wis. 367.

4. *Mason v. Weston*, 29 Ind. 561.

"Discovery proper is, in its essential conception, merely an instrument of procedure, unaccompanied by any direct relief, but in aid of relief sought by the party in some other judicial controversy. The suit for discovery, properly so called, is a bill filed for the sole purpose of compelling the defendant to answer its allegations and interrogatories, and thereby to disclose facts within his own knowledge, information, or belief, or to disclose and produce documents, books, and other things within his possession, custody, or control, and asking no relief in the suit except it may be a temporary stay of the proceedings in another court to which the discovery relates." 1 *Pomeroy Equity Jurisp.* § 191.

5. *Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220.

"Now a proceeding supplementary to execution is entirely statutory." *Bryant v. Bank of California* (Cal.), 7 Pac. 128.

iliary to the main action.⁶ Some authorities consider such proceedings in their essential features as an independent action.⁷

II. WHO MAY BE EXAMINED.

1. Debtors. — **A. IN GENERAL.** — In general, any debtor against whom a judgment has been obtained may be examined in supplementary proceedings, if there has first been a compliance with the statutory requirements.⁸

B. CORPORATIONS. — Whether or not a corporation may be examined as a debtor is a question on which the decisions and statutes

6. Iowa. — *Estey v. Fuller Impl. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

New York. — *Smith v. Tozer*, 42 Hun 22, 11 N. Y. Civ. Proc. 343; *Bryan v. Grant*, 87 Hun 68, 33 N. Y. Supp. 957; *Davis v. Turner*, 4 How. Pr. 190; *Sherwood v. Buffalo & N. Y. C. R. Co.*, 12 How. Pr. 136; *Gould v. Torrance*, 19 How. Pr. 560; *Holbrook v. Orgler*, 49 How. Pr. 289; *Pope v. Cole*, 64 Barb. 406; *Maass v. McEntegart*, 20 Misc. 676, 46 N. Y. Supp. 534; *Stiefel v. Berlin*, 28 App. Div. 103, 51 N. Y. Supp. 147.

North Carolina. — *Carson v. Oates*, 64 N. C. 115; *Rand v. Rand*, 78 N. C. 12; *Bronson v. Wilmington Life Ins. Co.*, 85 N. C. 411; *Coates Bros. v. Wilkes*, 92 N. C. 376; *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731.

South Carolina. — *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

"But we are not required to decide this question since it has been held, and we think correctly, that a supplementary proceeding is a proceeding in the action itself, and not a distinct and independent action or proceeding like the former creditor's bill in equity." *Barker v. Dayton*, 28 Wis. 367.

7. N. Y. Code of Civ. Proc. § 2433. *McCaskill v. Lancashire*, 83 N. C. 393; *Griffin v. Dominguez*, 2 Duer 656; *Allen v. Starring*, 26 How. Pr. (N. Y.) 57; *Jones v. Sherman*, 18 Abb. N. C. 461, 11 N. Y. Civ. Proc. 41; *Sinnott v. First Nat. Bank*, 34 App. Div. 161, 54 N. Y. Supp. 417.

Clerke, J. — "It has been generally, and I think correctly, held that

an order for the examination of a judgment debtor is not a mere process like the execution to enforce satisfaction of the judgment. It is not based on the judgment alone but on a presentation of new facts which the plaintiff must prove to entitle him to the relief he seeks. It is, in short, in all respects, a substitute for a creditor's bill, and is, in all its essential features, equivalent to a new suit." *Driggs v. Williams*, 15 Abb. Pr. (N. Y.) 477.

Under the Indiana statute, supplementary proceedings are held to be a civil action. *Toledo W. & W. R. Co. v. Howes*, 68 Ind. 458; *McMahan v. Works*, 72 Ind. 19; *Kissell v. Anderson*, 73 Ind. 485; *Abell v. Riddle*, 75 Ind. 345; *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; *Baker v. State*, 109 Ind. 47, 9 N. E. 711.

8. Foreign Corporations Having no Place of Business in the State. *Logan v. McCall Pub. Co.*, 140 N. Y. 447, 35 N. E. 655.

Joint Debtor. — *Lewis v. Rosler*, 19 W. Va. 61.

Part only of joint debtors may be examined. *Lewis v. Rosler*, 19 W. Va. 61.

A joint debtor may be examined as to joint property or his own separate property. *Emery v. Emery*, 9 How. Pr. (N. Y.) 130; *Jones v. Lawlin*, 1 Sandf. (N. Y.) 722.

A trustee may be examined when a judgment has been recovered against him as trustee. *In re Gough*, 31 App. Div. 307, 52 N. Y. Supp. 627.

Lunatic. — *Blake v. Respass*, 77 N. C. 193; *Wilkinson v. Markert*, 65 N. J. L. 518, 47 Atl. 488.

Married Women. — *Clinkscales v.*

have differed, some holding the examination of corporations proper,⁹ and others, *contra*.¹⁰

2. Third Persons.—With some exceptions, any third persons who are indebted to, or have property belonging to the judgment debtor in their possession or control, may be examined with respect to that debt or property.¹¹

Hall, 15 S. C. 602; Thompson v. Sargent, 15 Abb. Pr. (N. Y.) 452. Sheriff.—Where Execution Has Issued Against Him.—Potts v. Davidson, 1 How. Pr. (N. Y.) 216.

A stockholder of a corporation against which a judgment has been obtained cannot be examined as a judgment debtor. Hentig v. James, 22 Kan. 326.

9. Sage v. St. Paul, S. & T. F. R. Co., 47 Fed. 3; Bates v. International Co., 84 Fed. 518; Estey v. Fuller Impl. Co., 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

The case of Tompkins v. Floyd County Agr. & M. Assn., 19 Ind. 197, holds that supplementary proceedings are proper as against a corporation, or against those holding assets of the corporation. Logan v. McCall Pub. Co., 140 N. Y. 447, 35 N. E. 655. "We discover nothing from the terms of our statute authorizing proceedings supplementary to execution (Section 5174 Comp. L.) inapplicable to, or which indicates any legislative intention that such proceedings should not be available against a corporation debtor." South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co., 4 S. D. 173, 56 N. W. 98.

10. Conner v. Todd, 48 N. J. L. 361, 7 Atl. 477; Hinds v. Canandaigua & N. F. R. Co., 10 How. Pr. (N. Y.) 487; Hammond v. Hudson River Iron & M. Co., 11 How. Pr. (N. Y.) 29.

In Sherwood v. Buffalo & N. Y. C. R. Co., 12 How. Pr. (N. Y.) 136, it was said by the court that none of the provisions of the code with regard to supplementary proceedings were applicable to judgments against corporations.

Under the New York code, it was held that no supplementary proceedings could be held against a foreign corporation with no place of business in the state. Stephens v. Page, 4

Misc. 517, 24 N. Y. Supp. 698, 23 N. Y. Civ. Proc. 191. But see Logan v. McCall Pub. Co., 140 N. Y. 447, 35 N. E. 655, decided four months later. Cited note 8, *supra*.

In Levy v. Swick Piano Co., 17 Misc. 145, 39 N. Y. Supp. 409, it was held that no such proceedings could be maintained against a foreign corporation with a place of business in the state.

In the case of Vietor v. Richards Co., 20 Misc. 289, 45 N. Y. Supp. 800, it was held that the receiver in the state of a foreign corporation, having a place of business within the state could not be examined in supplementary proceedings where such proceedings could not be had against the corporation.

It was held, however, in Courtois v. Harrison, 1 Hilt. (N. Y.) 109, 3 Abb. Pr. 96, 12 How. Pr. 359, that supplementary proceedings after judgment against a joint stock association were proper.

11. California.—Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254.

Indiana.—Devan v. Ellis, 29 Ind. 72; Folsom v. Clark, 48 Ind. 414; Fowler v. Griffin, 83 Ind. 297; Dillman v. Dillman, 90 Ind. 585; Mitchell v. Bray, 106 Ind. 265, 6 N. E. 617; Baker v. State, 109 Ind. 47, 9 N. E. 711.

Minnesota.—Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398.

New York.—Boice v. Turner, 4 How. Pr. 195; Davis v. Turner, 4 How. Pr. 190; Graves v. Lake, 12 How. Pr. 33; Terry v. Hultz, 39 How. Pr. 169; Tompkins County Bank v. Trapp, 21 How. Pr. 17; Courtois v. Harrison, 1 Hilt. 109, 3 Abb. Pr. 96, 12 How. Pr. 359; Holbrook v. Orgler, 49 How. Pr. 289; Smith v. Cutter, 64 App. Div. 412, 72 N. Y. Supp. 99.

North Carolina.—Coates Bros. v. Wilkes, 94 N. C. 174; Farmers' &

3. Exceptions.—There are cases holding that no examination can be required of the receiver of the debtor,¹² a discharged bankrupt as to the debts affected by the discharge,¹³ an officer of a court having custody of a fund in court,¹⁴ a receiver of a foreign corporation,¹⁵ a bank holding the funds of a bankruptcy court,¹⁶ a foreign consul,¹⁷ or a municipal corporation.¹⁸ It would seem that,

M. Nat. Bank v. Burns, 109 N. C. 105, 13 S. E. 871.

In *Murphy v. Busick*, 22 Ind. App. 247, 53 N. E. 475, 72 Am. St. Rep. 304, it was held that such proceedings could be maintained against an executor having possession of a legacy belonging to the judgment debtor.

An examination of a corporation as a third party was held proper in *Semmes v. Noell*, 18 N. Y. Civ. Proc. 200n., and in *Pendergast v. Dempsey*, 18 N. Y. Civ. Proc. 198, 10 N. Y. Supp. 938.

In *Wainright v. Tiffany*, 13 N. Y. Civ. Proc. 223, such proceedings were held proper against a domestic corporation as a third party.

One who held funds of a foreign corporation against whom a judgment had been obtained was held liable to an examination, in *McBride v. Farmers' Bank*, 28 Barb. (N. Y.) 476, 7 Abb. Pr. 347.

One may be examined as to a debt owed by him to a judgment debtor, but not yet due. *Davis v. Herrig*, 65 How. Pr. (N. Y.) 290.

An assignee of the judgment debtor may be examined. *Bruce v. Crabtree*, 116 N. C. 528, 21 S. E. 194.

In *re Sickie*, 52 Hun 527, 5 N. Y. Supp. 703, 17 N. Y. Civ. Proc. 138.

But see *Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220, where, under the Wisconsin statute, it was held that supplementary proceedings could be held only against the judgment debtor.

And see *Osborne v. Reardon*, 79 Iowa 175, 44 N. W. 346, where it was held that the Iowa statute did not provide for supplementary proceedings against third persons.

12. *Fitchburg Nat. Bank v. Bushwick Chem. Co.*, 13 N. Y. Civ. Proc. 155.

13. Where a debtor was refused a discharge in bankruptcy, but was later discharged in composition pro-

ceedings, it was held that such discharge was binding with creditors of whom the court had jurisdiction, and was a bar to supplementary proceedings by one of such creditors obtained before the discharge in composition proceedings. *Leo v. Joseph*, 56 Hun 644, 9 N. Y. Supp. 612; *Smith v. Paul*, 20 How. Pr. (N. Y.) 97.

14. Anonymous, 1 Code Rep. N. S. (N. Y.) 211; *Smith v. McNamara*, 15 Hun (N. Y.) 447.

15. *Smith v. McNamara*, 15 Hun (N. Y.) 447. This case went on the ground that the receiver was an officer of a court.

In *Vietor v. Richards Co.*, 20 Misc. 289, 45 N. Y. Supp. 800, it was held that where a corporation could not be examined in supplementary proceedings, a receiver of such corporation was also exempt from examination.

16. *Havens v. National City Bank*, 4 Hun (N. Y.) 131, 6 Thomp. & C. 346.

17. In *Griffin v. Dominguez*, 2 Duer (N. Y.) 656, it was held that a foreign consul would not be required to submit to an examination as a judgment debtor.

18. *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

"It is generally held that a public or municipal corporation cannot under any law, unless expressly so provided, be subjected to these (supplementary) proceedings, but such rule is always, I think, put on the ground of public policy." *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. D. 173, 56 N. W. 98.

But a municipal officer having funds of the corporation in his possession may be examined at the instance of a judgment creditor of the corporation. *Lowber v. Mayor of New York*, 5 Abb. Pr. (N. Y.) 268.

where the corporation cannot be examined, a third person indebted to such corporation is not subject to examination.¹⁹

III. WITNESSES.

Either party may go upon the stand in his own behalf, or may be called by the other, and may call other witnesses as upon the trial of an action.²⁰ It is not necessary that the debtor be examined.²¹

On the question of the competency of the husband or wife of the judgment debtor to testify in supplementary proceedings, the various codes and statutes should be carefully examined.²²

19. *Fitchburg Nat. Bank v. Bushwick Chem. Wks.*, 13 N. Y. Civ. Proc. 155.

20. *California*.—*McCullough v. Clark*, 41 Cal. 298.

Indiana.—*Devan v. Ellis*, 29 Ind. 72; *Bipus v. Deer*, 106 Ind. 135, 6 N. E. 894.

Iowa.—*McDonnell v. Henderson*, 74 Iowa 619, 38 N. W. 512.

New Jersey.—*Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502.

New York.—*Sandford v. Carr*, 2 Abb. Pr. 462; *Tompkins County Bank v. Trapp*, 21 How. Pr. 17; *Clapp v. Lathrop*, 23 How. Pr. 423; *In re Sickie*, 52 Hun 527, 5 N. Y. Supp. 703, 17 N. Y. Civ. Proc. 138.

North Carolina.—*Coates Bros. v. Wilkes*, 92 N. C. 376.

"The section provides that either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action." *Semmes v. Noell*, 18 N. Y. Civ. Proc. 200n.; *Daily Reg. (N. Y.)*, March 30, 1886.

In *Colton v. Bigelow*, 41 N. J. L. 266, it was said: "The right to examine the judgment debtor is the privilege of the creditor. It was given for his benefit and advantage to enable him more effectually to discover the property of the debtor."

21. *Colton v. Bigelow*, 41 N. J. L. 266; *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502; *Wilkinson v. Markert*, 65 N. J. L. 518, 47 Atl. 488; *McBride v. Farmers' Bank*, 28 Barb. (N. Y.) 476, 7 Abb. Pr. 347; *Graves v. Lake*, 12 How. Pr. (N. Y.) 33.

22. *Estey v. Fuller Impl. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

Where an order to the wife to appear and be examined concerning property of her husband in her control was issued, it was held error on the ground that this would require the wife to be a witness in a suit to which her husband was a party. *Andrews v. Nelson*, 7 Abb. Pr. (N. Y.) 3n.

The examination of a wife of a judgment debtor on supplementary proceedings against her with respect to the property of the husband in her possession is not an examination for or against her husband within the meaning of the code requiring the husband's consent. *Frankenthal v. Solomonson*, 20 Wash. 460, 55 Pac. 754, 72 Am. St. Rep. 116, 44 L. R. A. 311.

In *O'Brien's Petition*, 24 Wis. 547, it was held that the wife of a judgment debtor might be examined as to whether she had property of the husband under her control.

But in *Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220, it was held that the husband of a judgment debtor cannot testify for or against his wife except as to transactions in which he acted as her agent.

It was held in *New York* that in supplementary proceedings against the husband, the wife could not be examined as a witness. *Macondray v. Wardle*, 26 Barb. (N. Y.) 612, 7 Abb. Pr. 3.

While in *Lockwood v. Worstell*, 15 Abb. Pr. (N. Y.) 430n, it was held that a wife of a judgment debtor might be examined under code § 294 in supplementary proceedings against herself as a third party having property of the judgment debtor.

IV. SCOPE OF EVIDENCE.

1. In General.—The general scope of the evidence admissible in supplementary proceedings is determined by the purpose of the examination. Whatever evidence has a direct tendency to accomplish such a purpose and to lead to the discovery of property of any sort belonging to the debtor, and subject to execution on the judgment against him, is admissible, if not excluded by some rule of law; and evidence not having such a tendency is immaterial and irrelevant.²³ Examining counsel need

23. California.—McCullough v. Clark, 41 Cal. 298.

New Jersey.—Peck v. Lowe, 7 N. J. L. J. 35.

New York.—Forbes v. Willard, 54 Barb. 520; Clapp v. Lathrop, 23 How. Pr. 423; *In re Rinkskopf*, 8 N. Y. Civ. Proc. 246n; *Coursen v. Dearborn*, 7 Robt. 143; *In re Sickie*, 52 Hun 527, 5 N. Y. Supp. 703. 17 N. Y. Civ. Proc. 138; *Canavan v. McAndrew*, 20 Hun 46.

North Carolina.—La Fontaine v. Southern Underwriters Assn., 83 N. C. 132.

Wisconsin.—Cleveland v. Burnham, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190.

"Under these proceedings, the judgment creditor can in a summary manner compel the disclosure of any property belonging to the judgment debtor in the hands or under the control of any other person, and of any indebtedness due to the judgment debtor, and, for this purpose, great latitude is usually allowed in the examination. The creditor is always entitled to prosecute the inquiry to such an extent as to enable him to ascertain the true condition of the property and business affairs of the debtor." *Hagerman v. Tong Lee*, 12 Nev. 331.

In *Millar v. Weaver*, 23 Misc. 254, 53 N. Y. Supp. 259, it was held error to refuse to receive testimony of a trustee of the debtor who was called for the purpose of showing that the property held by him exceeded in value the consideration for which the debtor claimed to have sold his interest, and also that the alleged purchase price had been paid by the alleged trustee instead of by the alleged purchaser.

In *Hunt v. Enoch*, 6 Abb. Pr. (N. Y.) 212, *Hilton, J.*, said: "As the inquiry sought by the questions objected to would not tend to show that the defendant was in the possession of and entitled to any property which a judgment of this court might order or direct to be applied toward the satisfaction of the judgment (Code Paragraphs 297-299) the objections are sustained and the defendant discharged from further examination under this proceeding."

Mitchell, J.: "The claim, alone, of the person alleged to have the property or to be indebted terminates the right to relief as against him in this proceeding, and as on such claim no relief can be granted in this proceeding, so no inquiry can, after the claim, be made here with a view to defeat that claim. If he claims the property, he need answer no further. The validity of this claim is to be settled in a suit against him where he will have the advantages to which the party to a suit is entitled by law." *Van Wyck v. Bradley*, 3 Code Rep. (N. Y.) 157.

In the case of *Bipus v. Deer*, 106 Ind. 135, 5 N. E. 894, it was held that on a proceeding supplementary to execution, the party prosecuting the proceeding is not concluded by the testimony of the defendant that he is a householder and exempt, and it is error for the court to refuse to hear evidence to the contrary.

In a supplementary proceeding, the question as to what the debtor had done with the proceeds of certain property disposed of by him was held proper, and evidence as to the property owned by the debtor's son, other than what the debtor had given him, was excluded. The tax list re-

not show what is expected to be proved by the questions asked.²⁴

While the nature of the proceedings requires a liberal scope in the admission of evidence, the testimony must be such as will reasonably tend to disclose the necessary facts, and the purpose of the various statutes will not justify an examination which is simply

turned by the judgment debtor to the assessor under oath shortly before the proceeding is admissible to show the property claimed by him at that time, but deeds and mortgages executed by the judgment debtor to various persons were excluded as immaterial, for the reason that the judgment creditor could inquire of the debtor about the transaction to which such instruments relate. *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

In *Flint v. Webb*, 25 Minn. 263, referring to evidence concerning the falsity of the sheriff's return of execution unsatisfied, Cornell, J., said: "No question of this character can be raised after the commencement of the proceedings and upon the disclosure of the defendant on his examination under the order. *Stoors v. Kelsey*, 2 Paige 418; *Fenton v. Flagg*, 24 How. Pr. 499. Such disclosure is not, as the defendant's counsel supposes and claims, in the nature of a creditor's bill, nor can the facts testified to by the defendant in his examination be treated like the averments contained in a bill of that character. Its sole purpose is a discovery of the debtor's property to the end that it may, so far as it is not exempt from execution, be subjected to the payment of his debt to the judgment creditor, and its relevancy must be determined by reference to that object."

Where there was no accumulation, it was said that evidence as to whether the surplus of a trust fund was applicable or not was not admissible. *Campbell v. Foster*, 35 N. Y. 361, *affirming* 16 How. Pr. 275.

Gray v. Ashley, 24 Misc. 396, 53 N. Y. Supp. 547. In this case it was held that under the New York statute, all the jurisdictional facts should be proved by the evidence of the person examined.

24. "The point made is that the

appellants having made no offer as to what they expected to prove in answer to their said questions, no question is before us involving the correctness of the rulings complained of excluding the testimony sought to be elicited in answer to the said questions. We recognize the force of the rule contended for by the appellee, but like all other rules, it has its exceptions, and, in our opinion, the present case falls within the exceptions. In the trial of an ordinary civil action or criminal prosecution when a witness is called to the stand, the party calling him is presumed to know when he propounds a question the answer that the witness will make to the question, and it is but just and proper that the party calling the witness inform the court as to the testimony which he expects to elicit, if the witness is permitted to answer the question. This works no hardship to the party calling the witness and it may be that, when the court is informed as to what the testimony will be if the witness is permitted to answer, its mind may be changed as to the propriety of the question, but in cases of the class now under consideration, there can be no such presumption as that which arises in ordinary cases. In cases like the present, it is the party that is being examined, and not in the capacity of a witness but as the adverse party. The purpose of the examination is not to elicit information, the character of which is known to the party making the examination as in the case of a witness supposed to be friendly, at least not hostile to the party calling him. The object of the examination is to obtain information which is supposed to be peculiarly within the knowledge of the party who is being examined, and entirely unknown to the party who is making the examination. If the party making

harassing, or which is a general inquiry into the debtor's private life and affairs, unless a basis for such inquiries has been shown.²⁵

2. Discretion of Officer. — The examining officer must necessarily have a large discretion in determining the scope and extent of the interrogatories to be permitted,²⁶ but an abuse of, or arbitrary exercise of, such discretion is subject to review.²⁷

3. Property in Another State. — An inquiry may be made concerning property owned by the debtor in another state.²⁸

4. Property Acquired Since Beginning of the Proceedings. — It is not proper to inquire about property acquired by the debtor since the supplementary proceedings were instituted.²⁹

the examination had such information as to enable him in advance to inform the court of what his adversary would answer to the questions propounded, then there would be no occasion for the examination. The object of the examination is that the creditor may obtain information whereby he may discover property upon which he may levy his execution, of which before such examination he has no knowledge. . . . In examinations like the one under consideration, the court should allow great liberty. If the questions propounded are at all pertinent, the court should require that they be answered." *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

25. "A judgment creditor is not permitted to harass his debtor by successive examinations in supplementary proceedings. He is entitled to examine the defendant as fully as may be, once. After that, it becomes a question of discretion." *Canavan v. McAndrew*, 20 Hun (N. Y.) 46.

"The statute was intended to accomplish a proper purpose in assisting judgment creditors to discover secreted property, but it does not justify a general inquiry into every judgment debtor's private affairs, where there is not shown to be some reasonable basis for an inquiry to discover a fraudulent transfer or concealment of property. If this statute is authority for the uncovering of the family history and private relations of unfortunate debtors under the pretext of fishing up some clue which might lead to something,

it is high time it was repealed." *Bradley v. Burk*, 81 Minn. 368, 84 N. W. 123.

26. *Flint v. Webb*, 25 Minn. 263; *Hagerman v. Tong Lee*, 12 Nev. 331; *Cleveland v. Burnham*, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; *Leroy v. Halsey*, 1 Duer (N. Y.) 589; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 423; *Canavan v. McAndrew*, 20 Hun (N. Y.) 46.

In *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16, it was held that in the discretion of the referee, even after the examination had been concluded and signed, that a correction could be made by supplementary statements.

In *Heilbronner v. Levy*, 64 Wis. 636, 26 N. W. 113, the court said: "The order and scope of the examination of a judgment debtor in a proceeding supplementary to execution is largely in the discretion of the judge or commissioner before whom such examination is being taken."

27. *People v. Leipzig*, 52 How. Pr. (N. Y.) 410; *Cleveland v. Burnham*, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190.

"Hence this court will not interfere and limit such an examination, unless it is made to appear, very clearly, that there has been an abuse of discretion by the examining officer in requiring the judgment debtor to answer improper interrogatories." *Heilbronner v. Levy*, 64 Wis. 636, 26 N. W. 113.

28. *Peck v. Lowe*, 7 N. J. L. J. 350.

29. *Gregory v. Valentine*, 4 Edw. Ch. (N. Y.) 282.

5. Former Transfers, Assignments, and Conveyances.—The circumstances of former transfers, assignments, and conveyances of property by the judgment debtor may be inquired into,³⁰ and he may be questioned as to the proceeds of property of which he has disposed,³¹ but the validity of such transfers, assignments and conveyances cannot be determined in the supplementary proceedings.³²

6. Where Property Is Claimed or Indebtedness Denied by Third Persons.—Where property in question is claimed by third parties,³³ or where the existence of an indebtedness to the judgment debtor is denied,³⁴ this does not end the proceedings, and questions tending

30. *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Millar v. Weaver*, 23 Misc. 254, 53 N. Y. Supp. 259; *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

According to *Williams v. Carrol*, 2 Hilt. (N. Y.) 438, a debtor who has made a *bona fide* transfer of property cannot be required to name the purchaser, but otherwise if he has reserved the right to redeem by paying an inadequate consideration.

In *Mechanics' Bank v. Healy*, 14 N. Y. Wkly. Dig. 120, it was held that the creditor may show that the transfer was not made in good faith, notwithstanding the claim of a witness that he owns the property in question as a *bona fide* purchaser.

31. *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

32. *Carson v. Oates*, 64 N. C. 115; *McCaskill v. Lancashire*, 83 N. C. 393; *First Nat. Bank v. Cook*, 12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

33. *Carson v. Oates*, 64 N. C. 115; *Tompkins County Bank v. Trapp*, 21 How. Pr. (N. Y.) 17; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 423; *Teller v. Randall*, 26 How. Pr. (N. Y.) 155; *Maass v. McEntegart*, 20 Misc. 676, 46 N. Y. Supp. 534; *Brown v. Edmonds*, 5 S. D. 508, 59 N. W. 731.

In New York, it was held in *Sandford v. Carr*, 2 Abb. Pr. (N. Y.) 462, that a witness is not to be excused from answering on the ground that he sets up a claim to the property which is the subject of an examination.

It was earlier held in New York, in *Van Wyck v. Bradley*, 3 Code Rep. (N. Y.) 157, that a claim by a

witness examined in the proceedings terminated the proceedings, except that he might be required to state the measure of his claim to ascertain if it extended to the whole property.

In *Krone v. Klotz*, 3 App. Div. 587, 38 N. Y. Supp. 225, 25 N. Y. Civ. Proc. 320, 3 N. Y. Anno. Cas. 36, it was said by Williams, J.: "It seems to be conceded by counsel for respondent that, if there was a substantial dispute as to the ownership of the \$200, the order appealed from was improperly granted under section 2447, Code of Civ. Proc., and this is true. Wherever such dispute exists in good faith the court cannot settle such dispute in supplemental proceedings but should leave the parties to their action. *Rodman v. Henry*, 17 N. Y. 482, *Banks v. Pugsley*, 47 N. Y. 368; *Barnard v. Kobbe*, 54 N. Y. 516; *Waldron v. Walker* (Sup.) 18 N. Y. Supp. 292. The fact of ownership should be clearly and conclusively established, in order to warrant the making of the order to pay over the money, under this section of the Code."

See also *Mechanics' Bank v. Healy*, 14 N. Y. Wkly. Dig. 120, cited in note 31, *supra*.

In California, where a third person files a verified answer in which he denies that he has in his control any property belonging to the judgment debtor, or any property that was conveyed to him for the purpose of defeating the claims of creditors, the judge cannot proceed further with the examination, and must leave the parties to their action to determine title. *Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413.

34. *Waldron v. Walker*, 63 Hun 631, 18 N. Y. Supp. 292.

to show that a transfer of property to the witness was not in good faith are proper. But the officer before whom the supplementary proceedings are held has no jurisdiction as such to determine the title to the property or the existence of the indebtedness.³⁵

7. Where an Assignment for the Benefit of Creditors Has Been Made.—Where a prior assignment for the benefit of creditors has been made by the judgment debtor, the validity thereof cannot be determined in supplementary proceedings,³⁶ but questions may be asked concerning property of the debtor acquired before or after such assignment.³⁷ Where a creditor has acquiesced in a general assignment and has filed a claim, he can inquire in supplementary proceedings only as to the property of the debtor acquired by him since the assignment.³⁸ Upon an examination of an assignee for the benefit of creditors, the proceedings can be had only in "aid of the assignment, and not in hostility thereto."³⁹ And the judgment creditor who brings an action to have an assignment by the debtor declared invalid does not thereby waive his right to bring supplementary proceedings,⁴⁰ but the examination will be limited to property acquired since the assignment.⁴¹

8. Collateral Matters.—All evidence which can have no tendency to disclose property of the judgment debtor subject to execution

"Appellants denied that they were indebted to the judgment debtors. In such case, the statute Section 5182 Comp. L. provides that 'the debt shall be recoverable only in an action against such person. . . . by the receiver.' When appellants denied owing this alleged debt to the judgment debtor, neither the court nor the judge had legal right to proceed to examine in such summary way whether it did owe such debt or not. The law had provided another remedy by action by a receiver, where the rights of the parties could be determined in the usual course of a suit at law." *Thompson & Sons Mfg. Co. v. Guenther*, 5 S. D. 504, 59 N. W. 727.

35. *Sandford v. Carr*, 2 Abb. Pr. (N. Y.) 692; *Mechanics' Bank v. Healy*, 14 N. Y. Wkly. Dig. 120.

The headnote to *Gerton Carriage Co. v. Richardson*, 6 Misc. 466, 27 N. Y. Supp. 625, states that, "Where a will provides that a legatee who is also made executor shall receive his support from the income of the estate, and that he may use the principal for that purpose, if necessary, and no accounting has been made by him as executor, and no separation made of the parts necessary for his

support, supplementary proceedings will not lie to subject his interest in the estate to a judgment against him." And the general ground of the decision was that the title to the property was unsettled.

36. *Beebe v. Kenyon*, 3 Hun (N. Y.) 73, 5 Thomp. & C. 271; *In re Rindskopf*, 8 N. Y. Civ. Proc. 246 n.

37. *Seymour v. Wilson*, 15 How. Pr. (N. Y.) 355; *Seligman v. Wallach*, 16 Abb. N. C. (N. Y.) 317; *Schneider v. Altman*, 16 Abb. N. C. (N. Y.) 312.

In re Rindskopf, 8 N. Y. Civ. Proc. 246 n. In this case it was decided that evidence was properly admitted to show the amount of property embraced in the assignment, and the amounts of debts appearing on the books, payable out of the assigned estate.

38. *Wilson Bros. v. Daggett*, 9 N. Y. Civ. Proc. 408.

39. *In re Rindskopf*, 8 N. Y. Civ. Proc. 246 n.; *In re Sickle*, 52 Hun 527, 5 N. Y. Supp. 703, 17 N. Y. Civ. Proc. 138. See *Bruce v. Crabtree*, 116 N. C. 528, 21 S. E. 194.

40. *In re Sickle*, 52 Hun 527, 5 N. Y. Supp. 703, 17 N. Y. Civ. Proc. 138.

41. *Schloss v. Wallach*, 16 Abb.

is collateral to the object of the proceedings and not admissible.⁴² The merits of the original action cannot be passed upon in supplementary proceedings, and evidence as to such merits is incompetent,⁴³ nor is evidence admissible going to the validity of the judgment⁴⁴ or of the execution,⁴⁵ or of the sheriff's return,⁴⁶ or of a discharge in bankruptcy.⁴⁷

9. Evidence Tending to Incriminate the Witness.—If the evidence is otherwise admissible, a witness will not be excused from answering on the ground that his answer may tend to incriminate him or to show that he has been a party to a fraudulent conveyance or transfer of property.⁴⁸ But his answer in such case cannot be used against him in a criminal prosecution.⁴⁹ The statute should be carefully consulted in connection with the cases.

N. C. (N. Y.) 319 *n*; Wilson Bros. v. Daggett, 9 N. Y. Civ. Proc. 408.

42. See note 25, *supra*; Coursen v. Dearborn, 7 Robt. (N. Y.) 143; Flint v. Webb, 25 Minn. 263; Comstock v. Grindle, 121 Ind. 459, 23 N. E. 494; Heilbronner v. Levy, 64 Wis. 636, 26 N. W. 113; Bradley v. Burk, 81 Minn. 368, 84 N. W. 123.

43. O'Neil v. Martin, 1 E. D. Smith (N. Y.) 404; Walker v. Donovan, 53 How. Pr. (N. Y.) 3; Hobbs v. Town of Eaton (Ind. App.), 78 N. E. 333; Harper v. Behagg, 14 Ind. App. 427, 42 N. E. 1115.

44. Courtois v. Harrison, 1 Hilt. (N. Y.) 109; People v. Oliver, 66 Barb. (N. Y.) 570; Hyatt v. Dusenbury, 12 N. Y. Civ. Proc. 152.

45. Greenlich v. Rose, 26 N. Y. City Ct. 174; People v. Oliver, 66 Barb. (N. Y.) 570; Hyatt v. Dusenbury, 12 N. Y. Civ. Proc. 152.

46. Flint v. Webb, 25 Minn. 263; Walker v. Donovan, 53 How. Pr. 3; Tyler v. Whitney, 33 Barb. (N. Y.) 327, 12 Abb. Pr. 465; Stiefel v. Berlin, 28 App. Div. 103, 51 N. Y. Supp. 147; Hobbs v. Town of Eaton (Ind. App.), 78 N. E. 333.

47. Coursen v. Dearborn, 7 Robt. (N. Y.) 143.

48. State v. Burrows, 33 Kan. 10, 5 Pac. 449; Seymour v. Wilson, 15 How. Pr. (N. Y.) 355; Keiley v. Dusenbury, 52 How. Pr. (N. Y.) 277, 2 Abb. N. C. 360; Clapp v. Lathrop, 23 How. Pr. (N. Y.) 423; Marx v. Spaulding, 43 Hun (N. Y.) 365; *In re Sickie*, 52 Hun 527, 5 N. Y. Supp. 703, 17 N. Y. Civ. Proc. 138;

Millar v. Weaver, 23 Misc. 254, 53 N. Y. Supp. 259.

In Lathrop v. Clapp, 40 N. Y. 328, 100 Am. Dec. 493, in citing this provision of the statute, the court said: "This enactment was undoubtedly made to give a more full examination than could be obtained without it."

"The act contemplates a thorough and searching examination into all fraudulent dispositions of property made to defeat creditors and does not allow the inquiry to be evaded upon any ground of the self incriminating answer which may follow. It must be answered whatever the bearing upon the witness, and however tending to show his fraudulent conduct, because this is necessary to the creditor's relief, and fraud finds no favor in the law." *La Fontaine v. Southern Underwriters Assn.*, 83 N. C. 132, 143.

Where a witness refuses to answer on the ground that his answer would tend to incriminate, it was held to be at the discretion of the court to compel him to answer, if, in the court's opinion, the evidence called for would not be incriminating. *Forbes v. Willard*, 54 Barb. (N. Y.) 520.

49. *New York*.—Clapp v. Lathrop, 23 How. Pr. 423; Forbes v. Willard, 54 Barb. 520; Keiley v. Dusenbury, 52 How. Pr. 277, 2 Abb. N. C. 360; People v. Spier, 12 Hun 70, 2 Abb. N. C. 466; Barber v. People, 17 Hun 366; Dusenbury v. Dusenbury, 63 How. Pr. 349, 16 Jones & S. 205. See *Lapham v. Marshall*, 51 Hun 36, 3 N. Y. Supp. 601.

V. EVIDENCE TO BE IN WRITING.

The testimony of the witnesses should be taken down in writing,⁵⁰ and it is generally provided that, if correct, it should be signed by them.⁵¹

VI. ANSWERS AND DEFENSES.

Any answer or defense which the debtor has to the enforcement of the judgment, he may avail himself of on supplementary proceedings.⁵²

VII. EVIDENCE NECESSARY TO JUSTIFY AN ORDER FOR THE DELIVERY OF PROPERTY.

To justify relief on such proceedings the evidence must be clear and convincing.⁵³

North Carolina.—*La Fontaine v. Southern Underwriters Assn.*, 83 N. C. 132, 143.

50. *Iowa Code* §4075; *Coates Bros. v. Wilkes*, 92 N. C. 376; *Sherwood v. Dolen*, 14 Hun (N. Y.) 191; *Marx v. Spaulding*, 43 Hun 365.

In the discretion of the referee, even after the examination has been concluded and signed, corrections thereof may be made by additional statements. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16.

51. *Marx v. Spaulding*, 43 Hun (N. Y.) 365.

In *Sherwood v. Dolen*, 14 Hun (N. Y.) 191, it was held, that where the testimony of the witness was erroneously taken down, he was entitled to have the minutes corrected before signing them, even if their falsity

was declared by a supplementary entry.

52. *Walker v. Donovan*, 53 How. Pr. (N. Y.) 3.

Where supplementary proceedings have resulted in the discovery of sufficient property to satisfy the claim of the creditors, an order for the examination of another person may be vacated as unnecessary. *Crane v. Beecher*, 6 N. Y. Supp. 225, 26 N. Y. St. 233.

53. *Gray v. Ashley*, 24 Misc. 396, 53 N. Y. Supp. 547.

To justify an order requiring a judgment debtor to deliver over money or property, the evidence on supplementary proceedings must be "direct, clear and convincing." *Bradley v. Burk*, 81 Minn. 368, 84 N. W. 123.

SUPPRESSION OF EVIDENCE.—See Obstructing Justice; Presumptions; Spoliation.

SURETY OF PEACE.

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I. NATURE OF PROCEEDING.

A proceeding for surety of the peace, though not a criminal prosecution¹ is in the nature of one² and is instituted for the purpose of preventing the commission of a crime, offense, or misdemeanor, where the prosecuting witness has just cause for believing at the time of instituting the proceeding that a crime, offense, or misdemeanor will be committed.

II. SUFFICIENCY AND ADMISSIBILITY OF EVIDENCE.

1. *Sufficiency of Evidence on Prosecution's Behalf.* — In a prosecution for surety of the peace, if there is evidence in the cause tending to support every material charge in the affidavit upon which the prosecution rests, though it is not as satisfactory as could be wished, yet its weight is wholly for the jury, and a verdict

1. Blackstone, having completed his discussion of crimes and misdemeanors, opens the eighteenth chapter of Book IV, by saying: "We are now arrived at the fifth general branch or head under which I propose to consider the subject of this book of our commentaries, viz: 'The means of preventing the commission of crimes and misdemeanors.'" And the great commentator then proceeds to discuss proceedings to obtain bonds to keep the peace as a different thing from a prosecution for a crime or misdemeanor.

The constitution of Indiana makes the jury the exclusive judges of the law and evidence in criminal cases. (See § 19 of art. 1.) It was held in *Arnold v. State*, 92 Ind. 187, that

there is no criminal case where there is no crime, unless both the act and the intent exist. In surety of the peace cases there is no crime, because no act is committed which the law regards as a crime. See also *Fisher v. Hamilton*, 49 Ind. 341; *State v. Cooper*, 90 Ind. 575.

2. "It is no doubt true that in a limited sense the proceeding is a criminal prosecution, and that, as to matters of practice, the rules of criminal, rather than of civil, procedure apply." *Arnold v. State*, 92 Ind. 187.

Where the act authorizing such prosecutions is silent upon a point of practice under it, the practice in criminal cases governs. *State v. Maners*, 16 Ind. 175.

on the weight of the evidence will not be disturbed on appeal.³

A Threat To Do Great Bodily Injury, Coupled With a Condition Which Includes the Performance of a Duty, by the party threatened, if made in a manner which would lead a cautious man to believe that it would be executed, is sufficient evidence for requiring the party making the same to keep the peace.⁴ So, too, evidence of a threat to inflict bodily harm, coupled with a condition that the threatened party persists in acts which are in themselves lawful, is sufficient evidence for compelling the threatening party to keep the peace.⁵

But a Threat To Do Great Bodily Injury, made upon condition that the threatened party persists in an unlawful purpose, is not suffi-

3. *Williamson v. State*, 138 Ind. 699, 38 N. E. 51.

4. *Ritchey v. Davis*, 11 Iowa 124. This was a case of malicious prosecution for having plaintiff arrested maliciously and without probable cause, upon a charge of an alleged threat to do the defendant a great bodily injury. In the prosecution complained of the following appeared to be the facts: An execution in favor of one Ogden, against Ritchey, in which case Davis was the regular attorney of record, was placed in the hands of the sheriff for collection. The sheriff called upon Ritchey to turn out property, which he refused to do; then he returned the execution and said to Davis, the attorney, that he must show property. Ritchey afterwards came to the county seat and remarked to Davis, in a passion, "*I understand you are coming to Corning on your smashing process, and if you do, I warn you in time, that if you come to show my property, you come at your peril.*" Some three or four other witnesses testified that they heard Ritchey say to Davis that if he came over to Corning to show his property to the sheriff, he would do so "*at the risk of his life, or the peril of his existence,*" etc. Whereupon a proceeding was commenced by Davis against Ritchey to compel him to give bonds to keep the peace, and this was the proceeding on account of which this action of malicious prosecution was brought. In an action for malicious prosecution it is necessary for plaintiff to show malice and want of probable cause. The court, quoting

the instruction of the court below, said: "That if Ritchey coupled his threats with a condition, the jury may consider that, as a circumstance going to show a want of probable cause to prosecute Ritchey. As applicable to this case, this instruction given in this unqualified manner was calculated to mislead. A threat coupled with a condition which contemplates the doing of an unlawful or even an unnecessary act by the party threatened would furnish perhaps no ground of complaint. But a threat coupled with a condition which included the performance of a professional duty is a very different thing, and that was this case. Davis was the attorney of the plaintiff in the execution; he had been told by the sheriff that Ritchey had refused to turn out property, and that he, the sheriff, thought he was concealing his property, and that it would be necessary for him (Davis) to show property and give an indemnifying bond, if he wanted his execution satisfied. Under these circumstances if Davis did know of property which the sheriff did not, it was his right as a faithful attorney to point it out, and the defendant in the execution would have no right to threaten his life for doing so; and if he did it in a way to lead a cautious man to suspect that he intended to make good his threat, he should be placed under bonds to keep the peace."

5. *Ex parte Hulse*, 21 L. J., M. C. 21; *Reg. v. Mallinson*, 16 Q. B. 367, 15 Jur. 746.

cient cause for requiring the party making the threat to give surety for keeping the peace.⁶

Conviction of Offense Not Amounting to Disturbance of the Peace. Where the evidence merely shows that a party has been guilty of violating a police regulation, which involves no annoyance or danger to persons or property, nor infraction of the public peace, nor the commission of a felony or misdemeanor, such evidence is not sufficient to make it the duty of the court to require him to give security to be of good behavior.⁷

2. Admissibility of Evidence on Prosecution's Behalf.—The complaining witness in a proceeding for surety of the peace should be permitted to testify that certain persons told him that the defendant

6. § 4796, 2 Comp. Laws Utah, 1888, authorizes an information to be laid before a magistrate, that a person has threatened to commit an offense against the person or property of another. § 4798, 2 Comp. Laws Utah, 1888, authorizes the magistrate to issue a warrant for the arrest of such person, if it appears from the depositions that there is just reason to fear the commission of the crime threatened. In *Johnston v. Meaghr*, 14 Utah 426, 47 Pac. 861, it appeared from the evidence that a party while trespassing upon the premises of another was threatened with violence by the latter, if he continued to trespass. The court said: "Can one who attempts to take possession of another's land, who is in actual possession, forcibly and unlawfully, when the other forbids, resists, and threatens to shoot, have him arrested and bound over to keep the peace, while he unlawfully appropriates the land to his own use? Can a party, by swearing that he fears another will commit a threatened crime against him if he persists in trespassing on his property, require the other to give a bond to keep the peace while he does the unlawful act? Peace warrants and bonds to keep the peace are not intended to protect men in doing unlawful acts against others. Their object is to secure an observance of law, not to encourage its violation."

7. In *Com. v. Foster*, 28 Pa. Super. Ct. 400, the court said: "This proceeding had its inception in a complaint, verified by affidavit, presented to a justice of the peace,

'charging the defendant with having violated the act of assembly approved April 22, 1794, 3 Sm. L. 177, for many Sundays by doing and performing worldly employment or business on the first day of the week designated in the act of assembly as "The Lord's Day," commonly called Sunday, in carrying on his business as a dealer in cigars and soft drinks, and selling cigars, tobacco and other articles of merchandise. . . . The question here presented is does the court of quarter sessions have power to require a person to give security to be of good behavior, who has several times been convicted of doing business on Sunday in violation of the act of 1794, in the absence of any allegation or evidence that such business was done in such a manner as to disturb the peace or constitute a public nuisance? . . . The statute 34th Edward III., c. 1, authorizes justices of the peace 'to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behavior towards the king, and his people . . . to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants, nor others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders.' . . . This record contains nothing from which it could be inferred that there was any reasonable ground to apprehend, or that this justice of the peace apprehended, that this defendant would commit any felony or misdemeanor,

threatened to inflict upon him bodily injury, and such testimony is not objectionable on the ground of hearsay.⁸

3. Inadmissibility of Evidence on Defendant's Behalf. — Evidence that the defendant had been informed that the complainant had slandered his wife on the same day of, and just prior to, the menacing conduct which gave rise to the proceeding, is not admissible for the defendant.⁹

Affidavits Not Admissible. — It appears that in the English law one against whom articles of the peace had been exhibited is not enti-

or disturb the peace, or in any way trouble, disturb or injure any of the people of the state, in their persons or property. The complaint which was at the foundation of the proceeding discloses that the purpose for which it was instituted was entirely foreign to that of the statute from which the justice of the peace derived his authority. The order of the court below is reversed and the defendant is discharged."

8. *Davis v. State*, 138 Ind. 11, 37 N. E. 397. This was a prosecution for surety of the peace. The court said: "It is claimed as error that the court permitted the complaining witness to testify that certain persons told him, in the absence of the defendant, that the defendant threatened to kill him and to do him other injuries. This was objected to as hearsay evidence. It is proper to prove threats made against the complaining witness by the defendant, and that such threats were communicated to the complaining witness. The evidence is not in the record, and we are unable to say whether the threats here complained of were proved on the trial as made by the defendant, or not. If it was proved on the trial that such threats were made by the defendant, then it would be not only proper but necessary to prove that the knowledge of the threats was communicated to the complaining witness. It is the threat and the communication of that threat to the complaining witness that puts him in the fear of which he complains. Presuming, as we must in the absence of the evidence, that the court did its duty, we must take it for granted that the court only allowed the evidence as to the communication of the threats on the ground

that the threats themselves were also proved. On that ground the admission of the evidence complained of was correct."

9. In *Arnold v. State*, 92 Ind. 187, the court said: "This was a prosecution commenced before a justice of the peace on the affidavit of George H. Dolson, against the appellant, for surety of the peace. . . . The evidence tends to show that the menacing conduct of the appellant towards the prosecuting witness, which occasioned the filing of the affidavit, occurred about four days before the filing of the same. The appellant testified that on the day, and just before the happening, of the conduct complained of, he had a talk with William Buell. Appellant's counsel then asked him this question: 'What, if anything, did Buell say to you during that conversation as to what Dolson had said about your wife?' This question was objected to as not being competent, material or relevant. The appellant offered to prove by himself, in answer to the question, that Buell informed him that Dolson, the prosecuting witness, had told Buell, and was circulating the report, that the appellant's wife had been guilty of adultery. The court sustained the objection to the question. We cannot say that there was any error in the ruling of the court. The issue to be tried was whether the complaining witness had just cause to entertain the fears expressed in his affidavit. The statement made by Buell to the appellant, which was not admitted in evidence, furnished, of course, no legal excuse or justification for the appellant's threatening behavior towards Dolson. It did not tend to prove that the appellant

tled to read affidavits on his own behalf, in contradiction of the facts sworn to against him in such articles.¹⁰

III. DEFENSES.

Under statutes which declare that "no negro or mulatto shall be a witness," except in cases in which "negroes or mulattoes alone shall be *parties*," and "no negro, mulatto or Indian shall be admitted to give *evidence* but against or between negroes, mulattoes or Indians," it is no defense to a proceeding for surety of the peace that the complaining witness is a negro.¹¹

Remedy Not Personal to Plaintiff—No Defense.—It is no defense to a proceeding for surety of peace that it appears in evidence that the remedy sought by the complaining witness is not personal to himself. One may act on behalf of another who for any reason is incapacitated.¹²

meditated no harm. On the contrary, it tended to prove that there was ground for anger and malice, and added weight to the probability that, in his violent language and conduct, the appellant intended to injure the person of the complaining witness."

10. *Rex v. Doherty*, 13 East 171, 12 R. R. 315; *Vane's Case*, 13 East 172*n*, 1 Term R. 697, 12 R. R. 317.

11. In *Com. v. Oldham*, 1 Dana (Ky.) 466, the Chief Justice said: "The only question presented by the assignment of errors in this case, is, whether a free man of color may, by his own oath, require a white man to give security to keep the peace. The second section of an act of 1798, 2 Dig. 1150, declares that 'no negro or mulatto shall be a witness'—except in cases in which 'negroes or mulattoes alone shall be parties;' and the second section of another act of the same session, 2 Dig. 1251, declares that 'no negro, mulatto, or Indian shall be admitted to give *evidence* but against or between negroes, mulattoes or Indians.' But these enactments were intended to apply only to testimony in suits pending between parties. They do not disqualify free men of color to take an oath and swear to facts in every case in which a white man may be concerned. A free man of color may sue or be sued; when plaintiff, he may swear for a con-

tinuance, or make affidavit for requiring bail; when defendant, he may swear to a plea of *non est factum*. These and similar rights are incident to his freedom; and without them he would be virtually disfranchised. Any free man has an unquestionable right to bind any other free person to keep the peace, whenever he shall have sufficient cause for apprehending bodily harm from the malice of such person. How shall a free man of color require a white man to keep the peace? Just as a white man may bind *him* to keep the peace—by swearing to such facts as may be necessary to show that he has just cause for apprehending peril to his life or person. And when thus deposing he is not a witness in a '*case*' between parties; nor is he giving '*evidence*' against a white man, within the object or meaning of either of the foregoing sections of the acts of 1798. He is not a '*witness*', but a party swearing to what any other party may, for the like purpose, make an affidavit."

12. In *State v. Tooley*, 1 Head (Tenn.) 9, the court said: "This was a peace warrant, issued by a justice of the peace of Hawkins, against the defendant, on the complaint, made on oath, of C. J. Kounts, that he had just cause to fear, and did actually fear, that the

defendant would kill his (Kount's) *wife*, or do her some great bodily harm, etc. The justice recognized the defendant to appear at the next term of the Circuit Court of Hawkins. In the Circuit Court a motion was entered to quash the warrant, which was made absolute, and the defendant discharged. From this judgment, the attorney-general prosecuted an appeal in error, on behalf of the state. The ground for quashing the warrant, it is said, was, that the husband could not resort to this *preventive* remedy in behalf of his wife. And the argument has been repeated here, that the husband cannot demand surety of the peace against another for an apprehended danger to the person of his wife; that the remedy is personal to the *party in fear*, by whom the oath must be taken, and in whose name the

proceeding must be instituted and conducted. No authority, directly upon this question, has been adduced on either side. But, in view of the relation of husband and wife, and the nature and purpose of this peculiar remedy—which is not to redress, but merely to prevent the commission of offences—it seems to us that the judgment of the circuit court is clearly erroneous; if not, various classes of society will necessarily be excluded from the benefit and protection of this wise and humane principle of preventive justice. If the doctrine be correct, it must follow that married women, infants of very tender age, persons *non compos*, and those who are in the condition of slavery, cannot avail themselves of this remedy; because, incapable in law, of occupying the relation of prosecutor."

SURETYSHIP.—See Principal and Surety.

SURVEYS.—See Boundaries; Diagrams; Maps; Public Lands.

SURVIVAL.—See Death and Survivorship; Presumptions.

SWAMP LANDS.—See Public Lands.

SWEARING.—See Affidavits; Perjury; Witnesses.

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I. PROCEEDINGS FOR LEVY AND ASSESSMENT.

1. Original Proceedings. — A. IN GENERAL. — Ordinarily, of course, the levying of taxes and the assessment of property for taxation purposes does not, at least in the first instance, involve any questions of evidence.¹ But of recent years, in many of the states, statutes have been enacted by which, in respect of certain classes of property and property owners, particularly corporations, the power of assessing such property has been taken out of the hands of the local assessing officers and vested in certain boards or commissioners created especially for that purpose.²

1. Compare the statutes of the various states on this question.

2. In Nebraska the assessment of the property of railroad and other corporations specifically named is, by statute, vested in the state board of equalization, whose duty it is to secure all reasonable and necessary information, the more important of which, it is provided, shall be furnished by the officers of the corporations to be assessed, and in default thereof to be obtained by such means as are most likely to secure the correct information, together with such other reliable information relative to the matter as the board may be able to secure. In determining the value it is the duty of the board to consider all factors having the elements of property, and which enter into and form a part of the total property and assets of the corporation. Whether the property be tangible or intangible, or a valuable privilege or contract right which enhances the value of the corporation estate and adds to its income earning capacity, it should be considered and taken into account by the assessing board in fixing the value of the total property to be assessed. For this purpose the board is clothed with ample authority and power, and may have recourse to any rational method of acquiring information relating to such property and its value as will best conduce to a correct ascertainment of the actual value of all such property. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

The Market Value of the Stocks and Bonds of a railroad corporation is an important factor, with other pertinent information, by which to determine the fair cash value of the

property assessed, which is represented by such stocks and bonds. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

The Earnings of a Railroad Company are evidence of a most important character in determining the true value of the property from which the earnings accrue, and is one of the chief elements which give value to the property, and should be considered in determining the value for assessment purposes of the entire corporate property which is assessed. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

In Assessing Sleeping and Dining Cars under the provisions of §§ 40a and 40b (revenue act), the board cannot value and assess the franchises or other intangible property of the corporations owning such cars as independent species of property. In estimating the value of such property for assessment purposes the assessing board, in determining the value thereof, is not confined alone to the cost of construction, but may consider the value of the property assessed as a means of earning income, the profitability of the use to which it is put, and ascertain and fix its true value for assessment purposes with reference to the value it has as used and by reason of its use. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

In Assessing the Property of a Telegraph Company having property in more than one state, it is proper for the board of equalization, or assessing board, to consider the value of the whole property as an entirety, and also to consider the relation which the value of the property in

B. LISTING PROPERTY BY TAXPAYER. — In most of the states the statutes require the property owner to make and furnish to the assessor a list of his taxable property, which list is presumed to be correct.⁸ This list is, however, not conclusive upon the assessor;

the taxing district under consideration bears to the value of the entire property. *Western Union Tel. Co. v. Dodge County (Neb.)*, 113 N. W. 805. In this case, it was further held proper for the assessing officers to take into consideration the total gross and net receipts of the system, as a whole, as well as in the particular district; and also the amount of the company's stocks and bonds and their market value.

In Indiana the state board of tax commissioners in fixing the valuation of railroad track and rolling stock is not confined to the schedules and rates made by the railway company, but they have the right to seek other information to enable them to arrive at a just valuation. *Cleveland, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421; *Indianapolis & V. R. Co. v. Backus*, 133 Ind. 609, 33 N. E. 443; *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Evansville & I. R. Co. v. West*, 138 Ind. 697, 37 N. E. 1012.

Kentucky. — Where a state board of valuation and assessment seeks to determine the value of the capital stock of a corporation under Kentucky statute of 1903, § 4079, it may, in order to fix the valuation of the franchise, accept the statement made by the corporation under § 4078 as the basis of its value, or it may refer to other evidence. *Hager v. American Surety Co.*, 28 Ky. L. Rep. 782, 90 S. W. 550. See also *Com. v. Steele*, 31 Ky. L. Rep. 1033, 104 S. W. 687.

The board of tax commissioners may, in assessing personal property of a railroad corporation, consider admissions made by the officers of the corporation relative to the amount of its taxable property in previous years, as well as statements made to the railroad commissioners pursuant to law. *People ex rel. Manhattan R. Co. v. Barker*, 6 App. Div. 356, 39 N. Y. Supp. 682.

In *People ex rel. H. & H. Co. v.*

Campbell, 139 N. Y. 68, 34 N. E. 753, the relator was a foreign corporation having its charter and local habitation in the state of Delaware. The comptroller claiming that it was "doing business in this state", imposed taxes upon it on account of said business under the act of ch. 542 of the laws of 1880 and the acts amendatory thereof (ch. 361, laws of 1881; ch. 501, laws of 1885; ch. 463, laws of 1889), for the years 1889, 1890 and 1891, computing the taxes upon the basis of \$25,000 capital stock "employed within this state." Subsequently the relator claiming that it did not do any business or employ any capital within the state applied to the comptroller to review and readjust the taxes, and after hearing the relator and reviewing and considering its evidence submitted to him he refused to make any change in the taxes imposed. Subsequently the relator obtained a writ of certiorari to review the action of the comptroller to which he made return and the general term affirmed his action. The comptroller claimed that the relator did not submit to him any competent evidence upon its application for review or re-settlement of the taxes as required by § 20, act 1889. It appeared that the relator did not furnish witnesses to be sworn and examined orally before the comptroller, but that the evidence was in the form of affidavits furnished to and received by him. It was held that his decision showed that he considered the affidavits as evidence, and it did not appear that any one objected to them as competent and sufficient evidence. The comptroller could doubtless have required the witnesses to be examined orally before him, but it was for him to determine how the evidence should be presented before him. In this, as in many other legal proceedings, affidavits may be received and treated as competent evidence.

3. *Lanesborough v. Berkshire*

it is merely evidence upon which he may base an assessment.⁴ And

County, 131 Mass. 424; Oregon Sav. Bank v. Jordan, 16 Or. 113; 17 Pac. 621.

In *Hager v. Citizens Nat. Bank* (Ky.), 105 S. W. 403, 914, it was held that inasmuch as a bank might pay taxes due from its shareholders on their shares of stock and subsequently enforce payment from them for the amount so paid, the bank itself could be required to furnish information and data upon which the assessment might be made in order that all the shares of stock might be taxed alike.

4. *Alabama*.—State Auditor v. Jackson County, 65 Ala. 142.

Connecticut.—Hartford v. Champlain, 58 Conn. 268, 20 Atl. 471.

Georgia.—State v. Southwestern R. Co., 70 Ga. 11.

Illinois.—Humphreys v. Nelson, 115 Ill. 45, 4 N. E. 637; Felsenthal v. Johnson, 104 Ill. 21; St. Louis V. & T. H. R. Co. v. Surrell, 88 Ill. 535; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Republic L. Ins. Co. v. Pollak, 75 Ill. 292.

Kentucky.—Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164.

Massachusetts.—Winnisimmet v. Assessors of Chelsea, 6 Cush. 477; Lincoln v. Worcester, 8 Cush. 55.

Nebraska.—Lynam v. Anderson, 9 Neb. 367, 2 N. W. 732.

Nevada.—State v. Kruttschnitt, 4 Nev. 178.

New York.—People v. Tax Comrs., 99 N. Y. 254, 1 N. E. 773; People v. Tax Comrs., 76 N. Y. 64.

Pennsylvania.—Com. v. Lehigh Val. R. Co., 104 Pa. St. 89.

South Dakota.—State v. State Board, 3 S. D. 338, 53 N. W. 192.

Vermont.—Weatherhead v. Guilford, 62 Vt. 327, 19 Atl. 717; Howes v. Bassett, 56 Vt. 141.

Wisconsin.—State ex rel. Smith v. Gaylord, 73 Wis. 306, 41 N. W. 518.

In *People ex rel. India Rubber & Gutta Percha Insulating Co. v. Barker*, 16 Misc. 252, 39 N. Y. Supp. 88, a proceeding instituted by writ of certiorari to review the action of the respondents in assessing the relator, a domestic corporation, for personal taxes for the year 1894, the relator

was primarily assessed in the sum of \$250,000, which was subsequently reduced by the respondents to the sum of \$69,000. The relator, considering itself still aggrieved, herein asked for a review of the action of the commissioners on the ground of illegality and error. A sworn statement was furnished to the respondents by the treasurer of the relator showing that the stock on hand, machinery, furniture and fitting, book accounts, bills receivable and cash, amounted in the aggregate to \$181,569.01, and the liabilities of the corporation were stated to be \$183,626.38, showing an excess of liabilities over personal property of \$2,057.37. Upon this statement it was claimed that the assessment should have been canceled. The respondents in proceeding to consider the correction of the assessment rejected this sworn statement of the treasurer as false, basing their action in that regard upon the following circumstances, which they set forth in their return to the writ. They stated that they had before them a statement made on behalf of the relator upon its application for exemption from taxation in 1893, from which it appeared that defendant's gross assets had been fixed at the sum of \$297,824.87. In respect to this the commissioners in their return said: "As no reason was given or assigned why stock on hand of the relator should have shrunk between 1893 and 1894 as claimed by the relator, we refuse to accept the statement of the relator upon that point as true or conclusive, and we believe and find the fact to be as to the value of the machinery the relator had in 1893 given was the actual value of the machinery at the sum of \$85,000, whereas in 1894 we believe the fact to be that it had returned merely its estimated value at a forced sale." It will thus be observed that the only definite exceptions taken to the correctness of the statement were to the valuations of the stock on hand and the machinery. Nowhere did it appear in the return that the respondents had any other informa-

tion whatsoever before them in respect to the stock or the machinery or the value of either. In fact, the portion of the return which has been quoted clearly shows both by necessary implication and by actual assertion that they acted entirely upon the belief inspired by a supposition incited by the large shrinkages in values within the preceding year of the stock and the machinery. *Held*, that there can be no presumption that the statement for 1894 was false because the values there given were less than the values which had been given for similar items in the preceding year. Especially is this true of the stock on hand, which from the nature of the case is constantly fluctuating in amount and depending upon the condition of business. In respect to the machinery it may well be that the amount of it has been reduced or that it has suffered serious deterioration aside from the average wear through use. It nowhere appears that the relator had no notice whatsoever that the commissioners were not perfectly satisfied with the statement which had been furnished, or that the respondents desired any further information. A sworn statement such as was furnished in this case is an examination under oath by the commissioners within the meaning of the statute, and they have no right to arbitrarily reject it as false, or to proceed in disregard of its statements without evidence or information satisfactorily tending to show that the facts so stated are inaccurate or untrue. While it is true that they may act upon knowledge or information of a reliable character which they have elsewhere acquired, and may upon that find the facts to be otherwise than as stated, and while they are not controlled by the direct rules of evidence which obtain in judicial proceedings, the information that they have and upon which they act must be of such character as to fairly and reasonably support their conclusions.

In *People ex rel. American Flag Co. v. Barker*, 91 Hun 642, 37 N. Y. Supp. 106, certiorari by the American Flag Co. to review the action of the commissioners of taxes and assessments of the city of New York in

assessing property of the relator in the year 1894, defendant appealed from an order vacating the assessment. Under ch. 450 of the laws of 1857 the commissioners were required to ascertain the valuation of the whole property owned by the corporation, whether real or personal or both in order to ascertain the capital which was the subject of taxation, and from the aggregate deduct the debts of the corporation and any exemptions allowed by law. In this case the only evidence before the commissioners appeared to have been two statements made by the company and the affidavit of its president, by which it appeared that the total assets of the company including all its property were \$197,988.90. That the liabilities were debenture certificates actually issued, amounting to \$148,300, and certificates agreed to be issued for services and property purchased for which the company was indebted \$55,650, making an aggregate of \$203,950, showing the corporation to be insolvent. It was stated in the first statement rendered that the capital stock actually paid in of \$400,000 was "paid by sale of good-will and services." It was held that although the statement made by the corporation was not conclusive upon the tax commissioners, yet, at the same time, they must have some evidence before them to justify their action. "They could have required the officers of this corporation to appear before them and submit to an examination as to the property owned by the company for which this capital stock was issued. They omitted to require such testimony, but according to their return did accept the statement of the officers of the company as to the amount of its assets, disallowing certain alleged indebtedness because the statement said that the debenture representing that indebtedness had not been issued. In that, the commissioners were clearly in error as the amount of the indebtedness for which the company had agreed to issue these debentures is just as much the indebtedness of the company as if the debentures had been issued. The commissioners having accepted this statement of \$197,988.90 as the total gross assets

he may resort to any other proper means to aid him in determining what property to assess, and its value.⁵

Where the Property Owner Refuses To List his property as required by law, the assessor is generally authorized to act upon the best information obtainable in making the assessment.⁶

C. OMITTED PROPERTY. — In most of the states statutes have been enacted looking to the listing and assessing of property claimed to have been omitted from the regular listing and assessing.⁷ Some of these statutes vest the power to do this in the regular local assessing officers, making the original proceeding purely an *ex parte* matter,⁸ although granting to the taxpayer feeling himself aggrieved the right of review as in the case of other assessments by some superior tribunal; in which case of course the same rules of evidence applicable to other proceedings on review would apply.⁹ Other statutes, however, provide for the institution of a special proceeding before some tribunal of competent jurisdiction; and of course in such case, unless the statute itself otherwise expressly provides, the usual rules of evidence would seem to apply.

of the company, it cannot be said upon the evidence before it that they should have found that the capital stock of \$400,000 was unimpaired. On the contrary, upon the evidence before the court there was nothing upon which to sustain such a finding."

5. *Hartford v. Champion*, 54 Conn. 436, 7 Atl. 721; *Collier v. Morrow*, 90 Ga. 148, 15 S. E. 768; *Felsenthal v. Johnson*, 104 Ill. 21; *Burns v. State*, 5 Ind. App. 385, 31 N. E. 547; *State v. Covington*, 35 S. C. 245, 14 S. E. 499.

In *Daugherty v. Bazell*, 29 Ky. L. Rep. 884, 96 S. W. 576, it was held that while the statute makes it the duty of the county assessor to call upon each taxpayer in the county in person or by deputy and to obtain from him a correct list and valuation of all his taxable property, it is equally the duty of the taxpayer to list his property with the assessor (§ 4056, Kentucky Stats. 1903), and if by any reason this is not done he is required by statute to go before the county court clerk and list his property. (§ 4064, Kentucky Stats. 1903.) Nor is the assessor confined to the statements of the taxpayer. He may have records and other sources of information, including the testimony of witnesses (§ 4053, Kentucky Stats. 1903), in ascertaining the value of the taxpayer's property. In

this he exercises his judgment as well as his discretion as to what evidence he will call for and consider.

The California Statute providing for examination of the taxpayer and other witnesses is merely directory. *People v. National Bank*, 123 Cal. 53, 55 Pac. 685, 69 Am. St. Rep. 32, *distinguishing* *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735.

6. *Hartford v. Champion*, 58 Conn. 268, 20 Atl. 471; *McMillan v. Carter*, 6 Mont. 215, 9 Pac. 906; *People v. Tax Comrs.*, 99 N. Y. 254, 1 N. E. 773.

7. Compare the various statutes in this respect.

8. See preceding section.

9. See *infra*, this section, "Reviewing, Correcting and Setting Aside Assessments."

In Indiana the board of equalization has power under the Indiana Revised Statutes of 1881, § 6317, to inspect and examine the books and papers of corporations, including banks, and to require a witness to testify, in making a preliminary examination to determine whether any property has been omitted from taxation before giving any notice to any taxpayer that the board is about to assess property omitted by him. *Satterwhite v. State*, 142 Ind. 1, 40 N. E. 654, 1087. *State v. Wood*, 110 Ind. 82, 10 N. E. 639. In this case

Burden of Proof.—Thus, in such a proceeding the plaintiff has the burden of proof in respect of the matters essential to recovery, such as that the property was in fact omitted,¹⁰ that the person

it should be noted that §6317 provides that: "For the purpose of properly listing and assessing property for taxation, and equalizing and collecting taxes, county auditors, auditor of state, and board of equalization shall each have the right to inspect and examine the records of all public offices. . . . and they shall also have the power to administer all necessary oaths or affirmations in the discharge of their duties; and it shall be the duty of every assessor or other officer charged with the duty of listing property for taxation, or charged with the duty of collecting taxes, to give, in writing, all information he may acquire in reference to the concealment of property from taxation by any person or corporation . . . to county auditors, auditor of state, or boards of equalization aforesaid. §6399, it will be observed, gives the county board of equalization power to lessen or increase the valuation of any tract or lot of real estate, upon complaint. If an increase of valuation is asked, the owner is to be notified. The purpose of the notice is to give such owner a chance to be heard. Upon his appearance the board must decide between him and the complainant, and in order to reach a correct conclusion may, doubtless, consider such testimony as may be available."

In *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443, a proceeding by the county auditor to place omitted property of testator on the tax duplicate for taxation, under the provision of §8531 *et seq.*, Burns, 1894, it appeared that testator from 1881 until the time of his death in 1893 had been in the banking business, loaning money and dealing in bonds; that during this time it did not appear that he made or lost any large sum of money, and he annually returned personal property for taxation varying from \$14,000 to \$24,000. At the time of his death he left a personal estate of taxable property appraised at \$383,906.46. The executor, who was the brother of the testator, and

practically his sole beneficiary, refused to produce testator's books and accounts, and the auditor made an assessment of omitted property, taking the amount returned by the executor as a basis, and deducted five per cent. as the probable net annual increase, and the result thus reached he took as the true amount for 1892, and from this he deducted five per cent. and took the result as the correct amount for 1891, and so on back to 1881. *Held*, that the assessment made by the auditor will be presumed to be correct, and will not be overthrown in the absence of the preponderance of the evidence to the contrary.

In *Gager v. Prout*, 48 Ohio St. 89, 26 N. E. 1013, it was held that in proceedings before a county auditor for the correction of false returns made by the owner of taxable property, a certified copy of the inventory of the estate of the deceased person, filed by the executor in the probate court, is competent evidence to show omissions in the returns of the deceased, and in the absence of anything to the contrary may warrant the auditor in making additions.

10. In *Com. v. Haggin*, 90 Ky. L. Rep. 788, 99 S. W. 906, an action brought in the name of the commonwealth by a revenue agent to require listing for taxation of certain bonds, stocks, etc., it was held that even though the evidence showed that the beneficial owner thereof was a resident of the state during the years indicated by the revenue agent's statement, the evidence must further show that he omitted to list for assessment in the years indicated property which should then have been taxed.

In a proceeding by the commonwealth to compel a taxpayer to list corporate stock claimed to have been omitted, it is incumbent upon the commonwealth to first show that it proceeded first against the corporation; otherwise, it must be presumed that the corporation did its duty by listing this property as required by

sought to be charged was the owner of the property during the time in question,¹¹ etc.

D. CHANGING ASSESSMENT TO NAME OF OWNER OF PROPERTY. In Ohio it is provided by statute that whenever the person named in the tax duplicate as the owner of the property assessed is by reason of a conveyance or other transfer of title no longer the owner thereof, the county auditor shall on application and presentation of title, together with such affidavits as may be required by law, or the proper order of the court, transfer the property assessed from the name of the person in which it may stand on the duplicate to the name of the owner; but before he can be required to do this the party or parties desiring the transfer must make the proof prescribed by the statute.¹²

2. Reviewing, Correcting and Setting Aside Assessment. — A. BY BOARDS OF REVIEW, EQUALIZATION, ETC. — a. *General Statutory Provisions.* — In practically all of the states and territories, the statutes regulating the procedure of the taxing officers in respect of the assessment of property for purposes of taxation provide for a method by which the doings and actions of those officers may be reviewed either by some tribunal especially created for that purpose or by some tribunal properly clothed with competent jurisdiction to that end. These tribunals are variously styled, such as boards of equalization, boards of review, tax commissioners, etc.; but their purpose is the same—and that is to provide a remedy by which a

law. *Com. v. Steele*, 31 Ky. L. Rep. 1033, 104 S. W. 687. See also *Com. v. Chesapeake & O. R. Co.*, 28 Ky. L. Rep. 1110, 91 S. W. 672.

11. Where a sheriff sues executors to collect taxes on property alleged to have been omitted from the list of taxable property filed by their testator, the burden of showing that deceased owned the property during the years for which the taxes are claimed, is on the sheriff. *Butler v. Watkins*, 16 Ky. L. Rep. 302, 27 S. W. 995. The court said: "Ought the sheriff to list the property unless he has some proof, at least, that it has been omitted, and, if he has such proof, shall he not be required to produce it? May he rest his case on the figures and lists he has made out, it may be, in the privacy of his office, and which makes the taxpayer a violator of his oath, and the preceding county officials negligent of their duties? We think the rule is clearly otherwise. In *Bate v. Speed*, 10 Bush. 644, it was said that 'in collateral proceedings the presumption may sometimes be indulged that tax-

ation has been legally imposed; but in such a case as this, where the action of the judicial and ministerial officers whose duty it is to impose it is called directly in question by the taxpayers, . . . such a presumption does not, and from the very nature of things, cannot arise.' This is not an assessment made in the ordinary course of things, the regularity and correctness of which may be presumed."

12. *Cincinnati College v. La Rue*, 22 Ohio St. 469.

In a proceeding by mandamus against a county auditor to compel him to perform the duties enjoined by the section above referred to, it was held that where the vendee of coal underlying lands desires to have that part of the premises transferred into his name on the tax list of the county, it is incumbent upon him under the provisions of said sections to present to the county auditor proper evidence of his title and make a satisfactory proof to him of the value of said coal as compared with the valuation of the whole lands as

taxpayer feeling himself aggrieved at the assessment put upon his property by the assessing officers may have his complaint passed upon by the proper tribunal.¹³

b. *Powers and Duties in Respect of Witnesses and Evidence.*
(1.) Generally.—The various statutes providing for this remedy and governing its application very generally contain provisions governing the powers and duties of the reviewing officers in respect of the taking of evidence and the examination of witnesses.¹⁴

charged on the tax list, and a written agreement between the vendor and the vendee of the coal as to the division of the valuation on the tax list between them is not binding upon the auditor. The evidence on which he is to act is prescribed by the statute and he cannot be compelled to act on any other. *Dye v. State ex rel. Davis*, 73 Ohio St. 231, 76 N. E. 829.

13. In Nebraska a taxpayer has a right to an opportunity to be heard before the county board of equalization before that board can legally increase the valuation on his property as fixed by the assessor. *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090.

A taxpayer has a right to assume that a board of review will remain in session the full statutory time and to arrange to be present on any day he may choose during that time, and if, by reason of the failure of the board to perform this statutory duty he is prevented from appearing and objecting to his assessment, the tax levied against him thereon is void. *Township of Caledonia v. Rose*, 94 Mich. 216, 53 N. W. 927.

A taxpayer, having voluntarily invoked the benefit of § 840 of the Georgia code, by exercising the privilege of selecting on his part one of the disinterested persons, cannot complain that the mode of assessment to which he has thus resorted is unconstitutional because the statute fails to make any provision for notice or hearing, or for any other reason; and, inasmuch as the statute makes no such provision, the board of disinterested persons was not bound to give notice of the time and place of its meeting, nor to afford the taxpayer any opportunity to be heard, the statute contemplating that these persons should act upon their

own knowledge of the property and opinion of its value, and not upon evidence of the examination of witnesses. *Collier v. Morrow*, 90 Ga. 148, 15 S. E. 768.

Where the board of supervisors assess a tax upon property without notice to the taxpayer as required by statute (Kentucky Stats. 1903, § 4122), equity will enjoin the collection of the tax, although § 4128 of the same statute provides that a taxpayer aggrieved by the action of the board may apply to the county judge for redress. *Mt. Sterling Oil & Gas Co. v. Ratliff*, 31 Ky. L. Rep. 1229, 104 S. W. 993. See also *Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171.

The mere fact that the board of review referred the complaint to one of its members, who heard the complaint, does not invalidate the subsequent action of the board on the complaint. "All bodies composed of a number of persons may, and generally do, act through committees of one or more to procure facts in reference to the matter to be acted upon and receive recommendations as to the action that should be adopted." *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19.

14. For cases in which such statutes have been construed and applied, see:

Arizona.—*Hampson v. Dysart*, 6 Ariz. 98, 53 Pac. 581; *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 84 Pac. 511.

Arkansas.—*Baird v. Williams*, 49 Ark. 518, 6 S. W. 1.

California.—*Central Pac. R. Co. v. Placer County*, 43 Cal. 365.

Illinois.—*St. Louis, V. & T. H. Co. v. Surrell*, 88 Ill. 535.

Indiana.—*First Nat. Bank v. Isaacs*, 161 Ind. 278, 68 N. E. 288;

(2.) **Necessity of Taking Evidence.** — Whether or not it is necessary for such officers formally to take evidence, offered to be adduced before them, or whether this is a matter within their discretion, depends upon the terms of the statute. Of course where the statute grants to the complaining taxpayer the right to be heard upon his complaint, it would seem incumbent upon the reviewing officers to hear any proper evidence sought to be adduced.¹⁵

Discretion of Officers. — In many of the states, however, these reviewing officers are vested with large discretionary powers in respect of taking evidence. They may, if they see fit, take evidence,

Cleveland, C., C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421; *Evansville & I. R. Co. v. West*, 138 Ind. 697, 37 N. E. 1012.

Iowa. — *First Nat. Bank v. City Council*, 112 N. W. 829; *Smith v. Board of Supervisors*, 30 Iowa 531.

Kansas. — *Symms v. Graves*, 65 Kan. 628, 70 Pac. 591; *Fields v. Russell*, 38 Kan. 720, 17 Pac. 476; *Board of Comrs. v. Lang*, 8 Kan. 284.

Kentucky. — *Mt. Sterling Oil & Gas Co. v. Ratliff*, 31 Ky. L. Rep. 1229, 104 S. W. 993.

Maryland. — *County Comrs. v. New York Min. Co.*, 76 Md. 549, 25 Atl. 854.

Nebraska. — *Western Union Tel. Co. v. Dodge County*, 113 N. W. 805; *Dundy v. Richardson County*, 8 Neb. 508.

Nevada. — *State v. Northern Bell M. & M. Co.*, 12 Nev. 89.

New York. — *People ex rel. E. G. L. Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13.

North Carolina. — *Caldwell Land & L. Co. v. Smith*, 59 S. E. 653.

Tennessee. — *Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111.

Texas. — *Johnson v. Holland*, 17 Tex. Civ. App. 210, 43 S. W. 71.

Wisconsin. — *Foster v. Rowe*, 128 Wis. 326, 107 N. W. 635.

15. See *County Comrs. v. New York Min. Co.*, 76 Md. 549, 25 Atl. 864; *Hager v. Citizens Nat. Bank (Ky.)*, 105 S. W. 403, 914; *State v. McClurg*, 27 N. J. L. 253.

Where the law gives the taxpayers the right to present their claims for reduction of taxation or valuation in writing, and to make their proofs in support of such claims by affidavit, the board of review have no power to refuse to consider claims sup-

ported by affidavits merely and require the claimants to appear in person and submit to oral examination. *McMorran v. Wright*, 74 Mich. 356, 41 N. W. 1082. The court said that the board would in such cases have power to pass upon proofs submitted and to declare them insufficient if good reasons existed therefor, but that they had no authority to reject the proofs without examining them for no other reason than that the complainant would not appear and submit to an oral examination.

It Is the Rule in California that the board of equalization, sitting as such, act judicially in raising or lowering assessments, and it has no power to change an assessment arbitrarily and of its own volition without hearing evidence. This is not only the rule under the present statute (*Oakland v. Southern Pacific Co.*, 131 Cal. 226, 63 Pac. 371), but it has been the rule under the various revenue laws since 1861. *People v. Reynolds*, 28 Cal. 108; *San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264; *Hagenmeyer v. Board of Supervisors*, 82 Cal. 214, 23 Pac. 14; *Farmers & Merchants Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312.

In *Central Pacific R. Co. v. Placer County*, 43 Cal. 365, a proceeding before a board of equalization to have an assessment reduced, it was claimed that the board acted upon illegal testimony, but it was held that the board acted within its jurisdiction and that its rulings could not be reviewed.

The Arizona Statute provides that during the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the

or they may obtain information as to the value of the property under consideration from the best and most reliable source at their command.¹⁶

complaining taxpayer, and they shall have the right to make any statement touching such assessment, and produce evidence relating to questions before the board, and the board of equalization shall make use of all the information that they can gain otherwise, in equalizing the assessment roll of the county. *Hampson v. Dy-sart*, 6 Ariz. 98, 53 Pac. 581.

16. In *Arkansas* the county board of equalization may proceed without complaint being made against the assessor's returns, and may act upon evidence or upon their own knowledge. *Baird v. Williams*, 49 Ark. 518, 6 S. W. 1.

In *Illinois* it is not essential to a valid assessment that the local assessing officers shall hear evidence in fixing the taxable value of property; on the contrary, it is believed that they almost uniformly act upon their own knowledge and individual judgment as to its worth. *St. Louis V. & T. H. Co. v. Surrell*, 88 Ill. 535. And this same rule has been held to apply to the state board of equalization created and empowered to fix the value of property belonging to corporations. *St. Louis V. & T. H. Co. v. Surrell*, 88 Ill. 535; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561.

The state board of equalization has the power of increasing the valuation of property returned by the officers of the corporation without hearing evidence impeaching that return; the return is not conclusive. *St. Louis V. & T. H. Co. v. Surrell*, 88 Ill. 535. See also *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561.

In *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19, it was complained that the action of the board of review was invalid for the reason that the witnesses from whom they obtained information as to the value of the property in controversy were not called in and sworn and an opportunity given for cross-examination. The court, in sustaining the action of the board, said: "The law gives

the board the power, and imposes upon it the duty, of changing any assessment which, in their opinion, may be incorrect; and in fixing the valuation to be fixed upon the taxpayer's property the board may act upon their own knowledge, information and judgment, and are not concluded by the statements of the owner of the property. (*Sterling Gas Co. v. Higby*, 134 Ill. 557, and cases there cited.) In the case at bar the action of the board of review in increasing appellant's assessment was within the scope of their authority. They had jurisdiction of the person and of the subject-matter, and no fraud of any kind, either in the procedure of the board or in the conclusion reached by them, being shown, the court below had no power to set aside the assessment nor to restrain the collection of the tax."

Under the *Iowa Statute*, a board of review and equalization of assessments, as well as the assessor, has the right and power to seize upon any information within reach which may furnish aid to an equalization. They may receive evidence or they may act on the knowledge of other than members. *First National Bank v. City Council (Iowa)*, 112 N. W. 829. See also *Grimes v. Burlington*, 74 Iowa 123, 37 N. W. 106; *Smith v. Board of Supervisors*, 30 Iowa 531, where the court in speaking of the powers of the board said: "That the board may not receive evidence to enable them to form a correct judgment in the premises, we do not hold; on the contrary, we are of opinion that they may resort to any proper mode of information that will enable them to make a just and proper equalization of the assessments within their county. But they are not required to do so in all cases. The members of the board, coming from different parts of the county, may, and generally are, sufficiently acquainted with the value of the taxable property in the various portions of the county, without calling in other witnesses or procuring any

further evidence than their own knowledge of the facts involved. This power of equalization being conferred upon the board, to be exercised by them upon their judgment and belief of the facts in each particular case, their discretion cannot be controlled or reviewed on certiorari."

In Kansas the county board of equalization is not required to examine witnesses or to resort to any particular kind of evidence. The board is its own judge of what it will rely upon in making its order, and its conduct will not be controlled by the courts unless it acts corruptly or in a manner so oppressive, arbitrary or capricious as to amount to fraud. *Symms v. Graves*, 65 Kan. 628, 70 Pac. 591. The court said: "Matters of assessment and taxation are administrative in their character and not judicial, and an interference by judges who are not elected for that purpose with the discharge of their duties by those officers who are invested with the sole authority to make and estimate value is unwarranted by the law. The district court could not substitute its judgment for that of the board of equalization, and this court cannot impose its notion of value on either. These are fundamental principles in law of taxation and cannot be waived aside to meet the exigencies of any particular case. (Auditor of State *v. A.*, T. & S. F. Railroad Co., 6 Kans. 500, 7 Am. Rep. 575; *K. P. Rly. Co. v. Comm'rs of Ellis Co.*, 19 id. 584.) But fraud, corruption and conduct so oppressive, arbitrary and capricious as to amount to fraud, will vitiate any official act, and courts have power to relieve against all consequential injuries. In every case, however, the departure from duty must be shown by the party seeking redress to fall within the well defined limits of the powers of a court of equity." See also *Fields v. Russell*, 38 Kan. 720, 17 Pac. 476. Compare *Board of Comrs. v. Lang*, 8 Kan. 284.

Under the railroad tax law of 1874 as amended in 1875, the action of the state board of equalization in raising the assessment of that portion of plaintiff's property described in the statute as "railroad track", is not

impeached by proof that, in so raising it, the board acted only upon the information furnished by the schedules and statements returned by the various companies to the state auditor, and their personal knowledge of the value and business of the several railroads. And such action is conclusive as to the proper valuation of such property, notwithstanding errors in the prior proceedings of assessors and commissioners. *Kansas Pac. R. Co. v. Riley County*, 20 Kan. 141.

Missouri.—*State v. Hannibal & St. J. R. Co.*, 101 Mo. 120, 13 S. W. 406; *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294.

Montana.—*State ex rel. Beall v. Ellis*, 15 Mont. 224, 38 Pac. 1079.

In Nebraska boards of equalization may obtain information of the value of taxable property under consideration from the best and most reliable source at their command; and they are not governed in their investigation in this respect by the strict rules of evidence as applied by courts of law in the trial of ordinary cases. *Western Union Tel. Co. v. Dodge County (Neb.)*, 113 N. W. 805. Compare *State v. Dodge County*, 20 Neb. 595, 31 N. W. 117; *Dundy v. Richardson County*, 8 Neb. 508.

People ex rel. E. G. L. Co. v. Barker, 144 N. Y. 94, 39 N. E. 13, holding that where a corporation pursuant to the provisions of § 820 of the Consolidation Act of 1882 made application to the commissioners of taxes for a reduction and cancelation of the assessment for taxes, and presented to the board a verified statement as to the value of its property, the commissioners had a right to act upon evidence outside of that furnished by the corporation. The commissioners are not concluded by the statements made by the applicant.

In Tennessee the board is required to keep minutes of its daily sessions signed by the members thereof, the records to be preserved in the office of the secretary of state. The statute empowers the board to make rules and regulations for its own government, and to obtain such evidence, information and statistics as may be deemed material as to the

(3.) **Compelling Attendance of Witnesses.**—Such reviewing officers generally have power to compel the attendance of witnesses before them.¹⁷

(4.) **Swearing Witnesses.**—Under most of the statutes governing the reviewing of assessments, the reviewing officers have the power to swear witnesses giving testimony before them.¹⁸

value and condition of properties to be equalized, and to regulate and prescribe the mode of taking evidence, whether by affidavit, deposition or otherwise; and to send any of its members to any portion of the state to obtain information and evidence deemed material. *Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111.

Utah.—*Central Pac. R. Co. v. Standing*, 13 Utah 488, 45 Pac. 344.

In Wisconsin, § 1077b, Rev. Stat. 1898, provides that the commissioners shall appoint a convenient time and place in such county for hearing any evidence or arguments upon the valuations under review to be offered by any taxpayer or officer of any city, village or town, and shall attend at the time and place named, and hear any evidence or arguments offered on behalf of taxpayers, and shall sit at least five days; and further, that the commissioners "may adjourn from day to day and from time to time, call for and examine any assessment or taxpayers or records in the county, subpoena and swear witnesses and, in general, conduct the hearing after the usual manner of a judicial hearing; but they shall hear evidence and arguments and consider the facts as to the valuation of the property of specific taxpayers only so far as in their judgment such valuation bears on the just aggregate valuation of any city, village or town." And it has been held that under this statute the refusal of the commissioners appointed in pursuance thereto to hear evidence that certain personal property had been omitted from the tax rolls in a certain municipality was not error, their action in this respect being discretionary. *Foster v. Rowe*, 128 Wis. 326, 107 N. W. 635. *Compare Hixon v. Eagle River*, 91 Wis. 649, 65 N. W. 366; *Brown v. Oneida County*, 103 Wis. 149, 79 N. W. 216; *State ex rel Davis v. Pors*, 107 Wis.

420, 83 N. W. 706; *State v. Fuldner*, 109 Wis. 56, 85 N. W. 118.

In *Shove v. Manitowoc*, 57 Wis. 5, 14 N. W. 829, it was held that a board of review under chs. 154 and 246, laws of 1877 (§ 1061 R. S.) are authorized to increase or lessen an assessment of property for taxation only upon being satisfied from the evidence taken that it was too low or too high; and an arbitrary increase in the assessment without examination of witnesses under oath is void. See also *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581.

17. As under the **Arizona Statute**.—*Hampson v. Dysart*, 6 Ariz. 98, 53 Pac. 581.

Utah.—*Central Pac. R. Co. v. Standing*, 13 Utah 488, 45 Pac. 344. **Wisconsin Statute.**—*Foster v. Rowe*, 128 Wis. 326, 107 N. W. 635.

Section 7822 of the Nebraska Statute, gives the board of equalization of the city of Lincoln power to compel the attendance of witnesses for the investigation of matters pending before them. *White v. City of Lincoln (Neb.)*, 112 N. W. 369.

The court has power by mandate to order a witness to answer questions asked him by the board of equalization on the preliminary examination under the Indiana Revised Statutes of 1881, § 6317, although it cannot direct what answer he shall make. *Satterwhite v. State*, 142 Ind. 1, 40 N. E. 654, 1087.

18. See *First Nat. Bank v. Webster County (Neb.)*, 113 N. W. 190; *Hampson v. Dysart*, 6 Ariz. 98, 53 Pac. 581; *Foster v. Rowe*, 128 Wis. 326, 107 N. W. 635; *Johnson v. Holland*, 17 Tex. Civ. App. 210, 43 S. W. 71. *Compare State v. Baker*, 170 Mo. 194, 70 S. W. 470, holding that swearing witnesses may be dispensed with.

In **Nebraska** the statute authorizes the county board of equalization,

(5.) **Nature and Competency of Evidence.** — In some jurisdictions, however, it would appear that in respect of the evidence to be received by the reviewing officers for the purpose of determining whether or not the valuation placed upon the property under consideration by the assessing officers shall be disturbed, the same rules of evidence as to competency, relevancy, etc., would apply as would apply in a court of law upon a similar question.¹⁹ And in Alabama

when they have reason to believe that any person or corporation has not been fairly assessed, to call before them such person, or agent or officer of the corporation, and to require him or them under oath to give such information as they may possess touching the valuation of the property sought to be listed and assessed. *First National Bank v. Webster County* (Neb.), 113 N. W. 190.

19. Valuations in Previous Years. For the purpose of assessing taxes, the valuations of property in previous years are not evidence of its value in subsequent years, but evidence showing that assessors or county commissioners considered such valuations in making up their assessments will not be sufficient to cause such assessment to be set aside, on a writ of certiorari, where no injury has been done. *Lowell v. County Comrs.*, 152 Mass. 372, 25 N. E. 469.

In *Penobscot Chemical F. Co. v. Bradley*, 99 Me. 263, 59 Atl. 83, where an appeal was taken from the assessment of certain taxes in the defendant town, it appeared that the essential claims of the appellant were as follows: That in assessing the taxes complained of the assessors did not rate and value the property of the appellant equitably and proportionately as compared with other property of like nature and kind in the same town, and that the valuation placed upon said property was greatly in excess of the true value thereof. This case was before this court on report for determination "upon so much of the evidence in the case as is legally admissible." The court said: "At the outset we are met with the objection that much of the evidence which the appellant was permitted to introduce below was not admissible. Briefly stated, the important objections are to evidence showing . . . the valuations placed

upon the appellant's property by assessors in other years, as having some tendency to show the actual value of the property. We think, however, that they are not admissible for that purpose. The statutes contemplate an independent value each year, and the question at issue is what was the true valuation during the years in question, not what the assessors of other years thought it was then. There is no relationship between a town and the assessors which makes the opinion of the latter admissible against the former. The assessors are an independent statutory board. They are not agents of the town. Their opinions are not the town's opinions by relation. . . . Though they are elected by the town, the town cannot control them nor dictate their course of proceeding. Their duties are prescribed by statute. They assess taxes, not for the town alone, but for the county and state as well. Their assessments for other years are, to be sure, conclusive as to the value for taxing purposes in those years, but, as bearing upon the assessments in consideration, and as having a tendency to show error in them, we think they can be regarded only as the opinion of the assessing board out of court and hearsay."

Sales of Other Similar Property. In *Haven v. County Comrs.*, 155 Mass. 467, 29 N. E. 1083, a petition for a writ of certiorari to quash proceedings of county commissioners in refusing to abate a tax assessed upon the petitioner, it appeared that at the hearing before the county commissioners evidence was introduced for the purpose of showing the value of the petitioner's property. This evidence consisted of testimony as to the value of other property far remote from that under consideration. This was held incompetent, the court

remarking that the rule of law applicable under ordinary circumstances is that, when the value of a particular parcel of real estate is to be determined, recent sales of other similar lands in the vicinity may be shown, but only when they are similar.

In *Lowell v. County Comrs.*, 152 Mass. 372, 25 N. E. 469, an action for a writ of certiorari to quash proceedings of county commissioners, it appeared that the Merrimack Manufacturing Company had contended before the commissioners that it had been taxed at more than its just proportion, and in support of its contention offered to show the valuation placed by the assessors upon certain other pieces of property owned by other corporations in the immediate vicinity. The statute provides (Pub. Stat. ch. 11, § 45) that the assessors shall "make a fair cash valuation of all the estate, real and personal, subject to taxation." The court said: "The just proportion intended by the existing statutes is attained by assessing the property of different persons at a uniform rate, upon its fair cash valuation. . . . If, then, the respondents admitted the evidence objected to for the purpose of determining the proportionate value as distinguished from the actual cash value of the property of the Merrimack Manufacturing Company, we think they erred in the rule of law which they adopted as the standard or test to be applied in determining whether the property had been overrated. If, however, the valuation of the assessors of similar pieces of property of other corporations and persons was admitted only as evidence of the actual cash value of the property of the Merrimack Manufacturing Company, then the admission of this evidence would not necessarily require that the proceedings should be quashed. If we assume that such evidence would be held incompetent in proceedings in court, still proceedings before county commissioners, acting as a board of appeal from the decisions of the assessors, are not, in all respects, subject to the same rules as trials of causes in court, and a writ of certiorari to quash their proceedings is not usually

issued for mere mistakes in the admission of evidence, when substantial justice appears to have been done. Upon an examination of the return of respondents, we think that it appears that the question was distinctly raised whether overrating within the meaning of the statute did not include a valuation relatively greater than that put upon the property of other persons, as well as a valuation in excess of the fair cash value of the property, and that the commissioners ruled that it included both kinds of overvaluation, and therefore admitted the evidence objected to, and found that the property of the Merrimack Manufacturing Company had been overvalued for the purpose of taxation. This was the adoption of a double standard of value, and was erroneous, and we cannot say that substantial justice has been done, because it may be that the county commissioners found that the valuation of the assessors was not in excess of the fair cash value of the property, but only that the property had been valued by the assessors at more than similar property of other corporations. The result is, that the abatement made by the county commissioners must be annulled, and they must proceed anew upon the complaint of the Merrimack Manufacturing Company to determine the fair cash value of its real estate and machinery according to law."

In *Inhabitants of Chicopee v. County Comrs. of Hampden*, 16 Gray (Mass.) 38, a petition to the county commissioners to abate a tax on the ground of overvaluation by the assessors, it was held that the relative value of the property subject to taxation is to be ascertained by a comparison with the whole property in a town subject to taxation and not by a comparison with any particular piece of property assessed to another person. Testimony of persons familiar with the general value of property in the town that the valuation complained of was not excessive or disproportionate and was not excessive or disproportionate in comparison with the valuation of other specific parcels of property in the same town, was excluded. *Held*, not necessarily erroneous. If a person ap-

the statute expressly provides that the court of county commissioners, in hearing objections to valuations fixed by the assessor, shall receive only evidence touching the fair market or real value of the property under consideration.²⁰

plying to the commissioners has not been assessed for more than his fair proportion of the whole tax assessed, he has no cause of complaint because one of his neighbors has been taxed more and another less than the just proportion.

Corporate Stock.—In *Lowell v. County Comrs.*, 146 Mass. 403, 16 N. E. 8, it appeared that upon a hearing before county commissioners on petition of a corporation for the purpose of having its taxes abated, evidence was admitted as to the market value of shares of the corporation. It was held that a writ of certiorari would not issue therefor, it appearing that there was other evidence as to the valuation of the corporation's property, and that even though it were inadmissible, it was evident that the petitioner was not prejudiced thereby.

In *Inhabitants of Chicopee v. County Comrs. of Hampden*, 16 Gray (Mass.) 38, a petition to the county commissioners, for the abatement of a tax assessed upon the property of a manufacturing corporation, the board held that evidence as to the price for which the stock sold on the market was conclusive as indicating the value of the company's real estate and machinery for purposes of taxation, it appearing that the company owned no other property and owed no debts. It was held that such ruling was error, for which a writ of certiorari will issue, the court remarking that though this kind of evidence might be admissible, it could not be conclusive.

Where a taxpayer on a hearing before the board of assessors claims that an indebtedness should be deducted from his moneys and credits, and has good evidence to establish the fact of the indebtedness, the fact that in former years he had given in as the sum of his indebtedness an amount less than that claimed by him, while a circumstance competent as addressed to an issue of fraud,

yet standing alone it is not sufficient to sustain an issue against him. *Stein v. Local Board of Review (Iowa)*, 113 N. W. 339.

In *White v. Portland*, 63 Conn. 18, 26 Atl. 342, which was an appeal from the doings of the board of relief of the defendant town in refusing to reduce the tax list of the appellants for the year 1889, the appellants complained that the valuation placed upon their property was excessive. To show this the appellants introduced testimony to show the assessed valuation of certain other property in the same town. *Held*, that had the appellants alleged a disproportionate assessment, evidence of the assessments of others would have been admissible, but inasmuch as their sole ground of complaint was that their property was excessively assessed, the testimony in question was inadmissible under the pleadings. An excessive assessment is essentially different from a disproportionate one. Proof of one does not necessarily prove the other.

20. It was held in *Alabama Mineral Land Co. v. County Comrs. of Perry*, 95 Ala. 105, 10 So. 550, that in fixing the taxable value of lands, it would perhaps be proper to receive evidence of the value of similar property under similar conditions, as a feature of the "surroundings" within the meaning of that expression as used in the statute, and as affording a criterion from which the value of the property in question could be deduced.

Under this statute the purchase price of the property under consideration can not be proved as an element of value. *State v. Bienville Water-Supply Co.*, 89 Ala. 325, 8 So. 54, the court remarking that "in this age of speculations, of inflations, of booms, and of magic cities, it would, in many cases, be a great injustice to the commonwealth, and in not a few to the taxpayer, to allow the purchase price (when the property

Where a taxpayer on a hearing before the assessing board claims that certain indebtedness of his on promissory notes should be deducted from his moneys and credits, the testimony of himself and others who have personal knowledge of the fact of the indebtedness is not to be excluded as secondary evidence on the ground that the note itself is the primary evidence and should be produced or accounted for before the testimony in question should be received.²¹

c. *Effect of Failure of Taxpayer To Complain.* — Under the statutes of the various states, a taxpayer has the right to a reasonable opportunity to be heard before the reviewing officers upon the question of the correctness of the valuation placed upon his property, and he cannot subsequently complain where he does not avail himself of this right,²² especially if although present he did not

yields an income, or is susceptible of valuation) to enter, as a rule, into the estimate of its taxable value."

21. *Stein v. Local Board of Review* (Iowa), 113 N. W. 339. The court in so holding and in speaking of the rule regarding the production of the best evidence, said: "Of course, the maxim has application in this as in all other cases, but the rule relied upon has no application. Indebtedness is a fact in and of itself. And its existence as a fact is in nowise dependent upon the form or character of the evidence which the parties have adopted as a means of identifying the amount, the time and terms of payment, etc. True enough, there are cases where in virtue of a special rule founded on public policy oral evidence of the existence of an indebtedness or obligation will not be received. But that is only between the immediate parties and their privies, and where the evidence is sought to be introduced in a proceeding brought to enforce the indebtedness or obligation."

22. *Florida.* — *Jackson County v. Thornton*, 44 Fla. 610, 33 So. 291.

Illinois. — *Kochersperger v. Larned*, 172 Ill. 86, 49 N. E. 988; *Hulbert v. People ex rel. Raymond*, 189 Ill. 114, 59 N. E. 567.

Michigan. — *Township of Caledonia v. Rose*, 94 Mich. 216, 53 N. W. 927; *First Nat. Bank v. St. Joseph*, 46 Mich. 526, 9 N. W. 838; *Williams v. Saginaw*, 51 Mich. 120, 16 N. W. 260; *Comstock v. Grand Rapids*, 54 Mich. 641, 20 N. W. 623; *Peninsular Iron & Lumb. Co. v.*

Crystal Falls, 60 Mich. 510, 27 N. W. 666.

Nebraska. — *Kittle v. Shervin*, 11 Neb. 65, 7 N. W. 861.

North Dakota. — *Farrington v. New England Inv. Co.*, 1 N. D. 102, 45 N. W. 191.

The taxpayer must be presumed to know the powers and duties of the board of review and the time fixed by the statute for its meeting, and he cannot excuse his failure to appear before that body by showing that he was absent from the state. *Hinds v. Belvidere*, 107 Mich. 664, 65 N. W. 544, *holding*, further, that if the taxpayer does not see fit to have his assessment corrected and perfected when it is in his power to do so, it must be assumed that a failure to complain is an equivalent to an admission of correctness.

Page v. Melrose, 186 Mass. 361, 71 N. E. 787. This action was brought for the abatement of taxes. The respondent contended that it did not appear that the complainant had made sufficient proof of an application to the assessors for abatement, which contention was founded upon the contention that such application should have been in writing, and further, the respondent contended that even though the oral application was sufficient there was no sufficient evidence in this case that this had been made. *Held*, that a partial abatement, the fact that interest was charged upon the tax bill from a certain day only, that a letter was sent to the complainant's agent communicating the fact that the board of as-

offer any evidence, but contented himself merely with arguments and protestations.²³

B. BEFORE COURTS.—*a. Scope of Section.*—In treating the question of reviewing assessments before courts in this section, the scope of the discussion will be confined to direct proceedings provided for that purpose by the various statutes, as for example, by appeal, writ of certiorari, etc.

The Remedies provided by the statutes of the various states for reviewing the actions of the assessing officers and the reviewing officers are various. Some of the statutes provide for appeals from the reviewing officers direct to some court of competent jurisdiction.²⁴ Others provide for such review by writ of certiorari.²⁵ Still others authorize the complaining taxpayer to institute an action before some court especially created or vested with jurisdiction for that purpose.²⁶

sessors had voted to take no action toward reducing the assessed valuation of her estate, were pregnant circumstances justifying the finding that the assessors were in fact applied to for an abatement within six months from the date of the tax bill.

23. *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700.

In *State ex rel. Beall v. Ellis*, 15 Mont. 224, 38 Pac. 1079, the applicant was a resident taxpayer in the city of Bozeman in the county of Gallatin. The respondents comprised the board of county commissioners and the clerk of said county. The applicant was the owner of considerable real estate situated in the city of Bozeman. He alleged that about the 19th day of February, 1894, the board of appraisers met and fixed the valuation of his real estate for that year, which he said was the true and fair value thereof. That thereafter the county assessor listed such real estate and assessed the same in accordance with the valuation thereof fixed by said board of appraisers, and duly returned the same as so listed and assessed; that on or about the 31st day of July, 1894, the respondents acting as a board of equalization of said county raised the valuation of said real estate as fixed by said board of appraisers, and listed, assessed and returned by said assessor. The applicant contended that the respondents took no evidence as to the value of real estate in said county before raising or increasing the valuation of

his property; that to authorize said increase the board should have taken evidence of such value. It was held that the statute does not require in terms that the board in such cases shall take evidence.

24. As in Iowa.—See *First Nat. Bank v. City Council (Iowa)*, 112 N. W. 829.

Nebraska.—See *Lancaster County v. Whedon*, 108 N. W. 127; *Woods v. Lincoln Gas & Elec. L. Co.*, 104 N. W. 931.

Kentucky.—*Marion County v. Wilson*, 105 Ky. 302, 49 S. W. 8,799.

Colorado.—See *Gillett v. County Comrs.*, 13 Colo. App. 380, 58 Pac. 335.

25. New Jersey.—See *Dodge v. Love*, 47 N. J. L. 436, 2 Atl. 810; *Bayonne v. Comrs. of Appeal*, 46 N. J. L. 93.

New York.—*People v. Comrs. of Taxes*, 104 N. Y. 240, 10 N. E. 437.

26. As in Massachusetts and New Hampshire by an action to abate the taxes. See *Clark v. Middleton (N. H.)*, 66 Atl. 115; *Hough v. North Adams (Mass.)*, 82 N. E. 46; *Page v. Melrose*, 186 Mass. 361, 71 N. E. 787.

Revised Laws of Massachusetts, ch. 12, art. 73, provide that a person aggrieved by taxes assessed upon him may apply for an abatement, etc. And in *Hough v. North Adams (Mass.)*, 82 N. E. 46, where a petition was made for an abatement of certain taxes and it appeared in evidence upon an inspection of the rec-

b. Presumptions and Burden of Proof. — Upon a proceeding instituted by a complaining taxpayer for the purpose of reviewing the action of the assessing officers and reviewing officers in respect of the assessment of his property, the presumption is in favor of the correctness of the action of the taxing officers, and the burden rests upon the complaining taxpayer to establish the error complained of.²⁷

ord that the taxes assessed against the property belonging to the one petitioning for the abatement were illegal, it was held that the petitioner was not "a person aggrieved" within the contemplation of the statute.

27. Arkansas. — *Moore v. Turner*, 43 Ark. 243.

California. — *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905.

Colorado. — *People ex rel. Hallett v. County Comrs.*, 27 Colo. 86, 59 Pac. 733; *Gillett v. County Comrs.*, 13 Colo. App. 380, 58 Pac. 335.

Idaho. — *Murphy v. Board of Equalization*, 6 Idaho 745, 59 Pac. 715.

Iowa. — *Frost v. Board of Review*, 114 Iowa 103, 86 N. W. 213; *King v. Parker*, 73 Iowa 757, 34 N. W. 451.

Kentucky. — *Marion County v. Wilson*, 105 Ky. 302, 49 S. W. 8, 799.

Louisiana. — *Merchants' Mut. Ins. Co. v. Board of Assessors*, 40 La. Ann. 371, 3 So. 891; *Factors & T. Ins. Co. v. Levy*, 42 La. Ann. 432, 7 So. 625; *Pons v. Board of Assessors*, 118 La. 1101, 43 So. 891.

Massachusetts. — *Amherst College v. Assessors of Amherst*, 193 Mass. 168, 79 N. E. 248; *Winnisimmet County v. Assessors of Chelsea*, 6 Cush. 477; *Brooks v. West Springfield*, 193 Mass. 190, 79 N. E. 337.

Nebraska. — *Lancaster County v. Whedon*, 108 N. W. 127; *First Nat. Bank v. Webster County*, 113 N. W. 190; *Woods v. Lincoln Gas & Elec. L. Co.*, 104 N. W. 931; *Field v. Lincoln Tract Co.*, 104 N. W. 930; *State ex rel. Mellor v. Grow*, 105 N. W. 898.

New Hampshire. — *Dewey v. Stratford*, 42 N. H. 282; *Farmington v. Downing*, 67 N. H. 441, 30 Atl. 345; *Clark v. Middletown*, 66 Atl. 115.

New Jersey. — *Bloomfield v. Pier-son*, 47 N. J. L. 247; *Dodge v. Love*, 47 N. J. L. 436, 2 Atl. 810; *Bayonne v. Comrs. of Appeal*, 46 N. J. L. 93; *State v. Manning*, 41 N. J. L. 275.

New York. — *People v. Comrs. of Taxes*, 104 N. Y. 240, 10 N. E. 437; *People ex rel. Manhattan R. Co. v. Barker*, 6 App. Div. 356, 39 N. Y. Supp. 682; *People ex rel. Knickerbocker Safe Dep. Co. v. Wells*, 181 N. Y. 245, 73 N. E. 961; *In re Voorhis*, 90 N. Y. 668; *People ex rel. Postal Tel. Co. v. Campbell*, 70 Hun 507, 24 N. Y. Supp. 208; *People ex rel. United States Tel. Co. v. Campbell*, 70 Hun 599, 24 N. Y. Supp. 212; *People ex rel. Edison Elec. Ill. Co. v. Barker*, 68 Hun 513, 22 N. Y. Supp. 1043; *People ex rel. Edison Elec. L. Co. v. Wemple*, 63 Hun 444, 18 N. Y. Supp. 511; *People v. Roberts*, 90 Hun 533, 36 N. Y. Supp. 73; *People ex rel. Green v. Hall*, 83 Hun 375, 31 N. Y. Supp. 956; *People ex rel. Murphy v. Jewell*, 9 Misc. 647, 30 N. Y. Supp. 511; *People ex rel. Chase v. Wemple*, 80 Hun 504, 30 N. Y. Supp. 503; *People ex rel. Western Elec. Co. v. Campbell*, 80 Hun 466, 30 N. Y. Supp. 472.

Oregon. — *Dayton v. Multnomah County*, 34 Or. 239, 55 Pac. 23; *Godfrey v. Douglas County*, 28 Or. 446, 43 Pac. 171.

West Virginia. — *Hannis Distilling Co. v. Berkeley County Court*, 59 S. E. 1051; *Hannis Distilling Co. v. Berkeley County Court*, 59 S. E. 1054.

Wisconsin. — *State ex rel. Manitowoc v. County Clerk*, 59 Wis. 15, 16 N. W. 617; *Foster v. Rowe*, 128 Wis. 326, 107 N. W. 635; *State ex rel. Burnham v. Cornwall*, 97 Wis. 565, 73 N. W. 63; *State ex rel. Smith v. Cooper*, 59 Wis. 666, 18 N. W. 438; *State ex rel. Giroux v. Lien*, 112 Wis. 282, 87 N. W. 1113. *Compare State ex rel. Davis Lumb. Co. v. Sackett*, 117 Wis. 580, 94 N. W. 314.

In *Sullivan v. State*, 110 Ala. 95, 20 So. 452, it was held that where, under the provisions of a statute creating county boards of equalization of tax assessments, prescribing

their powers and duties and authorizing appeals from the judgment or decision of such board to a circuit or city court, where the case shall be tried anew, an appeal is taken by the taxpayer from a judgment rendered by a county board of equalization, raising the assessed valuation of his property, no presumption of correctness attends the judgment of the board into the appellate court, so as to impose upon the taxpayer the burden of affirmatively showing the incorrectness of the assessment as made by the board.

On an appeal to a district court from the findings of a board of equalization, as provided by the Iowa statute, the court will presume in the first instance that the board acted properly and upon sufficient evidence as to values, and the burden is on the appealing taxpayer to overcome this presumption, and to establish the injustice or inequity of the raised assessment. *First Nat. Bank v. City Council (Iowa)*, 112 N. W. 829.

In *Hough v. North Adams (Mass.)*, 82 N. E. 46, a petition for the abatement of taxes, it was held that an assessment of taxes was a purely statutory proceeding, and ordinarily, the evidence must show that it has been pursued with technical strictness in order that the acts of the assessors may have any validity. See also *Page v. Melrose*, 186 Mass. 361, 71 N. E. 787.

In *State ex rel. Harrison County Bank v. Springer*, 134 Mo. 212, 35 S. W. 589, an application was made for a writ of certiorari to quash an assessment of a county board of equalization on plaintiff's property, it was held that where a taxing board is authorized to exercise their discretion, it was not necessary to the validity of their action that their record should show that the board heard evidence on the subject which they had under consideration.

Evidence Sufficient To Cause the Abatement of a Tax.—In *Edes v. Boardman*, 58 N. H. 580, which was an action on the case against selectmen for wrongfully and unlawfully assessing a tax upon the plaintiff and compelling him by a collector's warrant to pay it, it was held that where the evidence shows that a party is

for some property overtaxed, and for other property undertaxed to an equal or greater extent, in the same assessment, he is not entitled to an abatement. He is entitled to a correction of an erroneous form of assessment only when it is injurious to him.

In *People ex rel. West. F. I. Co. v. Davenport*, 91 N. Y. 574, which was an appeal from the judgment of the general term of the supreme court entered upon an order which affirmed an assessment made by the defendants, a board of trustees, against the relator upon personal property and quashed a writ of certiorari by which the said assessment was brought up for review, it was held that it is essential that a party assailing the validity of an assessment should make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment did not represent the fair value of the property assessed. See also *People ex rel. West Shore R. Co. v. Adams*, 56 Hun 645, 10 N. Y. Supp. 295, 125 N. Y. 471, 26 N. E. 746.

In *People ex rel. Fargo v. Murphy*, 57 Hun 586, 10 N. Y. Supp. 377, an action to reduce an assessment on the ground of overvaluation, it was the duty of the assessors to assess the property at its full and true value as if they were appraising the same in the payment of a just debt due from a solvent debtor. (2 Rev. Stats. (8th Ed.), ch. 13, title 2, art. 2, § 17, p. 1098.) *Held*, that it was incumbent upon the relators to show by reliable evidence that there was in this instance an actual overvaluation.

Where a property owner makes a complaint to the board of equalization that an assessment upon his property is excessive, the assessment roll as returned by the assessor is held to fix the value *prima facie* against both the board and the complainant. *Oregon Coal Co. v. Coos County*, 30 Or. 308, 47 Pac. 851.

In *Godfrey v. Douglas County*, 28 Or. 446, 43 Pac. 171, a case where a taxpayer has been notified to show a sufficient reason before a county court why an assessment upon his property

This was denied in one case, in others declared wholly overcome.²⁸

c. *Reception of Evidence.* — (1.) *Generally.* — The question of the reception of evidence upon the hearing of a proceeding for the review of the action of the taxing officers depends to some extent at least upon the terms of the statute regulating the procedure. In some of the states the rule is that upon such a proceeding the hear-

should not be increased, it was held that where he subsequently appeared on the hearing the presumption was, on a writ to review a judgment increasing the assessment, that the judgment was rendered on sufficient evidence, although it did not appear from the record on what it was predicated or that it was rendered upon any evidence.

In a proceeding before a county court to correct an alleged erroneous assessment, a petitioner who is in possession and control of the property and seeks relief from such assessment on the ground of want of ownership must establish his want of ownership and title in those for whom he claims to hold the property in possession by such legal and sufficient proof as would be required in a contest between him and a claimant of the property. This proceeding had passed the incipient stage with the return by petitioner of its property for assessment where the report of its proper returning officer might be accepted by the assessor as sufficient. The petitioner was contesting an assessment of its property already made in a lawful manner. It applied to the state for relief therefrom. The burden was upon it to make out its case by legal and sufficient proof or it would not be entitled to the relief asked. *Hannis Distilling Co. v. Berkeley County Court* (W. Va.), 59 S. E. 1051; *approved in Hannis Distilling Co. v. Berkeley County Court* (W. Va.), 59 S. E. 1054.

28. In collateral proceedings the presumption may sometimes be indulged that taxation has been legally imposed; but in such a case as this, where the action of the ministerial and judicial officers, whose duty it is to impose it, is called directly in question by the taxpayers, and their authority and jurisdiction denied, such a presumption does not, and from the very nature of things can-

not, arise. Considering the silence of the commissioners as to this essential prerequisite to their authority to act, and the absence of all extrinsic testimony tending to prove that they had pursued strictly the extraordinary powers with which they are invested, nothing should have been presumed in favor of the regularity of their proceedings, and the court ought under the circumstances to have overruled the motion for the order directing the payment of the tax assessed by them. *Bate v. Speed*, 10 Bush (Ky.) 644.

Compare Marion County v. Wilson, 105 Ky. 302, 49 S. W. 8, 799. The court said: "It should be presumed in the absence of evidence to the contrary, that the board of supervisors acted correctly. This presumption is universally made in favor of the action of a board taken, upon notice to the party affected, or evidence heard before the board. Our whole assessment system rests upon the fact that it lays hold of the conscience of the taxpayer. He is required to make a minute list, under oath, of his property; and, when he complains of the action of the assessor or the board of supervisors, the same appeal to his conscience should be required. Any other rule would allow great abuses."

In *State ex rel. Vilas v. Wharton*, 117 Wis. 558, 94 N. W. 359, an action to review an assessment of certain lumber for purposes of taxation, it appeared that the agent of the one to whom the lumber was assessed had testified before the board of review that all of said lumber had been sold prior to May 1st, and produced in evidence the contracts of sale. *Held*, that if the contracts were effectual to pass the title, such evidence of non-ownership overcame the presumption in favor of the assessment.

In *State ex rel. Heller v. Lawler*,

ing is *ae novo*, and the court is required to determine anew all questions raised before the board relating to the liability of the property to assessment.²⁹ And of course under such a rule the court may receive any pertinent evidence tending to show the true value of the property under investigation.³⁰

(2.) *Certiorari*.—Where the review of the action of the taxing officers is sought upon *certiorari*, the rule is that upon the hearing of the petition for the writ, the court is not confined to the court

103 Wis. 460, 79 N. W. 777, a writ of *certiorari* to test the validity of the proceedings of the board of review of a town in respect to its decision on the application of the relator to have the valuation of his property, as made by the assessor of such town, materially changed so as to be on the basis of equality with the assessment of property generally in said town, it was held that where the return of a board of review to a writ of *certiorari* showed that the uncontroverted evidence of the relator, which was the only evidence produced before the board, established that the assessed valuation of his lands was too high and also the basis on which his lands should be assessed in order to equalize the assessments, and nothing appeared in the record to impair its credibility, it was the plain duty of the board to correct the assessed valuation of his property accordingly, and their failure to do so constituted a clear violation of law which is subject to be corrected by *certiorari*.

29. *As in Nebraska*.—First Nat. Bank *v.* Webster County (Neb.), 113 N. W. 190.

On an appeal from an order of the board of equalization increasing the assessment of a taxpayer the appellate court tries the case anew upon the evidence introduced in that court and not alone upon the record of the board of equalization. Grimes *v.* Burlington, 74 Iowa 123, 37 N. W. 106.

In Florida the Statute (Rev. St. § 1542), provides that "in all cases where assessments are made against any person, body politic or corporate, and payment of the same shall be refused upon allegation of the illegality of such assessment, such per-

son, body corporate or politic, may apply to the judge of the circuit court by petition setting forth the alleged illegality, and present the same together with the evidence to sustain it, and the judge shall decide upon the same, and if found to be illegal shall declare the assessment not lawfully made." Jackson County *v.* Thornton, 44 Fla. 610, 33 So. 291, construing and applying § 1542.

This statute contemplates the formation of an issue and a hearing upon the petition filed thereunder, when sufficient in allegation to show an illegality of assessment in point of law, and it should not be dismissed on a preliminary motion before final hearing on the ground that the evidence filed therewith is not such as is required by the statute. Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489. See also City of Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416.

30. Western Union Tel. Co. *v.* Dodge County (Neb.), 113 N. W. 805.

On an appeal by a taxpayer from the findings of the board of equalization to the district court, as provided by the Iowa statute, the court can reach a conclusion only by giving consideration to the record and to the competent and relevant evidence originally brought before it bearing on the subject. First National Bank *v.* City Council (Iowa), 112 N. W. 829.

In a petition for the abatement of taxes it was held that overvaluation of one class of a taxpayer's estate does not entitle him to an abatement, if the evidence shows that the total tax assessed against him does not exceed his share of the public burden. Connecticut Val. Lumb. Co. *v.* Munroe, 71 N. H. 473, 52 Atl. 940.

record,³¹ but the hearing upon the writ itself is had upon the record, and evidence *aliunde* cannot be received,³² except in those jurisdictions where the statutes expressly provide otherwise.³³

d. *Nature and Competency of Evidence.* — Of course, upon hearing a proceeding instituted for the purpose of reviewing the action of the taxing officers, the ordinary rules of evidence as to competency, relevancy, etc., would seem to govern.³⁴

31. *Vance v. Little Rock*, 30 Ark. 435; *Levant v. Penobscot County*, 67 Me. 429.

Evidence as to Valuations of Property. — In *Lowell v. County Comrs.*, 146 Mass. 403, 16 N. E. 8, upon a petition for a writ of certiorari to quash the proceedings of county commissioners in abating taxes assessed upon certain corporations by a city, for the purpose of showing the value of the corporation's land for manufacturing purposes, evidence was introduced of the value of water power in another place. *Held*, that this evidence was admissible, it appearing that the conditions in both places were practically the same.

32. *Arkansas.* — *Baird v. Williams*, 49 Ark. 518, 6 S. W. 1; *Floyd v. Gilbreath*, 27 Ark. 675.

Idaho. — *Murphy v. Board of Equalization*, 6 Idaho 745, 59 Pac. 715.

Iowa. — *Smith v. Board of Supervisors*, 30 Iowa 531.

Maine. — *Levant v. Penobscot County*, 67 Me. 429.

Massachusetts. — *Charlestown v. Middlesex County*, 109 Mass. 270.

Wisconsin. — *State v. Manitowoc County*, 59 Wis. 15, 16 N. W. 617; *State ex rel. Smith v. Gaylord*, 73 Wis. 306, 41 N. W. 518; *State ex rel. Hines Lumb. Co. v. Fisher*, 129 Wis. 57, 108 N. W. 206.

See also *Barber v. San Francisco*, 42 Cal. 630; *Moore v. Turner*, 43 Ark. 243; *Gulf & S. I. R. Co. v. Adams*, 85 Miss. 772, 38 So. 348.

The trial in the certiorari proceeding to review the action of the board of supervisors in equalizing the assessment of property, is had upon the record, and evidence *aliunde* cannot be received. "To allow witnesses to be examined in certiorari proceedings will be to convert the proceedings into a trial *de novo* on

the merits as on appeal, which is not the office of the writ." *Smith v. Board of Supervisors*, 30 Iowa 531.

Upon certiorari to review the action of the assessors and board of equalization in certain assessments, no original evidence should be received; the reviewing court should only consider the record embraced in the answer of respondents on their return to the writ, which consists of the schedule returned by the assessor, the petition of the aggrieved party to the board, and the action of the board thereon. *People ex rel. Hallett v. County Comrs.*, 27 Colo. 86, 59 Pac. 733.

33. **As in New York.** — *People v. Cheetham*, 20 Abb. N. C. 44; *People v. Tax Comrs.*, 16 N. Y. Supp. 834; *People v. Carter*, 109 N. Y. 576, 17 N. E. 222.

34. See *Lancaster County v. Whedon* (Neb.), 108 N. W. 127; *People v. Comrs. of Taxes*, 104 N. Y. 240, 10 N. E. 437; *First Nat. Bank v. Montrose County*, 36 Colo. 265, 84 Pac. 1111; *People ex rel. Twenty-Third St. R. Co. v. Comrs. of Taxes*, 95 N. Y. 554; *People v. Zoeller*, 15 N. Y. Supp. 684.

In *Penobscot Chemical F. Co. v. Bradley*, 99 Me. 263, 59 Atl. 83, an appeal from the assessment of taxes, it was held that evidence of value, as distinguished from valuation, of other similar property in town, similarly situated, as shown by the evidence of actual sales, or by the opinion of properly qualified witnesses expressed in court, is admissible upon the question of true value.

On a petition for an abatement of a real estate tax, evidence as to the appraisal of other real estate in the same town is admissible for the purpose of comparing with the appraisal complained of, and as thus determining the question as to whether the assessment complained of was pro-

II. COLLECTION AND ENFORCEMENT OF TAXES.

1. The Fact of the Levy and Assessment. — A. PRESUMPTIONS AND BURDEN OF PROOF. — In order to establish the right on the part of the government to collect an ad valorem tax, as distinguished from a tax not laid according to the value of property, there must be proof of an assessment or valuation of the property against which the tax

portional, and whether an abatement is justly required. *Manchester Mills v. Manchester*, 58 N. H. 38. To the same effect, see *Mills v. Manchester*, 57 N. H. 309.

In *Alabama Mineral Land Co. v. County Comrs.*, 95 Ala. 105, 10 So. 550, which was an action brought to contest an assessment of lands for taxation, the question was raised as to whether or not valuations at which other lands had been returned or assessed would be competent as evidence of their real value. The court said: "The valuation of property as found upon the tax-books represents either the *ex parte* statement of the owner thereof in his return, or the conclusion of the assessor or of the commissioner's court from information, inspection or otherwise. The declaration of the owner would not be admissible against any person other than himself or some one in privity with him. The decision of the assessor, or of the commissioner's court, would not be admissible against a stranger to the proceeding in which the decision was rendered. Such stranger in offering proof of such valuation of the property of others, claims the benefit of evidence which would not be available against him. A valuation of his own property in which he does not participate, is inadmissible, if objected to by him. *Birmingham Mineral R. Co. v. Smith*, 89 Ala. 305. It is not permissible to prove a fact pertinent to the issue in a case by showing that some one not a party to the suit has made an oral or written statement in reference to such fact, or by producing evidence of the conclusion reached in another proceeding which involved the same question but was between parties who are strangers to the pending suit. The returns of the owners and the valuations as made on a review of the assessments are

equally incompetent as evidence of the value of lands belonging to other persons."

In *Greenwoods County v. New Hartford*, 65 Conn. 461, 32 Atl. 933, an appeal from the action of the board of relief, a taxpayer alleged in his complaint that a rule had been adopted by the assessors and board of relief to assess property at a fractional part of its actual value, and that his assessment was disproportionate to the other assessments in the town, it was held that evidence in respect to the rate of valuation placed by the assessors on other like property was admissible in support of that claim.

In *White v. Portland*, 63 Conn. 18, 26 Atl. 342, which was an action brought to reduce the assessed valuation of property belonging to the plaintiffs, it was held that where evidence is introduced for the purpose of comparing the valuation of the property in question with that of other property, such evidence is inadmissible unless the property is similar in kind and is near, and the methods of estimating the value are the same in both cases.

In *Dewey v. Stratford*, 42 N. H. 282, a petition for the abatement of taxes upon certain lots of land which were alleged to be taxed too high, the defendants offered to prove that certain other lands, claimed by the plaintiff in the same town, although not named in the petition, were taxed at less than their real value, for the purpose of showing that all the lands claimed by the plaintiff in the town were not, when taken together, appraised at an amount above their real aggregate value. It was held that this evidence was not admissible. See also *State v. New York*, N. H. & H. R. Co., 60 Conn. 326, 22 Atl. 765.

is sought to be enforced.³⁵ And it must also be shown that the taxes were due and unpaid.³⁶

35. United States.—*People v. Weaver*, 100 U. S. 539.

Alabama.—*Driggers v. Cassady*, 71 Ala. 529; *Crook v. Anniston City Land Co.*, 93 Ala. 4, 9 So. 425.

Arizona.—*Waller v. Hughes*, 2 Ariz. 114, 11 Pac. 122.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. Miller County*, 67 Ark. 498, 55 S. W. 926.

California.—*Lake County v. Sulphur Bank Q. S. M. Co.*, 66 Cal. 17, 4 Pac. 876; *People v. McCreery*, 34 Cal. 432.

Colorado.—*People v. Lothrop*, 3 Colo. 428.

Illinois.—*McCraney v. Glos*, 222 Ill. 628, 78 N. E. 921; *Gannaway v. Barricklow*, 203 Ill. 410, 67 N. E. 825; *Ohio & M. R. Co. v. Comrs. of Highways*, 117 Ill. 279, 7 N. E. 663.

Indiana.—*Evansville & I. R. Co. v. Hays*, 118 Ind. 214, 20 N. E. 736.

Iowa.—*Collins v. Keokuk*, 118 Iowa 30, 91 N. W. 791; *Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512; *Rood v. Board of Supervisors*, 39 Iowa 444.

Kentucky.—*Louisville Water Co. v. Clark*, 94 Ky. 47, 21 S. W. 246; *National Bank v. Licking Val. L. & M. Co.*, 15 Ky. L. Rep. 211, 22 S. W. 881.

Louisiana.—*McWilliams v. Michel*, 43 La. Ann. 984, 10 So. 11.

Maryland.—*Consolidated Gas Co. v. Baltimore*, 101 Md. 541, 61 Atl. 532.

Massachusetts.—*Thurston v. Little*, 3 Mass. 429.

Mississippi.—*Adams v. Stonewall Cotton Mills*, 89 Miss. 865, 43 So. 65; *Mullins v. Shaw*, 77 Miss. 900, 27 So. 602, 28 So. 958; *State v. Tonella*, 70 Miss. 701, 14 So. 17.

Missouri.—*State v. Burrough*, 174 Mo. 700, 74 S. W. 610; *St. Louis v. Wenneker*, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561.

Montana.—*Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134.

Nevada.—*State v. Yellow Jacket S. M. Co.*, 14 Nev. 220.

New York.—*May v. Traphagen*, 139 N. Y. 478, 34 N. E. 1064.

North Carolina.—*Peebles v. Taylor*, 121 N. C. 38, 27 S. E. 999.

North Dakota.—*Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117; *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. 5.

Pennsylvania.—*Miller v. Hale*, 26 Pa. St. 432.

Tennessee.—*Anderson v. Post* (Tenn. Ch. App.), 38 S. W. 283.

Texas.—*City of Houston v. Stewart* (Tex. Civ. App.), 90 S. W. 49.

West Virginia.—*State v. Tavenner*, 49 W. Va. 696, 39 S. E. 649; *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615.

In *People v. Waterman*, 31 Cal. 412, an action under the California code of 1861, to enforce the collection of delinquent taxes where the defendant interposed and contested the right to recover, it was held necessary to show by the delinquent list, or the original or duplicate assessment roll, that the tax had been assessed and levied.

In an action of debt to recover taxes due on forfeited property, it is incumbent upon the plaintiff to show, first, the levy of a valid tax, and then, that it is due on forfeited property. And for the purpose of showing the latter fact the judgment of the county court for the sale of the land is made conclusive evidence, but such judgment is not evidence of the levy of the taxes. *Ohio & M. R. Co. v. Comrs. of Highways*, 117 Ill. 279, 7 N. E. 663.

It is not necessary for the people in such an action to produce the proceedings of the county board showing the levy of the taxes. If they were not levied, or if irregular or unwarranted, it is for the objecting taxpayer to show it. *Chiniquy v. People ex rel. Swigert*, 78 Ill. 570.

36. *City of Houston v. Stewart* (Tex. Civ. App.), 90 S. W. 49; *Ohio & M. R. Co. v. Comrs. of Highways*, 117 Ill. 279, 7 N. E. 663.

In *McCallum v. Bethany*, 42 Mich. 457, 4 N. W. 164, the city ordinance allowed an action to be brought for delinquent personal taxes whenever they were returned unpaid by the town treasurer, and it was held that

And in a Suit in Equity To Restrain the Collection of Taxes, on the ground that the property of the complainant was excessively assessed by the board of review, the complainant must put in evidence the record made by the board on the assessment book in which it is by law required to cause the various changes in assessments made by them to be entered.³⁷

Identity of Defendant. — In an action to recover delinquent taxes assessed on personal property of a corporation whose corporate name is not stated in full but is abbreviated, in the absence of evidence identifying the corporation defendant with that named in the assessment the plaintiff is not entitled to recover.³⁸

B. MODE OF PROOF. — a. *In General.* — Inasmuch as the statutes governing the levying of taxes and the assessment of the property within the jurisdiction of the taxing district for the purpose of raising the taxes so levied, very generally require that every essential step in such proceeding must appear in some written and permanent form in the records of the officers, or bodies authorized to act in relation thereto, the records so required to be kept are the proper and competent evidence to establish such levy and assessment.³⁹

failure in such an action to show the return of the taxes unpaid was fatal to recovery.

37. *Weber v. Baird*, 208 Ill. 209, 70 N. E. 231, so holding under the Illinois Revenue Act (4 Starr & C. Anno. Stat. 1902, ch. 1119, ch. 120, par. 111). The court said: "The inquiry in such an equitable proceeding is what property did the board decide the taxpayer owned and had omitted from his schedule, and did he own that property. What the board decided is to be determined by the record made by the board of its decision. A taxpayer seeking the aid of equity must therefore show the record made by the board, and then he will be heard to show that he did not own the property there specified in the record. If, in fact, the board did not enter its decision on the assessment books, or if its decision did not show on such books the kind and class of property said to have been omitted, such failure would vitiate the assessment unless in some way cured."

38. *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17, 4 Pac. 876. In this case the corporate name was abbreviated to "Sulphur Bank Q. S. M. Co.", and the court said that unless they could take judicial notice that the abbreviated

name was meant for that of the defendant, or unless there was evidence tending to show that the corporation defendant was known by the name thus abbreviated, the assessment could not be upheld. The court said: "We may conjecture, or very strongly suspect, that the assessor meant to assess the defendant as the owner of the personal property, but he did not assess the defendant. If the case showed that the defendant had been usually known, or was even sometimes called, 'Sulphur Banks Q. S. M. Co.', it may be conceded, for this decision, that the assessment of the personal property to defendant would be good. (*People v. Sierra Buttes Q. M. Co.*, 39 Cal. 514.) But in the transcript before us, there is no evidence that defendant was called, or called itself, by that name. It is plain that we cannot identify the name to which the personal property was assessed as an abbreviation of the name of defendant, even if an assessment to an abbreviation would be valid."

39. *Connecticut.* — *Marlborough v. Sisson*, 23 Conn. 44.

Illinois. — *Fagan v. Rosier*, 68 Ill. 84.

Maine. — *Milo v. Gardiner*, 41 Me. 543.

Michigan. — *Moser v. White*, 29

And parol evidence is not admissible for that purpose.⁴⁰ This rule

Mich. 59; *Williams v. Mears*, 61 Mich. 86, 27 N. W. 863.

New Hampshire. — *Pittsfield v. Barnstead*, 38 N. H. 115; *Paul v. Linscott*, 56 N. H. 347; *Cardigan v. Page*, 6 N. H. 182; *Wakefield v. Alton*, 3 N. H. 378.

Where the assessor or other proper officer failed to assess certain property and the treasurer discharged the duty of making the assessment within the proper time as required by statute in respect of omitted property, but failed to note the fact that the assessment was made by himself, his omission in this respect does not affect the legality of the assessment, and the fact that, and the time when, the assessment was made may be shown by other competent evidence. *Cedar Rapids & M. River R. Co. v. Carroll County*, 41 Iowa 153.

Proceedings by which taxes are voted cannot be left in parol. And if the records of a township do not disclose the fact that the proper authority voted to raise money to defray the expenses of the township, taxes levied by the supervisors for that purpose would be illegal; no presumption arises, in the absence of such vote appearing upon the record, that it was had or taken. *Williams v. Mears*, 61 Mich. 86, 27 N. W. 863.

The action of laying the lists of road taxes before the board of supervisors being the individual act of each town supervisor, may be shown by parol evidence, but what the board may do after the lists are placed in its hands is a matter of corporate action and to be proved by the record only. *Wabash R. Co. v. People ex rel. Thoele*, 138 Ill. 303, 28 N. E. 134.

In *Bright v. Markle*, 17 Ind. 308, an action by the plaintiff to recover the amount of taxes assessed against the defendant and which the plaintiff, when county treasurer, had charged up to himself and for which he had accounted, it was held error to permit the plaintiff to prove by parol evidence that the lands upon which the taxes had accrued were as-

sessed to the defendant without producing the assessment roll or tax duplicate, or showing any excuse for their non-production.

Although the statute may require the chairman or the clerk of a board of supervisors to sign the record of its proceedings, their failure to sign does not invalidate the record as proof of the action of the board, but has the effect merely of putting the party who desires to prove the official action of the board to the additional trouble of proving the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced. *People v. Eureka Lake & Yuba Canal Co.*, 48 Cal. 143.

In an action to recover municipal taxes the block books are admissible in evidence, and the fact that a witness states that it appears from the books that the defendant owned certain lots is immaterial. *City of Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410.

Where the proceedings of the board of commissioners contained no formal order granting the prayer of a petition for a railroad aid tax, an entry of the tax in the tax lists of the township petitioning therefor is sufficient to show that it was obtained. *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664.

In *Weber v. Ohio & M. R. Co.*, 108 Ill. 451, a bill to enjoin the collection of back taxes omitted, it was held that entries by the county clerk merely of the legal effect of what the clerk thought the certificates for the levy and extension of the taxes contained, was not admissible as evidence of such levy; that even if the certificates had been copied in the book they would have been merely secondary evidence and in no event admissible until it was shown that the original certificates, or some of them, had been returned as required by the statute, or that they were lost.

⁴⁰. *Fagan v. Rosier*, 68 Ill. 84. See also *Averill v. Sanford*, 36 Conn. 345.

applies not only to proof of the original levy and assessment, but also to proof of the action of the reviewing officers.⁴¹

In a suit in equity to foreclose a lien on land for delinquent taxes, it is proper to permit the county clerk as a witness on behalf of the complainant to testify that, at the request of the complainant, he had examined the collector's books and made a computation of the taxes due and unpaid as shown thereby, and had prepared a paper which showed the balance unpaid, and to produce such paper as a part of his testimony.⁴²

b. *Assessment Lists*. — The original assessment list made and sworn to by a taxpayer is admissible in evidence against him.⁴³

c. *Tax Duplicate, Delinquent Lists, Etc.* — In some states the tax duplicate, delinquent lists, etc., duly certified as required by law, are competent *prima facie* evidence of the due levy and assessment of the taxes in it.⁴⁴

41. The best evidence of the facts that a town clerk and the local assessor met to review the assessment of property and adjourned the hearing of complaints to a subsequent date, is the record of the town clerk. *St. Louis Bridge Co. v. People ex rel. Baker*, 128 Ill. 422, 21 N. E. 428.

The granting of a county tax must be proved by records of the county convention; the warrant of the county treasurer is not sufficient evidence thereof. *Paul v. Linscott*, 56 N. H. 347.

42. *Mix v. People*, 122 Ill. 641, 14 N. E. 209. The court said: "We see no objection to the evidence. It was a tabulated statement from the books prepared by the clerk, and if he had made any mistake or committed any error, a proper cross-examination, which the parties had the right to make, would have corrected any and all errors the clerk may have made. The fact that the statement was prepared under the direction of the solicitor of complainant was a matter of no moment. If it was accurate and correct it was proper for the consideration of the court in connection with the testimony of the clerk, notwithstanding complainant's solicitor may have requested the clerk to prepare the statement."

43. *Hall v. Bishop*, 78 Ind. 370, holding further that the production of certified copies is not necessary. See also *Mowry v. Slatersville Mills*, 20 R. I. 94, 37 Atl. 538.

44. *Illinois*. — *Goodrich v. Min-*

onk, 62 Ill. 121; *Chiniquy v. People ex rel. Swigert*, 78 Ill. 570.

In *Carney v. People*, 210 Ill. 434, 71 N. E. 365, an action brought to deliver delinquent taxes where the statute provides that a return of the county collector that taxes are delinquent shall be *prima facie* evidence that they are due and unpaid, it was held that if the return of the county collector is not in evidence the liability may be shown by proving the assessment, the extension of the taxes and their non-payment.

Maine. — In *Howe v. Moulton*, 87 Me. 120, 32 Atl. 781, which was an action in the name of a tax collector to recover taxes assessed against the defendant, it was held that the assessment of taxes may be proved by producing the tax list committed to the collector by the assessors under their hand with their warrant. This list is to be considered as an original paper and not merely a copy of other records. See also *Inhabitants of Norridgewock v. Walker*, 71 Me. 181.

The Michigan Statute (How. St., § 1058) which makes the tax roll when filed in the office of the county treasurer evidence in the same manner and with like effect as the assessment roll of which it is a copy, does not make the supervisors' certificate of assessment, if found on such tax roll, evidence, since such certificate is not part of the roll. *Redding v. Lamb*, 81 Mich. 318, 45 N. W. 997. See also *Hecock v. Van Dusen*, 80 Mich. 359, 45 N. W. 343.

d. *Tax Receipts*. — The production of a tax receipt is not sufficient to establish the existence of a levy and assessment of taxes where such levy and assessment are disputed facts.⁴⁶

e. *Secondary Evidence*. — Where the record of a tax levy and assessment has been lost or destroyed, its contents may, as any other document, be proved by secondary evidence.⁴⁶

In *Maxwell v. Paine*, 53 Mich. 30, 18 N. W. 546, it was held that the absence from the record of necessary action by the corporate authorities might be proved by the testimony of a witness who had examined the records and who could testify that the records failed to show such action, and that the records themselves need not be produced for that purpose.

In a suit by the township treasurer for the collection of a personal property tax, brought under the Michigan tax law of 1885, the city or township treasurer may testify to the fact and time of making a return or statement to the county treasurer of unpaid personal property tax, so long as his testimony is confined simply to those facts and does not go to the extent of giving the contents thereof. *City of Muskegon v. S. K. Martin Lbr. Co.*, 86 Mich. 625, 49 N. W. 489.

Minnesota. — In *re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Carpenter v. St. Paul*, 23 Minn. 232; *Howes v. Gillett*, 23 Minn. 231.

Vermont. — In *Bowman v. Downer*, 28 Vt. 532, the plaintiff claimed to recover the amount of certain taxes which he claimed had been assessed against the defendant and placed for collection in the hands of the plaintiff, as constable, and by him paid to the treasurer of the town, to which he was accountable, and that the defendant had promised to pay him. *Held*, that the tax bills in the hands of the plaintiff were admissible and *prima facie* evidence of the existence of the taxes, and the amount for which the defendant was liable upon them, and also, that the fact that the plaintiff had given bonds, as constable, and received the tax bills in question, and had settled with the town and taken up his bonds, afforded *prima facie* evidence that he had paid the taxes assessed against the defendant.

In *City of Hartford v. Champion*,

58 Conn. 268, 20 Atl. 471, it appeared that defendant had failed to return a list of her taxable property to the assessors according to law, whereupon the assessors had filled out a list for her as is provided by law. This action was brought under § 3901 of the general statutes to recover taxes assessed. The list above mentioned contained the following item "Insurance stocks, \$81,763." This was introduced in evidence for the purpose of proving the tax assessed. It was held not to be insufficient by reason of its not specifying the different insurance stocks.

In a suit in equity to enjoin the collection of taxes, the tax duplicate is not admissible in evidence for the taken by the board of equalization. purpose of showing what action was Jones *v. Rushville Nat. Gas Co.*, 135 Ind. 595, 35 N. E. 390.

The admission in evidence of a tax duplicate showing that one who seeks to enjoin the collection of a railroad aid tax is delinquent as to other taxes is not objectionable. *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664.

45. *Adams v. Osgood*, 55 Neb. 766, 76 N. W. 446.

A Certificate of the Town Clerk of the payment of road tax held no evidence that such tax had ever been assessed. *Flecksten v. Spicer*, 63 Minn. 454, 65 N. W. 926.

46. *Spear v. Tilson*, 24 Vt. 420; *Averill v. Sanford*, 36 Conn. 345; *Higgins v. Reed*, 8 Iowa 298, 74 Am. Dec. 305.

Where a statute provides that a board of equalization shall "keep a record of their proceedings," such statute is mandatory and the record is a condition precedent to a valid assessment and apportionment; but this does not necessarily mean that the record shall be kept in a book; any memorandum is sufficient. Where such records have been destroyed, although destruction was

2. Matters in Support or Avoidance of Taxes. — A. As Respects THE VALUATION OF THE PROPERTY. — a. *In General.* — The general rule is that the action of the officers upon whom the law imposes the duty of assessing property for purposes of taxation, whether taken in their capacity as original assessors or as reviewing officers passing upon the action of the original assessors, is, in respect of the valuation placed by them upon the property under consideration at least quasi-judicial in its nature, and conclusive evidence upon that question as against collateral attack,⁴⁷ except

unauthorized, nevertheless, if they were sufficient when made, their destruction has not destroyed their efficacy, if the contents can afterward be established by proof. Parol testimony, if clear and satisfactory, is competent and sufficient to establish their existence, loss and contents. *State Auditor v. Jackson County*, 65 Ala. 142.

In *Grace v. Bonham*, 26 Tex. Civ. App. 161, 63 S. W. 158, which was an action to recover taxes due, it was held that in proving the assessment of the property it was permissible for the person who was city assessor at the time of trial to testify that the general tax rolls of the city were true copies of the assessment lists for the years for which the taxes were claimed in the action, and that the defendant owner had not paid his taxes for those years, although the witness was not the assessor nor the deputy for those years, he testifying that he assisted in making up the rolls for those years, and knew that they were correct copies of the original assessment lists, and that such lists were lost.

47. United States. — *Pittsburgh, C. & St. L. R. Co. v. Backus*, 154 U. S. 421; *Stanley v. Supervisors of Albany*, 121 U. S. 535; *Chicago Union Tract. Co. v. State Board of Equalization*, 112 Fed. 607; *McLeod v. Receiver*, 71 Fed. 455, 18 C. C. A. 188; *Youngstown Bridge Co. v. Kentucky & I. Bridge Co.*, 64 Fed. 441.

California. — *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905.

Connecticut. — *State v. New York, N. H. & H. R. Co.*, 60 Conn. 326, 22 Atl. 765.

Illinois. — *Keokuk & H. B. Co. v. People*, 161 Ill. 132, 43 N. E. 691; *Illinois & St. L. Coal Co. v. Stookey*,

122 Ill. 358, 13 N. E. 516; *St. Louis, B. & T. R. Co. v. People ex rel. Baker*, 127 Ill. 627, 21 N. E. 348; *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27, 18 N. E. 827; *Bates v. Parker*, 227 Ill. 120, 81 N. E. 334; *Mix v. People*, 116 Ill. 265, 4 N. E. 783; *English v. People*, 96 Ill. 566; *People v. Big Muddy Iron Co.*, 89 Ill. 116.

Indiana. — *Hilton v. Mason*, 92 Ind. 157; *Hart v. Smith*, 159 Ind. 182, 64 N. E. 661; *Board of Comrs. v. Senn*, 117 Ind. 410, 20 N. E. 276; *Cleveland, C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421; *Indianapolis & V. R. Co. v. Backus*, 133 Ind. 609, 33 N. E. 443; *Pittsburgh, C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Evansville & I. R. Co. v. West*, 138 Ind. 697, 37 N. E. 1012; *Senour v. Matchett*, 140 Ind. 636, 40 N. E. 122; *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664.

Kentucky. — *Chicago, St. L. & N. O. R. Co. v. Com.*, 115 Ky. 278, 72 S. W. 1119.

Maryland. — *County Comrs. v. New York Min. Co.*, 76 Md. 549, 25 Atl. 864; *Consolidated Gas Co. v. Mayor, etc. of Baltimore*, 65 Atl. 628.

Michigan. — *Williams v. Saginaw*, 51 Mich. 120, 16 N. W. 260; *Detroit Citizens St. R. Co. v. Common Council of Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809; *Ward v. Echo Twp.*, 145 Mich. 56, 108 N. W. 364; *Gamble v. East Saginaw*, 43 Mich. 367, 5 N. W. 416.

Mississippi. — *Investment Co. v. Suddoth*, 70 Miss. 416, 12 So. 246.

Missouri. — *State ex rel. Wyatt v. Vaile*, 122 Mo. 33, 26 S. W. 672; *State ex rel. Gottlieb v. Western Union Tel. Co.*, 165 Mo. 502, 65 S. W. 775.

for fraud⁴⁸ or want of jurisdiction upon the part of such officers.⁴⁹

Cases Illustrating this rule in its application in respect of the

Montana.—*Montana ore Purch. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13.

Nebraska.—*Chapel v. Franklin County*, 58 Neb. 544, 78 N. W. 1062; *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

Nevada.—*State v. Central Pac. R. Co.*, 21 Nev. 270, 30 Pac. 693.

New Jersey.—See *Williams v. Bettie*, 50 N. J. L. 132, 11 Atl. 17.

New York.—*People ex rel. Edison Elec. L. Co. v. Campbell*, 148 N. Y. 759, 43 N. E. 177; *United States Tr. Co. v. New York*, 144 N. Y. 488, 39 N. E. 383; *People ex rel. Equitable G. L. Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13; *Van Deventer v. Long Island City*, 139 N. Y. 133, 34 N. E. 774; *McLean v. Jephson*, 123 N. Y. 142, 25 N. E. 409; *People v. McCarthy*, 102 N. Y. 630, 8 N. E. 85; *People ex rel. Board of Supervisors v. Common Council*, 101 N. Y. 82, 4 N. E. 348; *Mayor, etc. of New York v. Davenport*, 92 N. Y. 604; *In re McLean*, 6 N. Y. Supp. 230, 25 N. Y. St. 537; *People ex rel. Roebeling's Sons Co. v. Wemple*, 63 Hun 452, 18 N. Y. Supp. 504, *affirmed*, 138 N. Y. 582, 34 N. E. 386; *In re Peek*, 80 Hun 122, 30 N. Y. Supp. 59; *Austen v. Westchester Tel. Co.*, 8 Misc. 11, 28 N. Y. Supp. 77.

North Carolina.—See *Caldwell Land & L. Co. v. Smith*, 59 S. E. 653.

North Dakota.—See *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. 5.

Ohio.—*Wagoner v. Loomis*, 37 Ohio St. 571; *Hagerty v. Huddleston*, 60 Ohio St. 149, 53 N. E. 960.

Oregon.—*Southern Oregon Co. v. Coos County*, 39 Or. 185, 64 Pac. 646; *Southern Oregon Co. v. Shroeder*, 39 Or. 607, 64 Pac. 1117.

Pennsylvania.—*Moore v. Taylor*, 147 Pa. St. 481, 23 Atl. 768. *Compare Von Storch v. Scranton City*, 3 Pa. Co. Ct. 567.

South Dakota.—*State ex rel. American Exp. Co. v. State Board*, 3 S. D. 338, 53 N. W. 192.

Tennessee.—*Tomlinson v. Board of Equalization*, 88 Tenn. 1, 12 S. W.

414; *Grundy County v. Tennessee Coal, I. & R. Co.*, 94 Tenn. 295, 29 S. W. 116; *Briscoe v. McMillan*, 100 S. W. 111.

Vermont.—*Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919; *Weatherhead v. Guilford*, 62 Vt. 327, 19 Atl. 717.

Texas.—*Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111; *Linz v. Sherman* (Tex. Civ. App.), 62 S. W. 71; *Johnson v. Holland*, 17 Tex. Civ. App. 210, 43 S. W. 71. See *Engelke v. Schlenker*, 75 Tex. 559, 12 S. W. 999.

Utah.—*Home Fire Ins. Co. v. Lynch*, 19 Utah 189, 56 Pac. 681.

Washington.—*Olympia Water Wks. v. Thurston County*, 14 Wash. 268, 44 Pac. 267; *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123.

Wisconsin.—*Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445; *Brown v. Oneida County*, 103 Wis. 149, 79 N. W. 216; *Marshall v. Benson*, 48 Wis. 558, 4 N. W. 385, 762.

Compare *Board of Comrs. v. Sergeant*, 24 Kan. 572, where it was held that an order of the county commissioners made under § 70, ch. 107, of the Kans. Comp. Laws of 1879, correcting the personal property assessment of a taxpayer, although upon due notice and after examination and inquiry, is not so far judicial in its nature and conclusive as to preclude inquiry as to the true amount of property subject to taxation in an action brought to enjoin the collection of taxes levied upon such assumption.

48. *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 So. 416; *Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512; *Odd Fellows Hall Assn. v. Dayton*, 25 Ky. L. Rep. 665, 76 S. W. 181; *Auditor General v. Hughitt*, 132 Mich. 311, 93 N. W. 621; *State v. Cunningham*, 153 Mo. 642, 55 S. W. 249; *Gove v. Tacoma*, 26 Wash. 474, 67 Pac. 261.

49. See *infra*, this division "Want of Authority."

various kinds of taxable property, and under various circumstances, are set out in the note below.⁵⁰

50. *State v. Atwood Lumb. Co.*, 96 Minn. 392, 105 N. W. 276, *quoting* from *Otter Tail County v. Batchelder*, 47 Minn. 512, 50 N. W. 536.

In *Republic Life Ins. Co. v. Pol-lak*, 75 Ill. 292, it was held that the valuation of the state board of equalization is conclusive and final, and that the courts cannot examine into the mode or reasoning or the basis adopted by the board to ascertain the value of the property.

In *City of Grand Rapids v. Welle-man*, 85 Mich. 234, 48 N. W. 534, it was held that the action of the board of review and equalization of the city of Grand Rapids is conclusive upon the question of the equalized valuation of the several wards, and cannot be invalidated by evidence showing that the board adopted as a basis an erroneous footing of the assessment roll of one of the wards.

Value of Corporate Franchises. Where a method of determining the value of a corporate franchise for taxation is committed to the determination of an assessor, in the absence of fraud his judgment is conclusive as to the value to the extent that courts will not revise the judgment of this officer upon this question. The only remedy open to the taxpayer is by application to the board of equalization. *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832.

Reassessment by Board of Equalization.—The state board of equalization being a quasi court of record, its action in reassessing property in a proceeding in which it had jurisdiction of the person and the subject-matter is not subject to collateral attack on the ground that the complaining party has violated none of the provisions of the statute upon which such reassessment could be made. This latter is a jurisdictional fact to be determined by the board by the evidence before it, and the question as to whether it had this evidence is to be determined by the board. These matters can be reviewed only on certiorari. *Smoky Mountain Land, Lumb. & Imp. Co.*

v. Lattimore (Tenn.), 105 S. W. 1028.

Examination of Property by Assessors.—In *Brooklyn El. R. Co. v. Brooklyn*, 16 Misc. 416, 38 N. Y. Supp. 154, which was an action against the city of Brooklyn to enjoin the sale of their properties for delinquent taxes, it was contended that two assessors did not together examine its property each year before valuing the same for taxation. *Held*, that it was enough that each assessment roll was attested by the affidavit of two assessors, as required by law, that they did so examine the taxable property therein set down. The papers before the court showed the apparent willingness of at least two assessors to make doubtful, if not to contradict, their solemn attestation and oath by them of public duty done, but it was held that the law for reasons of sound public policy does not permit public officers charged with the doing of duties in their nature judicial to impeach the good faith and verity of their acts. Assessors act under the law upon a notice of hearing to all persons interested, and after hearing all who come before them their attestation of the assessment rolls in the form and words prescribed by law is a judicial act of unquestionable verity. If they were allowed to impeach it by their testimony no tax levy however exactly made would be safe.

Valuation of Capital Stock of Corporation.—The action of the county board of equalization is not subject to collateral attack in equity or otherwise unless the assessment is void and not merely erroneous. Such board is a quasi-judicial tribunal and binds everyone within its jurisdiction. Thus, it has exclusive original jurisdiction in the assessment of capital stock where the value of such stock exceeds the value of tangible property; and whether the value of such stock exceeds the value of the tangible property is a question for the board to decide.

b. *Relief in Equity*. — So, too, as against the interposition of a court of equity sought by a complaining property owner, the action of the taxing officers is conclusive evidence in respect of the valuation placed by them upon the property, except for fraud or want of jurisdiction.⁵¹ And the same rule has been held to apply whether the suit is in equity to cancel a tax sale certificate, or to restrain the collection of a tax.⁵²

Payment or Tender of Legal Tax. — And in the absence of a statute providing otherwise, as a condition of equitable relief, the complain-

Jones *v.* Rushville Nat. Gas Co., 135 Ind. 595, 35 N. E. 390.

In Maryland the statute (Code, Art. 81, § 144) provides that a corporation may appeal from the valuation of its shares of stock to the comptroller and treasurer, sitting as a board of review. And it is held that even if anything more than the valuation of the shares could be reviewed on such appeal, yet if the tax commissioner exceeds his authority by assessing for taxation unissued shares of stock, the corporation may, without having appealed to the comptroller and treasurer, resist the collection of the tax thereon in the courts. The action of a tribunal with limited statutory powers, from which no appeal is given, is conclusive only when such action does not exceed the jurisdiction conferred by the statute. *Consumers' Ice Co. v. State*, 82 Md. 132, 33 Atl. 427.

In People v. Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905, where the assessment of a railroad franchise was attacked upon the ground that it included the federal franchise, which was not taxable by the state of California, it was held that the intention of the board, or of any of its members, or the signification to be given to the term franchise as used in the assessment, could not be shown by evidence of conversations between members of the state board of equalization during the session at which the assessment was made. Nor was the evidence admissible for impeaching purposes unless the members of the board had been previously questioned in relation thereto.

51. *Arizona*. — *Cochise County v. Copper Queen Co.*, 8 Ariz. 221, 71 Pac. 946.

Colorado. — *Price v. Kramer*, 4 Colo. 546.

Dakota. — *Frost v. Flick*, 1 Dak. 131, 46 N. W. 508.

Idaho. — *Humbird Lumb. Co. v. Thompson*, 11 Idaho 614, 83 Pac. 941.

Illinois. — *Hanberg v. Western Cold Storage Co.*, 231 Ill. 32, 82 N. E. 842; *Barkley v. Dale*, 213 Ill. 614, 73 N. E. 325; *Coxe Bros. & Co. v. Salomon*, 188 Ill. 571, 59 N. E. 422; *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19; *White v. Raymond*, 188 Ill. 298, 58 N. E. 976; *Kimbark v. Raymond*, 188 Ill. 66, 59 N. E. 1133; *Mayer v. Raymond*, 188 Ill. 143, 59 N. E. 1133; *Cummins v. Webber*, 218 Ill. 521, 75 N. E. 1041; *Peirce v. Carlock*, 224 Ill. 608, 79 N. E. 959; *Chicago, B. & Q. R. Co. v. Frary*, 22 Ill. 34.

Indiana. — *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8; *Fell v. West*, 35 Ind. App. 20, 73 N. E. 719; *McCrory v. O'Keefe*, 162 Ind. 534, 70 N. E. 812.

Kansas. — *City of Lawrence v. Killam*, 11 Kan. 499.

Michigan. — *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700.

Minnesota. — *Clarke v. Ganz*, 21 Minn. 387.

Nebraska. — *South Platte Land Co. v. Crete*, 11 Neb. 344, 7 N. W. 859.

North Dakota. — *Farrington v. New England Invest. Co.*, 1 N. D. 102, 45 N. W. 191.

Oregon. — *Welch v. Clatsop County*, 24 Or. 452, 33 Pac. 934.

Texas. — *Deeck v. Peeler*, 74 Tex. 268, 11 S. W. 1111.

52. *Farrington v. New England Inv. Co.*, 1 N. D. 102, 45 N. W. 191. See also *Lawrence v. Killam*, 11 Kan. 499; *Wood v. Helmer*, 10 Neb. 65, 4 N. W. 968.

ant must show that he has paid or tendered the amount of taxes properly chargeable against his property.⁵³

Application for Relief to Board of Equalization. — It is not necessary for one who seeks to enjoin the collection of a tax wholly illegal to show that he had first applied for relief to the board of equalization.⁵⁴

c. Proof of Fraud. — (1.) **Presumptions and Burden of Proof.** As in other cases where fraud is asserted, so where fraud on the part of the taxing officers in the assessment of property for taxation is asserted as ground for escaping payment of taxes, it will not be presumed; it must be established by competent and sufficient evidence.⁵⁵

53. *Farrington v. New England Inv. Co.*, 1 N. D. 102, 45 N. W. 191; *Challis v. County Comrs.*, 15 Kan. 49; *Knox v. Dunn*, 22 Kan. 683; *Lawrence v. Killam*, 11 Kan. 499; *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8; *Welch v. Clatsop County*, 24 Or. 452, 33 Pac. 934.

54. *Davis v. Burnett*, 77 Tex. 3, 13 S. W. 613. See also *Court v. O'Connor*, 65 Tex. 334.

55. *United States.* — *Maish v. Arizona*, 164 U. S. 599.

Illinois. — *St. Louis Bridge & T. R. Co. v. People ex rel. Baker*, 127 Ill. 627, 21 N. E. 348; *Tolman v. Raymond*, 202 Ill. 197, 66 N. E. 1086; *Chicago, B. & Q. R. Co. v. Paddock*, 75 Ill. 616; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Bates v. Parker*, 227 Ill. 120, 81 N. E. 334; *LaSalle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27, 18 N. E. 827.

Indiana. — *Fell v. West*, 35 Ind. App. 20, 73 N. E. 719.

Michigan. — *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700.

Minnesota. — *State v. Atwood Lumb. Co.*, 96 Minn. 392, 105 N. W. 276.

Nebraska. — *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

New Jersey. — *Estell v. Hawkens*, 50 N. J. L. 122, 11 Atl. 265.

North Dakota. — *Farrington v. New England Inv. Co.*, 1 N. D. 102, 45 N. W. 191.

Texas. — *Johnson v. Holland*, 17 Tex. Civ. App. 210, 43 S. W. 71; *Hoeffling v. San Antonio*, 15 Tex. Civ. App. 257, 38 S. W. 1127.

Where a taxpayer seeks to restrain a collector of taxes on the ground of a wilful and fraudulent overvalua-

tion, the burden of proof is upon him to sustain those charges by a fair preponderance of evidence. *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700.

In *Barkley v. Dale*, 213 Ill. 614, 73 N. E. 325, a bill in chancery filed in the circuit court of Vermilion county by the appellant against the appellee to enjoin the appellee as county clerk of said county from extending against the appellant any taxes or penalties upon certain assessments made by the board of review of said county in the year 1903 upon credits claimed to have belonged to the appellant, and which were said to have been omitted by the assessor of the town in said county in which the appellant resided, from the assessment of appellant for the years 1883 to 1898, both inclusive, it was contended by appellee that the said assessments for the years 1883 to 1898, both inclusive, were for so low an amount as compared with the credits owned by the appellant in each of those years as to make the said assessments fraudulent and to amount in law to no assessment at all, and that by reason of that fact the board of review might assess the appellant upon omitted credits for the years 1883 to 1898, both inclusive, upon the ground that he had not been assessed at all upon credits. *Held*, that though the assessment may be impeached for fraud and by reason of fraud in making the assessments the assessments may amount to no assessment at all, yet when the evidence shows an over or under valuation of property, this will not be sufficient notice to establish the fact

(2.) **Competency and Sufficiency of Evidence.**—Of course, the competency of evidence offered to be adduced to establish fraud in the assessment is ordinarily to be determined by the general rules of evidence in cases where fraud is the issue.⁵⁶

Opinion Evidence.—Thus fraud in the assessment of property cannot be established by the testimony of witnesses consisting merely of their own inferences or conclusions; they should state the facts on which their opinion in that respect is based.⁵⁷

The **Sufficiency of the Evidence** relied upon to establish fraud is a question as to which no hard and fast rule can be stated; it depends

that the assessment was fraudulently made. In discussing this proposition, the court said: "We find no evidence of actual fraud in this regard and are of opinion that fraud cannot be implied from the fact alone that there appeared of record in Vermilion county during each of the years from 1883 to 1898, both inclusive, in the name of appellant, unreleased mortgages to an amount larger than his assessment for credits during each of these years. The appellant testified, and he was contradicted, that during each of the said years he returned to the assessor the true amount of all of his credits, and there is no showing that such mortgages were not actually assessed in those years. If they were assessed, although for too low an amount, the board of review in 1903 had no right to re-assess them on the theory that they had been assessed too low."

56. See *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27, 18 N. E. 827.

Where an action was brought to enjoin an assessor and tax collector from selling lands to pay taxes for the year 1903, it was held that evidence was inadmissible to show that the assessment for the year previous was less than that for the year in question. *Humbird Lumb. Co. v. Thompson*, 11 Idaho 614, 83 Pac. 941.

57. *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N. E. 439.

Clement v. People ex rel. Kochersperger, 177 Ill. 144, 52 N. E. 382. In this case the only evidence of fraud was the testimony of an agent for the trustee of the defendant, who stated, in substance, that the assessment upon the property in question

would not have been so high if he, the witness, had been willing to bribe the assessor, and that he, as the assessor, assessed similar property at ten per cent. of its fair cash value, and that upon that basis the property in controversy should have been assessed at about one-half of what it was in reality assessed; and it was held that this evidence was insufficient to sustain the charge of fraud on the part of the assessor.

In *Lancaster County v. Whedon* (Neb.), 108 N. W. 127, it was held that the statement of the witness that he would not have increased the assessment valuation of the real estate of a certain district, and that such increase did not tend to equalize the values of real estate throughout the municipality, without stating any facts as a basis for his opinion, was not sufficient to overthrow the judgment of the board of equalization.

In *Von Storch v. Scranton City*, 3 Pa. Co. Ct. 567, it was held that an opinion of a witness which was based upon a comparison of assessment books was not competent evidence. The assessment books themselves were the proper evidence for the court.

In *Consolidated Gas Co. v. Baltimore* (Md.), 65 Atl. 628, an action to recover a tax assessed on certain easements held by a public service corporation in the streets of a city, it was held that witnesses who had made a study of tax laws and of the application of the principles of these laws to the assessment of real property in all its forms, and who had been called to value easements of public service corporations for various cities, and who knew the char-

largely upon the circumstances of each particular case.⁵⁸ Mere ex-

acter and extent of the operations of the Consolidated Gas Company in the mileage and size of its mains and pipes, were qualified as experts upon the subject of inquiry in this case.

58. *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418; *Olympia Water Wks. v. Gelbach*, 16 Wash. 482, 48 Pac. 251; *Percival v. Gelbach*, 16 Wash. 703, 48 Pac. 1118.

In *Spring Valley Coal Co. v. People*, 157 Ill. 543, 41 N. E. 874, an application for judgment and order for delinquent taxes, where the defense was a fraudulent overvaluation of property, great stress was laid upon the remark made in *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, that where the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of fraud upon his part against the taxpayer. But the court, in construing this language, said: "The decision of the question of fraud or no fraud would no doubt depend upon the circumstances under which, in each particular case, the excessive valuation was made. If it was manifest from these circumstances that the assessment could not have been honest, but was actuated by a malicious motive, then a conclusion of fraud would result. But the mere fact of overvaluation will not of itself establish fraud. And the rule is, that if the assessor through a mistake or error of judgment has assessed the property higher than it should have been assessed, his action cannot be rectified or reversed in an application for judgment against the property." See to the same effect, *Odd Fellows' Hall Assn. v. Dayton*, 25 Ky. L. Rep. 665, 76 S. W. 181.

While it is true that fraud will not be presumed, and that the decision of the state board of equalization in fixing the value of the corporate property for the purpose of taxation is quasi-judicial in its nature, still, when it is apparent to the court that every well-known rule for the valuation of capital stock, including fran-

chises, has been violated and arbitrarily disregarded by the board, and such board has refused to consider the statements as to values prepared by the assessors, under the statute for its use, and has refused to consider information as to the value of such corporate property submitted to it by interested parties, and has arbitrarily fixed such assessments at a grossly inadequate sum, under rules passed by it for the occasion, the court is justified in holding that fraud in the making of such assessments has been established, and such pretended assessments may be properly disregarded and treated as no assessment. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

Proof of the Intentional Under Assessment of a Certain Class of Property, whether the result of an agreement between owners and the assessing officers, or of the officer's disregard of his official duty without such agreement, is sufficient to invalidate the entire assessment. *Auditor General v. Jenkinson*, 90 Mich. 523, 51 N. W. 643.

Proof of a mere discrepancy in judgment as to the value of the property assessed for taxation, between the members of the board and the court to which application for judgment for delinquent taxes is made, however gross that discrepancy may be, is not sufficient to impeach the valuation fixed by the board on the ground of fraud. *St. Louis Bridge & Tunnel R. Co. v. People ex rel. Baker*, 127 Ill. 627, 21 N. E. 348.

In Michigan a statute provides that if any fraud affects the amount of one tax only, the tax shall be sustained so far as the same is legal and just. And in *Auditor General v. Hughitt*, 132 Mich. 311, 93 N. W. 621, it was held that proof that a supervisor fraudulently changed and reduced the valuation of certain lands on his assessment roll after the roll had been reviewed and completed, was sufficient to invalidate the entire tax roll since the statute did not apply to such a case, the reduction affecting every taxpayer.

cessive valuation of itself does not establish fraud;⁵⁹ but a valuation so grossly out of the way as to show that the assessing officers could not have been honest in their valuation, and must have known of its excessive character, is accepted as proof of fraud upon their part.⁶⁰

B. AS RESPECTS THE LEGALITY OF THE TAX. — a. *In General.* While, as previously shown, upon the question of the valuation placed upon the property by the assessing officers, the complaining property owner has his remedy by direct attack, and hence cannot, in a proceeding instituted for the purpose of enforcing collection of the tax, ordinarily be permitted to give evidence upon that question, yet there are various other matters pertaining to the legality of the tax and the right *vel non* to enforce its payment, as to which the complaining property owner will be permitted to give evidence, such as want of authority in the taxing officers, that the property was not subject to taxation, and various other matters;⁶¹

Proof of the intentional omission from the assessment roll of taxable personal property, the owners of which are known to the assessing officer, is sufficient to entitle an individual taxpayer to relief from the excessive amount of his taxes. *Solomon v. Oscoda*, 77 Mich. 365, 43 N. W. 990. See also *Walsh v. King*, 74 Mich. 350, 41 N. W. 1080.

59. *Southern Oregon Co. v. Coos County*, 39 Or. 185, 64 Pac. 646; *Southern Oregon Co. v. Schroeder*, 39 Or. 607, 64 Pac. 1117; *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553.

60. *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418.

In *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617, which was an action to cancel and set aside certain taxes levied and assessed against plaintiff's property, the evidence showed not only a gross overvaluation of plaintiff's property, but it showed also a gross overvaluation when compared with other property of like kind within the assessor's jurisdiction. *Held*, that slight or even considerable differences in valuation are not sufficient when honestly made to authorize a court to set aside an assessment, but where the assessment is many times the actual value of the land and is higher proportionately than other property, a condition does arise when the courts are authorized to do so. The court cited *Whatcom County v. Fair-*

haven Land Co., 7 Wash. 101, 34 Pac. 563; *Benn v. Chehalis County*, 11 Wash. 134, 39 Pac. 365; *Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346; *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480.

61. *United States*. — *Maish v. Arizona*, 164 U. S. 599.

Dakota. — *Frost v. Flick*, 1 Dak. 131, 46 N. W. 508.

Illinois. — *Clement v. People ex rel. Kochersperger*, 177 Ill. 144, 52 N. E. 382; *Keokuk & H. B. Co. v. People*, 161 Ill. 132, 43 N. E. 691; *Hanberg v. Western Cold Storage Co.*, 231 Ill. 32, 82 N. E. 842; *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19.

Iowa. — *Langworthy v. Dubuque*, 13 Iowa 86.

Missouri. — *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676; *State ex rel. Lane v. Hannibal & St. J. R. Co.*, 110 Mo. 265, 19 S. W. 816; *State ex rel. Flentge v. Burrough*, 174 Mo. 700, 74 S. W. 610.

Ohio. — *Hagerty v. Huddleston*, 60 Ohio St. 149, 53 N. E. 960.

Tennessee. — *Grundy County v. Tennessee Coal, Etc., Co.*, 94 Tenn. 295, 29 S. W. 116.

Material Alteration of Records. In *Walker v. Chicago*, 56 Ill. 277, a suit, under the charter of the City of Chicago, for taxes, the defendant objected that the real estate tax list, which, with the warrant attached thereto, was the basis of the suit, was not a copy of the tax list as revised by the board of assessors;

unless he has by his own conduct estopped himself from so doing.⁶²

b. *Regularity of Proceedings of Taxing Officers.* — (1.) **Generally.** Thus the question whether or not the proceedings of the taxing

that the list as revised, and after the time fixed by statute for its revision had expired, was changed, amended, abated and altered; and that the warrant was materially altered after it was received by the city collector. *Held*, it was competent for the defendant to inquire of the collector and tax commissioner, called by him as witnesses, as to their knowledge of such alterations, whether or not any had been made; whether the list and warrant had been so changed as to the description and valuation of any of the property in any respect, and if so, what changes had been made. Such material alteration might have been made as would vitiate the tax of the defendant, and the *onus probandi* being on him, he had the right to prove it. If abuses had crept in from which the tax lists were altered after the revision was completed, no matter by whom done, the defendant had the right, and it was the duty of the court to permit him, to investigate and expose them. Such inquiries were competent for the purpose of showing that alterations had been made, so affecting the rights of the defendant as to require the production of the original books, assessment roll and warrant to complete the proof, and to lay the proper foundation for their compulsory production; and if the books were already in court, then as preliminary to the investigation. *Walker v. Chicago*, 56 Ill. 277.

No Legal Levy. — In *Baltimore & O. S. W. R. Co. v. People ex rel. Wall*, 156 Ill. 189, 40 N. E. 834, an action to recover for alleged delinquent taxes, it was held that although the certificate of the town clerk to a levy of the taxes made a *prima facie* case as to the legality of the taxes, nevertheless, the defendant might show by the record of the proceedings of the town meeting that no such town tax was in fact levied by it, inasmuch as the first step in the legal levy of the town tax can

only be taken at a town meeting, and a record of every order or direction made by said meeting must be made a matter of record; hence, that the record was competent evidence, at least *prima facie*, that no such tax was legally levied.

62. *State v. New Orleans*, 40 La. Ann. 697, 4 So. 891.

In *Hilton v. Mason*, 92 Ind. 157, the court said: "This court has said, and still adheres to the rule, that every defense, either in law or fact, that can be made against the appropriation before the board of commissioners, must be made before the court, or on appeal; and if not so done, the parties are estopped from making it elsewhere, or by an injunction or by collateral attack as to matters existing when the petition was presented, or at the time of the final order of the board granting the petition and levying the tax; that parties cannot be silent when they should speak, and be permitted to speak when they should be silent; that having neglected and refused to avail themselves of the opportunity of defenses given them by law, both before the board and by appeal, they will not be allowed now to litigate these questions by an injunction."

One who appeals from an assessment of taxes to the board of county commissioners, under the Colorado statute, ch. 94, § 62, on the ground that the tax was illegal, is not thereby precluded from referring to the courts and testing the validity of such taxes by an action to recover taxes paid under protest. *Board of County Comrs. v. Wilson*, 15 Colo. 90, 24 Pac. 563.

The failure of a guardian, who was also a member of the board of review, while sitting as such, to object to an assessment on the property of his ward as illegal, does not operate to estop the ward from contesting the legality of the tax. *Barstow v. Big Rapids*, 56 Mich. 35, 22 N. W. 103.

were regular in all respects is one as to which the court will very generally permit inquiry.⁶³

Mere Irregularities Not Enough. — But proof of mere irregularities in the proceedings of such officers is not enough,⁶⁴ as for example, mere clerical inaccuracies.⁶⁵

The Fact That an Assessor Was Not Sworn by the proper officer cannot be shown as a defense to an action to enforce collection of delinquent taxes.⁶⁶

63. *State v. Sadler*, 21 Nev. 13, 23 Pac. 799; *Carrington v. People*, 195 Ill. 484, 63 N. E. 163; *Macomber v. Center*, 44 Vt. 235. And see cases cited in succeeding notes of this section.

64. *Idaho*. — *Murphy v. Board of Equalization*, 6 Idaho 745, 59 Pac. 715.

Illinois. — *Sanderson v. La Salle*, 117 Ill. 171, 7 N. E. 114; *People ex rel. Baker v. Chicago & A. R. Co.*, 140 Ill. 210, 29 N. E. 730.

Indiana. — *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962.

Kentucky. — *Southern Warehouse & T. Co. v. Mechanics Tr. Co.*, 21 Ky. L. Rep. 1734, 56 S. W. 162.

Maine. — *Rowe v. Friend*, 90 Me. 241, 38 Atl. 95; *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109; *Rogers v. Greenbush*, 58 Me. 390.

Michigan. — *Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881; *Pioneer I. Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700.

Minnesota. — *State v. West Duluth Land Co.*, 75 Minn. 456, 78 N. W. 115; *Minneapolis T. R. Co. v. Minnesota D. Co.*, 81 Minn. 66, 83 N. W. 485.

Mississippi. — *Brigins v. Chandler*, 60 Miss. 862.

Missouri. — *State v. Phillips*, 137 Mo. 259, 38 S. W. 931; *Thomas v. Chapin*, 116 Mo. 396, 22 S. W. 785;

Nevada. — *State v. Sadler*, 21 Nev. 13, 23 Pac. 799.

New Hampshire. — *Sawyer v. Gleason*, 59 N. H. 140.

New Jersey. — *State v. Runyon*, 41 N. J. L. 98; *State v. Taylor*, 35 N. J. L. 184.

Vermont. — *Henry v. Chester*, 15 Vt. 460.

In an action against lands to obtain judgment for delinquent taxes, the defendant cannot defeat the judgment by showing mere formal ob-

jections not affecting unjustly his right as a citizen and taxpayer. *Indianapolis & St. L. R. Co. v. People*, 130 Ill. 62, 22 N. E. 854.

In an equitable proceeding to foreclose a lien for taxes, the court will not consider questions which go only to the manner of the assessment or levy of the taxes in question or other irregularity or informality in the proceedings. *Roads v. Estabrook*, 35 Neb. 297, 53 N. W. 64.

If the assessment of a taxpayer's land is impartial, equal and fair, compared with the average valuation of other lands generally (except particular omitted or undervalued tracts) in the same taxing district, the fact that certain particular properties have been intentionally and wilfully omitted from the tax lists, or intentionally and wilfully undervalued, is no defense, either partial or total, to the application of the state for judgment for the amount of taxes levied against the land. *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970.

65. *Rowe v. Friend*, 90 Me. 241, 38 Atl. 95; *Peterson v. First Nat. Bank*, 8 Kan. App. 508, 56 Pac. 146; *Wilmot v. Lathrop*, 67 Vt. 671, 32 Atl. 861.

Where an election for the purpose of levying taxes has been held and the tax imposed, the burden is on the taxpayer who resists its collection to show that the election was void. Proof of a mere irregularity is not sufficient to authorize the interposition of equity to prevent the imposition of a burden the taxpayer has assumed for the purpose of aiding the public interest. *Trustees v. Garvey*, 80 Ky. 159.

66. In *Sullivan v. State*, 66 Ill. 75, the court said: "The statute prescribes that every town assessor before he enters upon the duties of

The Fact That an Assessor Failed To Attach His Oath to, or return the same with, the assessment roll, is a mere irregularity, not invalidating the tax.⁶⁷

(2.) **Presumptions and Burden of Proof.**—(A.) **GENERALLY.**—The general rule is that in the absence of evidence to the contrary it will be presumed that the taxing officers proceeded regularly and performed their duties within the law and in obedience to its mandate,⁶⁸ and hence where the collection of taxes is sought to be avoided on the ground that there existed in the proceedings by the taxing officers such irregularities or defects as vitiated the tax, the burden of

his office shall take and subscribe an oath, etc. The principle is well settled that the acts of officers *de facto* are as valid and effectual when they concern the public or the rights of third persons as though they were officers *de jure*, and the title to their office cannot be inquired into collaterally.”

67. *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090. In this case the court said: “It was not necessary to show that the assessor took the oath which the statute made it his duty to take. He was a public officer, and it will be presumed, in the absence of evidence to the contrary, that he proceeded regularly and performed his official duties within the law and in strict obedience to its mandate. The fact that the oath was not annexed to the assessment book is of slight consequence and altogether insufficient to overthrow the presumption that the oath was taken.” See also *Twinting v. Finlay*, 55 Neb. 152, 75 N. W. 548.

Compare *Grand Forks County v. Fredericks* (N. D.), 112 N. W. 839, holding that the absence of a verification from the assessment roll may be shown by way of defense in a proceeding for the collection of an unpaid tax under the provisions of the North Dakota Stat. ch. 161, p. 213, laws of 1903.

68. *Alabama.*—*State Auditor v. Jackson County*, 65 Ala. 142, 166; *Perry County v. Selma M. & C. R. Co.*, 58 Ala. 546.

Arkansas.—*Moore v. Turner*, 43 Ark. 243.

Colorado.—*Boston & C. Smelt. Co. v. Elder*, 20 Colo. App. 96, 77 Pac. 258.

Connecticut.—*State v. New York*,

N. H. & H. R. Co., 60 Conn. 326, 22 Atl. 765.

Illinois.—*In re Maple Wood Coal Co.*, 213 Ill. 283, 72 N. E. 786; *Weber v. Baird*, 208 Ill. 209, 70 N. E. 231; *Mix v. People ex rel. Shaw*, 81 Ill. 118, *Pike v. People ex rel. Miller*, 84 Ill. 80; *People v. Givens*, 123 Ill. 352, 15 N. E. 23; *Mix v. People ex rel. Swigert*, 86 Ill. 312; *Keokuk & H. Bridge Co. v. People*, 160 Ill. 132, 43 N. E. 691; *Carrington v. People*, 195 Ill. 484, 63 N. E. 163; *Mix v. People*, 116 Ill. 265, 4 N. E. 783.

Indiana.—*Fell v. West*, 35 Ind. App. 20, 73 N. E. 719; *Brunson v. Starbuck*, 32 Ind. App. 457, 70 N. E. 163; *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162; *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8.

Iowa.—*Silcott v. McCarty*, 62 Iowa 161, 17 N. W. 460; *In re Kauffman's Estate*, 104 Iowa 639, 74 N. W. 8.

Kentucky.—*Oldhams v. Jones*, 5 B. Mon. 458; *Butler v. Watkins*, 16 Ky. L. Rep. 302, 27 S. W. 995.

Louisiana.—*Oteri v. Parker*, 42 La. Ann. 374, 7 So. 570.

Maryland.—*Consolidated Gas Co. v. Baltimore*, 101 Md. 541, 61 Atl. 532.

Michigan.—*Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881; *Auditor General v. Hutchinson*, 113 Mich. 245, 71 N. W. 514; *Silsbee v. Stockle*, 44 Mich. 561, 7 N. W. 160, 367; *Yelverton v. Steele*, 36 Mich. 62; *Auditor General v. Ayer*, 109 Mich. 694, 67 N. W. 985; *Mills v. Richland Twp.*, 72 Mich. 100, 40 N. W. 183.

Missouri.—*State ex rel. Gottlieb v. Western Union Tel. Co.*, 165 Mo. 502, 65 S. W. 775.

Nebraska.—*Adams v. Osgood*, 60

proving such defects or irregularities is on the party asserting their

Neb. 779, 84 N. W. 257; *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090.

Nevada.—*State v. Meyers*, 23 Nev. 274, 46 Pac. 51.

New York.—*People v. McComber*, 7 N. Y. Supp. 71; *In re Peek*, 80 Hun 122, 30 N. Y. Supp. 59.

Pennsylvania.—*Von Storch v. Scranton City*, 3 Pa. Co. Ct. 567.

South Dakota.—*Bandow v. Wolven*, 107 N. W. 204.

Vermont.—*Spear v. Tilson*, 24 Vt. 420; *Macomber v. Center*, 44 Vt. 235; *Brock v. Bruce*, 58 Vt. 261, 2 Atl. 598.

Where there is nothing to show the date of filing an assessment list with the county clerk as required by law, it will be presumed to have been filed on the day of the date of the assessor's affidavit attached thereto. *Moore v. Turner*, 43 Ark. 243.

A township tax exceeding the amount voted by the township may be sustained on the presumption that the township board had exercised its statutory right and increased the amount in the absence of any showing to the contrary. *Silsbee v. Stockle*, 44 Mich. 561, 7 N. W. 160, 367.

Under the statute allowing three days for review of the assessment roll, where the sessions are not required to last later in the day than five o'clock in the afternoon, the fact that the supervisors certificate to the roll is dated on the last review day does not necessarily show that it was premature, since it would be competent for him to attach his certificate on that day after the hour specified; it must be presumed in favor of official regularity that he did not attach his signature prematurely. *Yelverton v. Steele*, 36 Mich. 62.

Where the tax collector's book shows a charge of unpaid personal property tax against particular parcels of land, it will be presumed that such charge became necessary because the tax could not be made out of personal property. *Shelbyville Water Co. v. People*, 140 Ill. 545, 30 N. E. 678; *Cairo, V. & C.*

R. Co. v. Mathews, 152 Ill. 153, 38 N. E. 623.

Where a statute requires that a board of equalization shall keep a record of their proceedings, which shall be signed by all the members present, and it appears from the evidence that when the board entered upon its duties all were present, and yet only two of their three names are signed to the record, it will be presumed, in support of the correctness of their conduct, that before their labors were completed one of the members absented himself, and that the record was in fact signed by all the members present at the time. The court said: "The making and signing a record of their proceedings is an official duty, which the law casts on these officers—a duty covered by their official oaths—and it is presumption of law that sworn officers do their duty." *State Auditor v. Jackson County*, 65 Ala. 142, 166.

In Virginia, the statute provides as follows: "Be it enacted by the general assembly, That it shall be lawful, and authority is hereby given to the supervisors of a county, to levy a tax on the roadway and track, depots, depot grounds and lots, station buildings, and other real estate of a railroad company whose road passes through such county. Such tax shall be equal to the tax imposed upon other property for county and school purposes, and based upon the assessment per mile of the same property made by the state for its purposes." County supervisors are hereby authorized to levy a tax on railroad property in their county at no time after the passage of this act based on the state assessment made previous to its passage. *Held*, that where the levy recites the fact that it was based on an assessment in accordance with the statute, the presumption is that the levy is legal. *Norfolk & W. R. Co. v. Supervisors*, 87 Va. 521, 12 S. E. 1009.

In Rhode Island, the provision of general laws, ch. 46, § 6, that before assessing a tax the assessors shall post up printed notices of the time

existence.⁶⁹ Thus it will be presumed that the board of equaliza-

and place of their meeting in three public places in the town for three weeks next preceding the time of their meeting is mandatory. Hence, in an action by a collector to recover a tax assessed against personal property, the burden is upon the plaintiff to prove compliance with the statute by positive evidence. *Taft v. Ballou*, 23 R. I. 213, 49 Atl. 895.

69. *Brunson v. Starbuck*, 32 Ind. App. 457, 70 N. E. 163; *State ex rel. Gottlieb v. Western Union Tel. Co.*, 165 Mo. 502, 65 S. W. 775; *In re Peek*, 80 Hun 122, 30 N. Y. Supp. 59; *Fell v. West*, 35 Ind. App. 20, 73 N. E. 719; *In re Maple Wood Coal Co.*, 213 Ill. 283, 72 N. E. 786; *Louisville Tank Line v. Com.*, 29 Ky. L. Rep. 257, 93 S. W. 635; *City of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264.

On an application for judgment against lands for delinquent taxes, the collector is not bound to prove that the land was regularly assessed since it will be presumed that the assessor and all other officers did their duty, and, if any reasons exist why judgment should not be rendered against the land it is for the land owner to show it. *Carrington v. People*, 195 Ill. 484, 63 N. E. 163.

In *Macomber v. Center*, 44 Vt. 235, which was an action of assumpsit to recover certain taxes assessed against the defendant, the question was raised by defendant as to the legality of notice given to defendant of said assessments. It was held that where the grand list is regular on its face it is to be presumed to be correct until the contrary is shown; therefore the onus is upon the defendant to impeach the regularity and legal validity of the list. But if the plaintiff, who was the collector, volunteers to fortify this presumption in his favor, and calls the listers to prove notice to the defendant of the assessment, such evidence, so far as it has a tendency to disprove the legal presumption that the defendant had notice in fact, should be submitted to the jury.

In *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, the ques-

tion was whether the state board of California had included within the assessment of defendant in error certain fences along its right of way that the board had no power to assess against it. No record of the assessment as made by the board was introduced, and no other documentary evidence of such assessment was offered, except the official communication of said board to the local assessor, which showed only the aggregate valuation of the company's franchise, roadway, roadbed, rails and rolling stock. The trial court made a special finding, in which it found that the said board "did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said railway and the land of coterminous proprietors." In passing upon the question thus presented the supreme court, at page 415, said: "It appears, as already stated, from the evidence, that the fences were included in the valuation of the defendant's property; but under what head, whether of franchise, roadway, or roadbed, does not appear. Nor can it be ascertained, with reasonable certainty, either from the assessment roll or from other evidence, what was the aggregate valuation of the fences, or what part of such valuation was apportioned to the respective counties through which the railroad was operated. If the presumption is that the state board included in its valuation only such property as it had jurisdiction under the state constitution to assess, namely, such as could be classified under the heads of franchise, roadway, roadbed, rails or rolling-stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of these heads, the fence in question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming for the purpose of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty

tion held annual sessions at the time required by law;⁷⁰ that the tax collector filed the delinquent list within the time required by law.⁷¹ It will be presumed that specific taxes were placed upon the duplicate in the treasurer's hands by the county auditor, whose duty it is to do so.⁷²

The presumption that public officers do their duty cannot, in an action against a corporation to recover delinquent taxes, be invoked for the purpose of proving the essential fact that the principal office of the corporation is in the municipality where the taxes were assessed, and in which the clerk extended them. Such an action being a statutory action, it devolves upon the plaintiff to prove the facts specified in the statute necessary to render the defendant liable in an action of this character.⁷³

(B.) THE LEVY. — Thus it will be presumed that ordinances making appropriations and levying taxes were passed in conformity to law, and that the city tax was properly levied and extended.⁷⁴ So, too, it will be presumed that the levying officers, in fixing the levy, did not exceed the rate allowed by law.⁷⁵ Where the tax bills are

of tendering, or enabling the court to render judgment for, such amount, if any, as was justly due." It was further held by the court that the whole assessment was invalid, as it could not be determined what was the amount of that part of the assessment that was valid.

70. *Adams v. Osgood*, 60 Neb. 779, 84 N. W. 257.

71. *Mix v. People ex rel. Shaw*, 81 Ill. 118.

72. *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162.

73. *Twin City Gas Works v. People*, 156 Ill. 387, 40 N. E. 950.

74. *Keokuk & H. Bridge Co. v. People*, 160 Ill. 132, 43 N. E. 691; *Berry v. San Antonio* (Tex. Civ. App.), 46 S. W. 273.

75. *In State v. Nevada Cent. R. Co.*, 28 Nev. 186, 81 Pac. 99, which was an action brought by the state to collect taxes on real property of the defendant corporation situated in Lander county, it was contended by defendant that the tax levied in that county for the year 1902, the year in question, was illegal because in excess of the rate authorized by law. The court said: "The defendant further contends that the levy of \$1.57 for county purposes on each hundred dollars of valuation made the whole levy void under the following provision of the revenue

act: 'The board of county commissioners in each county of this state are hereby authorized and empowered to levy annually on or before the first Monday in March an ad valorem tax for county purposes not exceeding the sum of \$2 on each hundred dollars value of taxable property in the county, and such special taxes as may be authorized and required by law, provided the total tax levied in one year for all purposes shall not exceed \$5 on each hundred dollars value of taxable property in any county or part thereof, provided no levy in excess of \$1.50 on each hundred dollars valuation of taxable property therein shall be so levied in any county of this state for county purposes unless the county is indebted for liabilities contracted prior to January 1st next preceding the making thereof and not bonded or funded.' It was not shown that the county was not indebted for liabilities contracted prior to 1901, and the presumption is in favor of official action and the levy. This makes it unnecessary to determine whether such levy would have been invalid if it had been shown that no such prior indebtedness existed."

A contestant of an application for judgment on a school tax must, in order to show that the levy was in

properly authenticated it must be presumed that the publication of the ordinances under which the taxes were laid was duly made.⁷⁶

(C.) OATH OF ASSESSOR. — In the absence of evidence to the contrary, the presumption is that the assessing officer did his duty and qualified by taking the required oath as provided by law.⁷⁷

(D.) LISTING TAXABLE PROPERTY. — It will be presumed that the listing of the taxable property was done in the regular manner;⁷⁸ and that the assessor has complied with the statute requiring him, before a specified time, to complete the assessment roll, containing a list of all the taxable property in his jurisdiction, duly verified.⁷⁹

(E.) NAMING THE TAXPAYER. — So, too, it will be presumed that the assessing officers properly performed their duty in respect of naming the taxpayer in the assessment.⁸⁰

(F.) AUTHENTICATION OF RETURN OF ASSESSMENT. — In the absence of evidence to the contrary it will be presumed that the assessing officers authenticated the return of the assessment in the form and manner required by law.⁸¹

(G.) ASSESSMENT FOR ESCAPED TAXES. — Where a tax assessor, in the line of his official duty, makes an assessment of property for escaped taxes, the presumption is in favor of the correctness of the assessment list and return thereof.⁸²

excess of the amount authorized by law, show that fact by the levy itself, and for this purpose, the record of the school board showing merely an estimate is not admissible. *English v. People*, 96 Ill. 566.

76. *Fonda v. Louisville*, 20 Ky. L. Rep. 1652, 49 S. W. 785; *Powell v. Louisville (Ky.)*, 52 S. W. 798.

77. *Carman v. Harris*, 61 Neb. 635, 85 N. W. 848.

Where the oath of the assessor to an assessment roll is taken before the county clerk and the roll thereupon filed in his office, the want of venue will not vitiate the oath, the presumption being that it was administered within the officer's jurisdiction. *Merriam v. Coffee*, 16 Neb. 450, 29 N. W. 389.

78. *Pentecost v. Stiles*, 5 Okla. 500, 49 Pac. 921.

Where a personal property tax appears on the tax list of a certain township, it will be presumed, in the absence of any evidence to the contrary, to have been placed there at the proper time and by lawful authority. *Silcott v. McCarty*, 62 Iowa 161, 17 N. W. 460.

79. *State v. Meyers*, 23 Nev. 274, 46 Pac. 51.

80. *Blatner v. Davis*, 32 Cal. 328;

Griffin v. Tuttle, 74 Iowa 219, 37 N. W. 167; *Corning Town Co. v. Davis*, 44 Iowa 622; *Moale v. Baltimore*, 61 Md. 224.

A slight error in the name of a taxpayer made by the assessor, when the property is correctly described and the owner is not misled by the name, will not avoid the owner's liability for taxes, provided he can be identified by competent testimony. *State v. Diamond Val. Live Stock & Land Co.*, 21 Nev. 86, 25 Pac. 448.

81. *Kellar v. Savage*, 20 Me. 199; *Bird v. Perkins*, 33 Mich. 28; *Silabee v. Stockle*, 44 Mich. 561, 7 N. W. 160, 367; *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090; *Carman v. Harris*, 61 Neb. 635, 85 N. W. 848; *Colman v. Shattuck*, 62 N. Y. 348; *Brock v. Bruce*, 58 Vt. 261, 2 Atl. 598.

82. *State v. Kidd*, 125 Ala. 413, 28 So. 480.

Where an action is brought to enjoin a county treasurer from enforcing the collection of certain taxes arising out of assessments made by the county auditor on certain personal property consisting of money, notes secured by mortgage and other credits belonging to plaintiff, which it is claimed by the auditor he had

(3.) **Documents Made Prima Facie Evidence by Statute.**—In many of the states the tax statutes provide that in a proceeding to enforce the collection of taxes against the property of the taxpayer as a personal liability, certain documents, such as the warrants, duplicates, tax lists, collectors' returns, and the like, are *prima facie* evidence of the right to recover,⁸³ imposing upon the defendant the burden

omitted to list and return for taxation, all presumptions are in favor of the correctness of the assessment made by the auditor, and these presumptions continue until the contrary is affirmatively shown by the evidence. If the auditor instead of assessing omitted property transcended his power by increasing the value of that which the assessor had placed upon property returned by appellee, then the burden is cast upon the latter in this action to prove that fact. *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109.

Compare, Butler v. Watkins, 16 Ky. L. Rep. 302, 27 S. W. 995, an action by a sheriff against executors for taxes on property alleged to have been omitted from the list of taxable property filed by their testator, where it is held that the burden of showing that deceased owned the property during the years for which the taxes are claimed is on the sheriff.

In *Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512, it is held that in order to sustain a claim for taxes on property alleged to have been omitted from assessments for previous years there must be some evidence as to what property the taxpayer had during those years.

^{83.} *Ketchum v. Pacific R. Co.*, 4 Dill. 41, 14 Fed. Cas. No. 7738.

Maish v. Territory, 164 U. S. 599, affirming 4 Ariz. 186, 37 Pac. 370. In this case the statutes of Arizona provided that the delinquent tax list is *prima facie* evidence that the "taxes therein are due against the property." On the trial, a printed copy of the delinquent list, and not the original filed in the office of the county treasurer, was introduced in evidence, to which various objections were made, but not that the original was the best evidence and should have been produced, nor that the printed list was not a true copy. The court

said: "Conceding without deciding that properly in an action like this the original list should be offered in evidence, nevertheless we are of opinion that the appellants cannot now take advantage of this. They did not in their objections point out wherein the delinquent list was incorrectly published and they made no objection to the admission in evidence of such published list on the ground that the original had not first been offered or that the published list was different from the original. It might be that in a description of other property or the taxes charged thereon there were such mistakes as to defeat the proceedings as to such property, or in reference to other property and the taxes charged thereon there was some trifling inaccuracy so as to make it true that a published list was not a copy of the original, but it would not follow therefrom that they were entitled to a judgment. *De minimus non curat lex* might uphold the publication. As they were called upon in the challenge of these taxes to point out specifically their objections, and as they did not show wherein the published list differed from the original, we cannot assume that the variance, if any there were, was sufficient to affect their substantial rights. While in a general sense it may be true that in such a proceeding the Territory is a plaintiff and is called upon to prove its case, yet the presumption which by the statute attached to the regularity of the proceedings and the duty cast upon the objectors to specifically point out the defects forbid our disturbing the judgment upon such technical ground when apparently an afterthought and not affecting the substantial rights of the appellants.

Alabama.—*State v. Kidd*, 125 Ala. 413, 28 So. 480.

California.—*Modoc County v. Churchill*, 75 Cal. 172, 16 Pac. 771;

City of Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410; Lake County *v.* Sulphur Bank, Q. S. M. Co., 66 Cal. 17, 4 Pac. 876; Los Angeles *v.* Glassell (Cal. App.), 87 Pac. 241.

Illinois.—Drennen *v.* People, 222 Ill. 592, 78 N. E. 937; Carney *v.* People, 210 Ill. 434, 71 N. E. 365; Andrews *v.* People, 75 Ill. 605; Mix *v.* People *ex rel.* Shaw, 81 Ill. 118; Pike *v.* People *ex rel.* Miller, 84 Ill. 80; Hosmer *v.* People, 96 Ill. 58; Mix *v.* People, 116 Ill. 265, 4 N. E. 783; People *v.* Givens, 123 Ill. 352, 15 N. E. 23; Consolidated Coal Co. *v.* Baker, 135 Ill. 545, 26 N. E. 651; Mahany *v.* People *ex rel.* County Collector, 138 Ill. 311, 27 N. E. 918; Chiniquy *v.* People, 78 Ill. 570; People *ex rel.* Baker *v.* Chicago & A. R. Co., 140 Ill. 210, 29 N. E. 730; Scott *v.* People *ex rel.* Douglas, 142 Ill. 201, 33 N. E. 180; Chicago & N. W. R. Co. *v.* People *ex rel.* Gilmore, 183 Ill. 196, 55 N. E. 643.

In Fisher *v.* People, 84 Ill. 491, the court noted the fact that this statute had been construed as working a radical change in the policy of the law with respect to judgments for delinquent taxes, and rendering inapplicable all former decisions holding to great strictness and literalness in following the language of the statute in such cases.

Kentucky.—Tax bills authenticated by the assessor make out a *prima facie* case that all the steps have been taken to make a binding tax-bill for the amounts and purposes and against the person and property therein described, and impose upon the taxpayer the burden then of proving that the proper steps were not taken. Fonda *v.* Louisville, 20 Ky. L. Rep. 1652, 49 S. W. 785; Sherley *v.* Louisville, 21 Ky. L. Rep. 945, 53 S. W. 530; City of Louisville *v.* Johnson, 95 Ky. 254, 24 S. W. 875; Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893.

In an action by a city to recover for delinquent taxes, although the original tax bill may have been lost another bill made by the assessor by his record and certified to as provided under the statute, makes out a *prima facie* case for the city as fully as the one first made out. And in Woolley *v.* Louisville, 114 Ky.

556, 71 S. W. 893, the court said: "There is nothing in the language of the statute limiting its operation to the bill first made out by the assessor and certified by him. The legislative purpose was to make the bills duly authenticated by the assessor, over his signature or a stamped fac simile thereof, *prima facie* evidence. It is the official certificate of the officer that gives the bill this character, and when the original is lost we see no reason why the same effect should not be given to a duplicate of it, made out and certified by the officer and proved by him to be a correct duplicate."

Michigan.—Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689 (tax roll *prima facie* evidence); City of Muskegon *v.* S. K. Martin Lumb. Co., 86 Mich. 625, 49 N. W. 489; Wattles *v.* Lapeer, 40 Mich. 624.

In Putman *v.* Fife Lake Twp., 45 Mich. 125, 17 N. W. 699, the statute provided that where a personal tax was returned for nonpayment the township treasurer might sue therefor, and that proof of the tax-roll and warrant were *prima facie* evidence of the legality of the assessment; but it was held that a certificate that "the foregoing is a true transcript of the tax-roll . . . and the warrant thereto attached" did not cover a return endorsed upon the transcript, and that the whole document should have been excluded on objection if the offer was made as a unit and embraced the tax-roll, warrant and return together.

Minnesota.—Under the statutes in force in that state, the introduction in evidence of the list of delinquent personal property taxes, showing the levy of such taxes for the year in question, establishes a *prima facie* case, it being *prima facie* evidence that all the provisions of law in relation to the levy and assessment of the taxes had been complied with. State *v.* Backus-Brooks Co., 102 Minn. 50, 112 N. W. 863; State *v.* Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567.

In County of Olmsted *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944, it was held that in proceedings to enforce payment of taxes against real

of giving evidence recognized as competent and sufficient to defeat such right of recovery.⁸⁴

estate under Gen. Stat. 1878, ch. 11, the list filed with the clerk is, not only as to the taxes become delinquent in the current year, but as to all authorized to be placed upon it, *prima facie* evidence of the validity of the tax; but where there are on it taxes for prior years, the facts authorizing their insertion in the list must be proved. In the cases provided for in § 97 of the chapter, as amended, (laws 1881, ch. 10, § 19), the tax for any prior year may be inserted in the list, though there be no tax becoming delinquent in the current year.

Missouri.—State *ex rel.* Bauer v. Edwards, 162 Mo. 660, 63 S. W. 388; State *ex rel.* Hopkins v. Brown Tobacco Co., 140 Mo. 218, 41 S. W. 776; State *ex rel.* Morris v. Cunningham, 153 Mo. 642, 55 S. W. 249; State *ex rel.* Gibson v. Davis, 131 Mo. 457, 33 S. W. 22; State *ex rel.* Wyatt v. Hoyt, 123 Mo. 348, 27 S. W. 382.

Nebraska.—Mutual Ben. L. Ins. Co. v. Daniels, 67 Neb. 91, 93 N. W. 134; Ure v. Reichenberg, 63 Neb. 899, 89 N. W. 414. Compare Merrill v. Wright, 41 Neb. 351, 59 N. W. 787.

A tax-list made in conformity with the provisions of the statute is *prima facie* evidence that a levy of taxes was made by the proper authorities, and is conclusive as against a claim of irregularities in making the levies. Holthaus v. Adams (Neb.), 105 N. W. 632.

In an action to enforce the collection of delinquent taxes and assessments on real estate under the Nebraska statute commonly known as the "Scavenger Act" (Comp. Stat. 1905, p. 77, art. 9), the petition shall be deemed and taken to be *prima facie* evidence of the legality of all taxes and assessments set forth therein and of the several amounts levied on behalf of the state, county or city in which the lands are situated, and that such taxes and assessments are unpaid and delinquent. State v. Several Parcels of Land (Neb.), 111 N. W. 367.

Nevada.—State v. Manhattan S. Min. Co., 4 Nev. 318; State v. Sadler, 21 Nev. 13, 23 Pac. 799.

Where in an action to collect delinquent taxes the state has put in evidence the delinquent tax list which by statute is made *prima facie* evidence of the assessment, it need not be proved that the board of county commissioners had authority to levy the tax or introduce evidence of such levy, it being incumbent on the defendant in order to successfully attack the levy to introduce the proceedings of the board making it, and specifically point out its illegal features and fatal defects. State v. Nevada Cent. R. Co., 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042.

Texas.—Figures v. State (Tex. Civ. App.), 99 S. W. 412. And see Clegg v. Galveston County, 1 White & W. Civ. Cas. § 60.

Where an action was brought by a city to recover taxes, it was held that under the provisions of the city charter making the tax rolls or a certified statement from said rolls, signed by the city assessor, *prima facie* evidence "that the tax on the property is due and that the facts stated therein are true and that all prerequisites required by law pertaining to the levying and assessing of the tax on property on which the suit is brought for the taxes due, have been complied with," the city was not required to do more than introduce the tax rolls, and unless the defendant could then show said rolls were illegally prepared or should show that the prerequisites of the assessment and levy of the taxes had not been complied with, the plaintiff's case would be made out for the taxes shown to be due by said rolls. City of Houston v. Stewart (Tex. Civ. App.), 90 S. W. 49.

84. Illinois.—Mix v. People *ex rel.* Shaw, 81 Ill. 118; Durham v. People, 67 Ill. 414; Consolidated Coal Co. v. Baker, 135 Ill. 545, 26 N. E. 651; People *ex rel.* Baker v. Chicago & A. R. Co., 140 Ill. 210, 29 N. E. 730; Chiniquy v. People, 78

Constitutionality of Statutes.—These statutes have been upheld as constitutional.⁸⁵

(4.) **Evidence To Contradict or Supply Record of Proceedings.**—As in the case of records of public officers, generally, so in the case of the record of the taxing officers, parol evidence cannot in a collateral action be received for the purpose of contradicting them,⁸⁶ except, of course, for the purpose of invalidating the proceedings evidenced

Ill. 570; *Keokuk & H. Bridge Co. v. People*, 161 Ill. 132, 43 N. E. 691; *Chicago & N. W. R. Co. v. People ex rel. Gilmore*, 183 Ill. 196, 55 N. E. 643; *Sholl v. People ex rel. Cress*, 194 Ill. 24, 61 N. E. 1122.

Minnesota.—*State v. Backus-Brooks Co.*, 102 Minn. 50, 112 N. W. 863; *State v. Western Union Tel. Co.*, 96 Minn. 13, 104 N. W. 567.

It is the doctrine of this court, repeatedly announced, that, under the statute, the collector's sworn report of the list of delinquent lands, together with proof of publication thereof and notice of application, make a *prima facie* case, and that judgment is to be entered thereon, unless good cause is shown to the contrary, and that if there be any valid objections not appearing on the face of said delinquent list, notice, and proof of publication, it is for the landowner to point them out and make them appear. In this respect there is no difference between these special assessments and any other tax authorized by law. The collector having made a *prima facie* case, if there were irregularities, or valid reasons why this tax was not legally assessed, the burden was upon defendants in error to establish such irregularity or illegality. *People v. Givens*, 123 Ill. 352, 15 N. E. 23.

85. Constitutionality of Statute. *Woolley v. Louisville*, 114 Ky. 556, 71 S. W. 893; *Burbank v. People ex rel. Rumsey*, 90 Ill. 554.

The Illinois revenue law making the collector's return of delinquent tax list *prima facie* evidence in a proceeding to enforce collection thereof, that all requirements of law have been complied with in the assessing and levying of taxes therein returned as unpaid, is not unconstitutional as giving the collector judicial power to question the de-

linquency. *Andrews v. People*, 75 Ill. 605.

86. *State v. Crookston Lumb. Co.*, 85 Minn. 405, 89 N. W. 173.

Parol evidence is not admissible to prove that the entry in the county commissioners' record properly signed and attested, was placed there without their authority. *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664, *holding* further, that it is wholly immaterial who prepared the entry, or if it was prepared with or without the authority of the board of commissioners; that if they adopted and passed it, it was as effectual as if it had been prepared by their order.

In *Gaither v. Green*, 40 La. Ann. 362, 4 So. 210, it was held that the minutes of the proceedings of the board of commissioners of the fifth levee district wherein a five miles district levee tax appears to have been levied, are to be taken as of unquestionable verity and are not to be attacked and proof entered into in a collateral proceeding to which said commissioners are not made parties to show that they are false. Parol evidence in a collateral action cannot be received to contradict the records of a public corporation which are required by law to be kept in writing, or to show a mistake in the matters therein recorded.

Where the statute requires the tax collector in case of the loss of his records to make his return of delinquent taxes "from the best information that he can obtain," the effect of such statute is to make the collector the sole judge of the sources and sufficiency of the information, and on an application for judgment the objecting taxpayer cannot impeach his report by showing that he did not in fact make his report from the best information he could obtain, and that he did not know what he returned to be true;

thereby.⁸⁷ Nor can such evidence be received for the purpose of showing a proceeding required by law to be made a matter of record.⁸⁸ But such evidence may be received to prove a fact con-

although evidence that his return was not true, in fact, may be received. *Andrews v. People*, 75 Ill. 605.

Where the record showed that at a school district meeting "it was voted that the district build a new schoolhouse; sixteen for and eleven against it," and evidence was offered in a tax case growing out of the action of the district in respect to said schoolhouse, to prove that seven of the sixteen who voted in the affirmative in that vote were not legal voters in that school district, it was held that the evidence was properly rejected. The records of the proceedings of municipal corporations cannot be collaterally attacked and overthrown in a suit at law. *Eddy v. Wilson*, 43 Vt. 362.

In a proceeding to annul an order of a board of equalization increasing the assessed valuation of certain property belonging to petitioner, it is competent to show by evidence other than the minutes of the board, who were the president, secretary and managing agent of the petitioner, and that the property was originally assessed to it. Such evidence does not contradict the record of the board, but shows that it acted within its jurisdiction in making the order complained of. *Allison Ranch Min. Co. v. Nevada County*, 104 Cal. 161, 37 Pac. 875.

⁸⁷ Proof of the failure of the chairman of a board of supervisors to sign the record of the board in relation to the equalization of the assessment roll and apportionment of taxes during his term of office is sufficient to invalidate the tax proceeding. *Auditor General v. Hill*, 97 Mich. 80, 56 N. W. 219.

In *State v. Aldridge*, 66 Ohio St. 598, 64 N. E. 562, the contention was as to how certain railroad property should be assessed; whether according to the mileage or a percentage basis. Under the statute (§ 2774 Rev. Stats.) it was claimed by those in favor of the percentage basis of distribution that that method was

ordered by the board of auditors at its meeting, and the minutes of the secretary were in accordance with this claim. On the other hand, it was claimed that only the valuation of the rolling stock was fixed by the board, and then the secretary was to make inquiry as to the legality of distributing by percentage basis, and make such distribution if found to be legal, and that such secretary found the method to be legal and made the distribution accordingly. The master to whom the case was referred found this latter contention to be true, and that the minutes of the secretary did not correctly state what actually occurred at the meeting. Upon the question as to whether or not parol evidence was admissible to contradict the record of the board of auditors, the court said: "Defendants urged that the minutes of the meeting of the auditors is a record conclusive in its nature, and that proof cannot be received to show the real facts as such proof would be contradicting the record. This claim is not tenable. In matters of taxation the real facts may be shown even though such facts add to or contradict the record of a taxing board."

⁸⁸ *State v. Central Pac. R. Co.*, 17 Nev. 259, 30 Pac. 887. This action was brought to recover judgment against the defendant corporation for taxes assessed against it. At the trial of the case it appeared that the minutes of the board of county commissioners, sitting as a board of equalization, failed to show that any complaint had been made by the defendant to the assessors' valuation of its property. This being a jurisdictional fact, it devolved upon defendant contending that the assessment should have been reduced, to show that such complaint had been made. For the purpose of proving this fact the defendant offered the commissioners themselves as witnesses. The court excluded their testimony. *Held*, properly so. The statute requires that a full and com-

sistent with the record, which the record need not and does not show.⁸⁹

The Record of the Levy Is Conclusive Evidence as to all matters properly stated therein.⁹⁰

c. *Want of Authority To Tax*. — A tax may be defeated by evidence showing that the officers were without authority to levy it.⁹¹

d. *Description of Property*. — (1.) **Generally**. — The general rule is that, for purposes of taxation, any description of the land by which it can be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient to sustain the assessment.⁹²

(2.) **Aiding Description**. — Each description need not necessarily be complete in and of itself; if it can be made certain by recourse

plete record of all the proceedings of the board of county commissioners shall be kept, and that all their proceedings shall be entered in the records. (§3074 Comp. Laws.) Where such a requirement exists the record is the proper evidence of the official doings of the board.

89. An attempt by county commissioners, when making their estimate of the taxes necessary to be raised for county purposes, to set apart, as a separate and distinct fund, the amount estimated by them to be necessary for roads, will not affect the validity of the estimate, nor of the tax levy based on it. Where, in such estimate, there was entered in the records of the board a gross item of \$8,000 as a county road fund, it is competent to prove by parol that in such gross item there was included an item of \$4,000 for a particular road. Board of Comrs. v. Nettleton, 22 Minn. 356.

90. West v. Whitaker, 37 Iowa 598; First Nat. Bank v. Concord, 50 Vt. 257. See also Rice v. Walker, 44 Iowa 458.

91. Board of Comrs. v. Nettleton, 22 Minn. 356; Scott v. Union County, 63 Iowa 583, 19 N. W. 667.

In Hunt v. Chapin, 42 Mich. 24, 3 N. W. 873, where the board of supervisors had ordered certain specific taxes spread upon the roll, it was held that the fact that others were added did not invalidate all taxes without an affirmative showing that they were not duly authorized.

92. Alabama. — Jones v. Pelham, 84 Ala. 208, 4 So. 22; Driggers v. Cassady, 71 Ala. 529.

Arkansas. — Chestnut v. Harris, 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213.

California. — Miller v. Williams, 135 Cal. 183, 67 Pac. 788; Harvey v. Meyer, 117 Cal. 60, 48 Pac. 1014; People v. Flint, 39 Cal. 670.

Connecticut. — Lewis v. Eastford, 44 Conn. 477.

Florida. — Miller v. Lindstrom, 45 Fla. 473, 33 So. 521.

Illinois. — Cairo, V. & C. R. Co. v. Mathews, 152 Ill. 153, 38 N. E. 623; Koelling v. People, 196 Ill. 353, 63 N. E. 735; Otis v. People ex rel. Raymond, 196 Ill. 542, 63 N. E. 1053; Law v. People, 80 Ill. 208; Fowler v. People, 93 Ill. 116 (where a surveyor was introduced as a witness who testified that he would have no difficulty in locating the land assessed by the description given, and the rule stated was again declared).

Iowa. — Armour v. Officer, 116 Iowa 675, 88 N. W. 1058.

Kansas. — Harding v. Greene, 59 Kan. 202, 52 Pac. 436.

Maine. — Burgess v. Robinson, 95 Me. 120, 49 Atl. 606; Bingham v. Smith, 64 Me. 450.

Michigan. — Auditor General v. Smith, 125 Mich. 576, 85 N. W. 8; Jackson v. Sloman, 117 Mich. 126, 75 N. W. 282.

Mississippi. — Hughes v. Thomas, 29 So. 74; Dingey v. Paxton, 60 Miss. 1038.

Missouri. — State v. Burrough, 174 Mo. 700, 74 S. W. 610; State v. Wabash R. Co., 114 Mo. 1, 21 S. W. 26.

Nebraska. — Speich v. Tierney, 56 Neb. 514, 76 N. W. 1090.

had to records, plats, maps, etc., incorporated in it by reference, or to other descriptions with which it may be grouped, it is sufficient.⁹³

Parol Evidence. — Parol evidence, while not admissible wholly to supply a description in an assessment,⁹⁴ is nevertheless admissible

New Hampshire. — *Smith v. Messer*, 17 N. H. 420.

New Jersey. — *Newcomb v. Franklin Twp.*, 46 N. J. L. 437.

New York. — *Peck v. Mallams*, 10 N. Y. 509; *Tallman v. White*, 2 N. Y. 66.

North Carolina. — *Fulcher v. Fulcher*, 122 N. C. 101, 29 S. E. 91.

North Dakota. — *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117; *Grand Forks County v. Fredericks*, 112 N. W. 839.

Oregon. — *Jory v. Palace Dry Goods Co.*, 30 Or. 196, 46 Pac. 786.

Rhode Island. — *Taylor v. Narragansett Pier Co.*, 19 R. I. 123, 33 Atl. 519.

South Dakota. — *Stokes v. Allen*, 15 S. D. 421, 89 N. W. 1023.

Texas. — *State v. Farmer*, 94 Tex. 232, 59 S. W. 541; *Barrett v. Spence*, 28 Tex. Civ. App. 344, 67 S. W. 921.

Utah. — *Allen v. Fitzgerald*, 23 Utah 597, 65 Pac. 592.

Wisconsin. — *Head v. James*, 13 Wis. 641.

In *Cooper Grocery Co. v. Waco*, 30 Tex. Civ. App. 623, 71 S. W. 619, an action was brought to recover taxes due on certain lands. From a judgment rendered in favor of plaintiff defendant appealed. It was contended by appellant that the description of the property as contained in the rendition and assessment rolls was insufficient. *Held*, that a description of property upon the tax rolls is sufficient if it furnishes means by which the property can be identified from the description itself, or by the use of extrinsic evidence to apply that description to the property though the numbers of the blocks and lots are not given. The same fullness of description is not required when the rendition for taxes is made by the owner as when the assessment is against an unknown owner on unrendered property.

In *State v. Woodbridge*, 42 N. J. L. 401, a writ of certiorari bringing up the assessment upon a tract of

land in the township of Woodbridge, a certificate of sale and the lease made to the said township for a thousand years, one reason assigned for the vacation of proceedings was because the description of property in the assessor's duplicate was insufficient. *Held*, that an assessment made as follows, "R. E. M. Land, 58 acres in Road District No. 21, in the Township of Woodbridge," taken in connection with proof that R. E. M. owned no other land in said road district, was a sufficient description to subject the said land to a sale for the taxes assessed upon it.

93. California. — *Lahman v. Hatch*, 124 Cal. 1, 56 Pac. 621.

Illinois. — *Cairo, V. & C. R. Co. v. Mathews*, 152 Ill. 153, 38 N. E. 623.

Kentucky. — *Com. v. Louisville & N. R. Co.*, 20 Ky. L. Rep. 882, 47 S. W. 1114.

Massachusetts. — *Westhampton v. Searle*, 127 Mass. 502.

Minnesota. — *Williams v. Central Land Co.*, 32 Minn. 440, 21 N. W. 550.

Missouri. — *State v. Vaile*, 122 Mo. 33, 26 S. W. 672.

New York. — *May v. Traphagen*, 139 N. Y. 478, 34 N. E. 1064.

Oregon. — *Dekum v. Multnomah County*, 38 Or. 253, 63 Pac. 496.

Washington. — *Noyes v. King County*, 18 Wash. 417, 51 Pac. 1052.

94. *Armour v. Officer*, 116 Iowa 675, 88 N. W. 1058.

A description in a tax proceeding, which is a proceeding *in invitum*, that is inherently and fatally defective, cannot be helped out and validated by extrinsic evidence. *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404.

Parol Evidence Inadmissible To Supplement an Indefinite Assessment Description. — *Kettelle v. Warwick & Coventry Water Co.*, 23 R. I. 114, 49 Atl. 492. This action was brought by Kettelle, a tax collector, to recover taxes assessed against the de-

to explain a latent ambiguity or to apply the description to the subject-matter.⁹⁵

Judicial Notice. — Judicial notice will be taken of the meaning of initials used in the description of land in assessment for taxes, without further proof.⁹⁶ And where a description of land in an assess-

fendant. The statute provided that "taxes on real estate shall be assessed to the owners, and separate tracts or parcels shall be separately described and valued as far as practicable." The assessors had filed a list of defendant's property, and although they assumed to divide the land into two parcels, neither description was definite enough to identify the land in question. The plaintiff attempted to introduce parol evidence to supplement the assessment. *Held*, inadmissible. To the same effect, see *Evans v. Newell*, 18 R. I. 38, 25 Atl. 347.

95. Arkansas. — *Longergan v. Baber*, 59 Ark. 15, 26 S. W. 13.

Florida. — *Miller v. Lindstrom*, 45 Fla. 473, 33 So. 521.

Illinois. — *Koelling v. People*, 196 Ill. 353, 63 N. E. 735. And see other Illinois cases cited *supra*.

Iowa. — *Armour v. Officer*, 116 Iowa 675, 88 N. W. 1058.

Maine. — *Greene v. Lunt*, 58 Me. 518.

Michigan. — *Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881.

Minnesota. — *Gillfillan v. Hobart*, 34 Minn. 67, 24 N. W. 342; *Minneapolis T. R. Co. v. Minneapolis Deb. Co.*, 81 Minn. 66, 83 N. W. 485.

Missouri. — *State v. Wabash R. Co.*, 114 Mo. 1, 21 S. W. 26.

New Jersey. — *State v. Woodbridge Twp.*, 42 N. J. L. 401.

North Dakota. — *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117.

Ohio. — *Stewart v. Aten*, 5 Ohio St. 257.

Pennsylvania. — *Marsh v. Nelson*, 101 Pa. St. 51.

Rhode Island. — *Evans v. Newell*, 18 R. I. 38, 25 Atl. 347.

Texas. — *Eustis v. Henrietta*, 90 Tex. 468, 39 S. W. 567.

96. Kile v. Yellowhead, 80 Ill. 208.

In *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, an action to quiet title, where the defendant claimed ownership of the land under certain tax sales and deeds, it appeared that the description of the land in the assessment rolls was in a combination of letters and figures as follows: "NW₄, NW₄ of NE₄, NE SW, W₂ SW", etc. The defendant claimed the right to show that such abbreviations and combinations of letters and figures were in general use in that particular locality in North Dakota, and also throughout the state of North Dakota, and throughout those portions of the United States where the government system of survey is used for the description of parts of sections of land, and were generally understood by the people and taxpayers of the county and state and in those portions of the United States where the government system of survey is used. The supreme court, in holding that the evidence was not admissible, said: "It is a matter of which this court will take notice, because a matter of common knowledge, that the government system of surveying land has been quite generally adopted in the western states, and that the system prevails in the states of North Dakota and Minnesota; and yet, as has been shown, the courts of last resort in the two states mentioned have taken judicial cognizance of the fact, and so held that the symbol writing in question, as a mode of describing land, has not the sanction of general usage in either of the said states. In view of these adjudications—that of *Powers v. Larabee* being very recent, and made after mature deliberation—we think it would be unwise to hold that evidence is admissible to prove only such facts as the court would be bound to judicially note without proof, if such facts really exist. If it be true that the symbol writing is, as alleged by the answer,

ment made thereon to aid in the construction of a ditch does not show in what county the land is situated, the court may know judicially from the congressional survey that it is in a certain county.⁹⁷

e. *Return of Property for Taxation by Owner*.—A return of property for taxation⁹⁸ is generally conclusive upon the person making it as to the extent and value of the property listed, the description, ownership, etc., and estops him from thereafter attacking an assessment based thereon,⁹⁹ except in the case of fraud, mistake of

used in describing land, and 'generally understood' by the taxpayers and the people of North Dakota, and throughout the western states, the judges and courts of such states are bound to judicially note the existence of such usage. To borrow the words of Chief Justice Caton, 'courts will not pretend to be more ignorant than the rest of mankind'. If evidence became necessary in this case to prove that the usage in question was generally understood and in common use by the taxpayers and people of this state and of the western states generally, then, and for the same reason, evidence would be needed to certify the same facts to any other trial court in the state in which the question might arise. *Vanada v. Hopkins* (Ky.), 19 Am. Dec. 92; *Bailey v. Publishing Co.*, 40 Mich. 251; 12 Am. & Eng. Enc. Law, p. 197, note 1."

97. *Bannister v. Grassy Ditching Assn.*, 52 Ind. 178.

98. *City of Wilmington v. Ricaud*, 90 Fed. 214, 32 C. C. A. 580.

In *Idaho* it was held, in an action to enjoin an assessor and tax collector from selling certain lands to pay the taxes thereon, that the whole theory of the revenue law is that the actual cash value of the property is the basis for assessment, and this being true, if the taxpayer desires to attack the assessment for the reason that it is too high in proportion to other property in the same vicinity, or if for any reason he desires to question the assessment before the board of equalization, it must appear that he has, as required by law, handed in a statement to the assessors under oath setting forth the fair cash value of his property alleged to have been erroneously assessed (§ 35, p. 248, session laws 1901).

Humbird Lumb. Co. v. Thompson, 11 Idaho 614, 83 Pac. 941.

99. *United States*.—Central Pac. R. Co. *v. California*, 162 U. S. 91.

California.—*Lake County v. Sulphur Bank Q. M. Co.*, 68 Cal. 14, 8 Pac. 593.

Colorado.—*Price v. Kramer*, 4 Colo. 546.

Connecticut.—*Randell v. Bridgeport*, 63 Conn. 321, 28 Atl. 523.

Florida.—*Town of Kissimmee v. Drought*, 26 Fla. 1, 7 So. 525; *Tampa v. Mugge*, 40 Fla. 326, 24 So. 489.

Illinois.—*Dennison v. County Comrs.*, 153 Ill. 516, 39 N. E. 118; *Tolman v. Raymond*, 202 Ill. 197, 66 N. E. 1086; *Iowa C. R. Co. v. People ex rel. Vernop*, 156 Ill. 373, 40 N. E. 954.

Indiana.—*Telle v. Green*, 28 Ind. 184.

Iowa.—*Leonard v. Madison County*, 64 Iowa 418, 20 N. W. 742; *Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512.

Massachusetts.—*Pingree v. Berkshire County*, 102 Mass. 76.

Michigan.—*Sage v. Burlingame*, 74 Mich. 120, 41 N. W. 878.

Minnesota.—*Faribault W. W. Co. v. Rice County*, 44 Minn. 12, 46 N. W. 143.

Missouri.—*Lexington v. Lafayette County Bank*, 165 Mo. 671, 65 S. W. 943.

Texas.—*Scollard v. Dallas*, 16 Tex. Civ. App. 620, 42 S. W. 640; *Moody & Co. v. Galveston*, 21 Tex. Civ. App. 16, 50 S. W. 481.

Vermont.—*Bemis v. Phelps*, 41 Vt. 1.

A statement of property furnished by a corporation through its agent to an assessor is binding on the corporation, and justifies the assessor in adopting it as a correct statement of corporate property. *People v.*

fact, want of jurisdiction on the part of the assessing officers, or other matter rendering the assessment void.¹ But such a return

Stockton & C. R. Co., 49 Cal. 414, *holding* further that where a corporation furnishes to the assessor a written statement of the real estate belonging to it, it cannot, in a subsequent action against it to recover taxes levied thereunder, question the authority of its agent to furnish the list; nor can it deny that the property contained in the list belonged to it.

Where a description of property assessed is taken from the list furnished by the taxpayer, the taxpayer cannot, in an action to recover the taxes levied, question the sufficiency of the description. *San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264. See also *Lake County v. Sulphur Bank Q. M. Co.*, 68 Cal. 14, 8 Pac. 593.

Where a railroad company has furnished to the state board of equalization a statement signed by its secretary, as required by law, in which it gives as property for which it was to be assessed a description of its roadway, and stated in addition the value of its franchise, it must be held that the franchise included in its statement was the one capable of assessment (the state franchise is distinguished from the federal franchise), and the company will not be permitted to say that the other was intended by it or was included in the assessment. *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905.

Consent by a Taxpayer to an Assessment in a Specified Sum estops him from afterwards claiming and showing that the assessment was too high. *Phelps Mortgage Co. v. Board of Review*, 84 Iowa 610, 51 N. W. 50.

One who lists and returns his personal property under the assumed name of another is estopped to show any irregularity or insufficiency of the tax proceeding in so far as they may have arisen solely from that cause. *Moore v. Furnas County Live Stock Co. (Neb.)*, 111 N. W. 464.

Where a taxpayer has furnished the assessor with a statement of his prop-

erty, and the assessor relying thereon has assessed the property therein described against the person furnishing the list, evidence is not admissible on behalf of such person for the purpose of denying the ownership of the property in an action to enjoin the collection of the taxes. *Inland Lumb. & Timber Co. v. Thompson*, 11 Idaho 508, 83 Pac. 933.

The action of the owner of the dower interest in land in returning the whole of the land for taxation is not conclusive and binding upon the children or remaindermen. *Com. v. Hamilton*, 24 Ky. L. Rep. 1944, 72 S. W. 744.

In *Otis v. People ex rel. Raymond*, 196 Ill. 542, 63 N. E. 1053, where it was claimed that the description of the property was insufficient to sustain the tax levied, it appeared that the complaining taxpayer appeared before the board of review but made no complaint that the property was improperly described, but, in fact, described the same in his petition to that board in accordance with the descriptions by which the property was assessed by the local assessor; and it was held, that by so doing, he voluntarily acknowledged the correctness and sufficiency of the assessment, and was bound thereby.

Compare Gibson v. Clark, 131 Iowa 325, 108 N. W. 527, *holding* that a tax payer's sworn return of his property for purposes of taxation is presumed to be true although not conclusive, and the presumption of truth arising therefrom cannot be overcome by mere surmise.

1. *United States*.—*City of Wilmington v. Ricaud*, 90 Fed. 214, 32 C. C. A. 580.

Connecticut.—*Phelps v. Thurston*, 47 Conn. 477.

Iowa.—*Salter v. Burlington*, 42 Iowa 531.

Kentucky.—*Com. v. Hamilton*, 24 Ky. L. Rep. 1944, 72 S. W. 744.

Missouri.—*State v. Burroughs*, 174 Mo. 700, 74 S. W. 610.

Nebraska.—*Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955.

being merely to aid the assessing officers is not conclusive upon them.²

Failure To Make Return.—So, too, where a property owner fails to return his property for taxation, as required by law, he is by his own action estopped from subsequently, in a proceeding against

Utah.—Centennial Eureka M. Co. v. Juab County, 22 Utah 395, 62 Pac. 1024.

Wisconsin.—State v. Bellew, 86 Wis. 189, 56 N. W. 782.

In *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955, the tax agent of a railroad company in the year 1895, and for several years prior thereto, listed for taxation with the officers of a school district, a bridge which was a part of his principal's railroad, erroneously believing that such bridge was within the limits of said school district. The railroad company paid the taxes assessed by the school district against the bridge for all the years prior to 1895. It then brought suit to enjoin the 1895 tax on the ground that said bridge was, as a matter of fact, not within the limits of such school district. *Held*, that the court was not required to conclusively presume that the bridge was within the limits of a school district because it had assumed the right to tax it for more than one year; that the court was not bound to presume that the bridge was within or without the limits of the school district; that the *situs* of the bridge was a question of fact to be determined from the evidence; that the railroad company was not estopped from maintaining the action because of its conduct in listing the property for taxation. So holding, because the action of the tax agent in so listing the property for taxation was under a mistake of fact. See also *Chicago & N. W. R. Co. v. Auditor General*, 53 Mich. 79, 18 N. W. 586; *Parke County Coal Co. v. Campbell*, 140 Ind. 28, 39 N. E. 149, 558.

In *Chicago & N. W. R. Co. v. Auditor General*, 53 Mich. 79, 18 N. W. 586, the general railroad law of Michigan made roads that lay partly within and partly without the state, taxable on so much of their gross receipts as corresponded to the ratio

of their local to their entire length. A local company was consolidated with a foreign one that controlled a number of other consolidated roads and several leased lines besides, but the corporation reported its receipts in gross, without discriminating between its own roads and those that were leased, and was assessed accordingly, as if it constituted a single line. *Held*, that it was not estopped by its report from disputing the legality of the assessment; the proper course was for the commissioner of railroads to require more definite information from it as a basis of assessment.

2. *Younger v. Meadows* (W. Va.), 59 S. E. 1087. Compare *Illinois Cent. R. Co. v. People ex rel. Vernon*, 156 Ill. 373, 40 N. E. 954; *Hall v. County Comrs.*, 10 Allen (Mass.) 100.

The assessing officer in arriving at a person's "surplus" under what is known as the "Kentucky Equalization Act," is not bound to accept the taxpayer's statement as conclusive thereof. *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164.

Lists of estates which taxpayers are required by law to present to assessors, before an assessment of taxes is made, if containing an estimated value of the property, are not conclusive evidence as to the value as against the assessors, but it is for them to exercise their own judgment in determining the value of the property. *Inhabitants of Newburyport v. County Comrs.* 12 Met. (Mass.) 211.

The verified list required under § 2769 Hill's Oregon Code, to be furnished the assessor by the taxpayer, does not constitute an assessment when it is received by the assessor. It is simply an aid to him in obtaining a true description of taxable property, and is also evidence from which the assessment may be made. *Oregon & W. Mtg. Sav. Bank v. Jordan*, 16 Or. 113, 17 Pac. 621.

him to collect taxes laid, showing irregularities in the assessment as ground for escaping payment.³

f. *The Taxability of the Property*. — (1.) *Generally*. — The cases very generally hold that payment of a tax may be escaped by showing that the property was not subject to taxation.⁴

(2.) *Presumptions and Burden of Proof*. — Every presumption is against the surrender of the power to tax.⁵ And accordingly where a property owner claims as a ground for escaping payment of taxes,

3. *Winn v. Butts*, 127 Ga. 385, 56 S. E. 406.

A property owner who, after demand by the assessor, refuses to give under oath a statement of his assessable property, cannot have the valuations of the assessor reduced by the county board of equalization; and hence he cannot in an action against him to recover the taxes levied under the assessment set up by way of defense any irregularity on the part of the board as to the time of their meeting. *Modoc County v. Churchill*, 75 Cal. 172, 16 Pac. 771.

Where a railway company fails to return for taxation a portion of its land as railroad track, and that portion is assessed by the local assessor as real estate other than railroad track, and it is not otherwise assessed, the railway company cannot afterwards in an action against it for judgment against the land for delinquent taxes show that as a matter of fact the land in question was part of its railroad track; the company is in such case estopped by its own action. *Indianapolis & St. L. R. Co. v. People*, 130 Ill. 62, 22 N. E. 854.

Where the law requires a railroad company to make out and file with the county clerk a statement or schedule showing the property held for right of way, it will be presumed that the company performed this duty, and that the county clerk accurately copies the schedule given in by the company; and the company is afterwards estopped from setting up a mis-description in its property as a ground for voiding payment of its taxes thereon. *Cairo, V. & C. R. Co. v. Mathews*, 152 Ill. 153, 38 N. E. 623.

4. *Dakota*. — *Frost v. Flick*, 1 Dak. 131, 46 N. W. 508.

Illinois. — *Coxe Bros. & Co. v. Salomon*, 188 Ill. 571, 59 N. E. 422;

Du Page County v. Jenks, 65 Ill. 275, 286; *Chicago, B. & Q. R. Co. v. Frary*, 22 Ill. 34; *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19; *Kimbark v. Raymond*, 188 Ill. 66, 59 N. E. 1133; *Mayer v. Raymond*, 188 Ill. 143, 59 N. E. 1133; *Hanberg v. Western Cold Storage Co.*, 231 Ill. 32, 82 N. E. 842; *Clement v. People ex rel. Kochersperger*, 177 Ill. 144, 52 N. E. 382.

Indiana. — *Nyce v. Schmoll* (Ind. App.), 82 N. E. 539.

Michigan. — *Albany & B. Min. Co. v. Auditor General*, 37 Mich. 391.

New York. — *People ex rel. W. R. I. Co. v. Davenport*, 91 N. Y. 574.

North Dakota. — *Farrington v. New England Inv. Co.*, 1 N. D. 102, 45 N. W. 191.

Tennessee. — *Street R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

5. *United States*. — *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 174; *Phoenix F. Ins. Co. v. Tennessee*, 161 U. S. 174; *New Orleans City R. Co. v. New Orleans*, 143 U. S. 192; *Wilmington & W. R. Co. v. Alsbrough*, 146 U. S. 279, *affirming* 110 N. C. 137, 14 S. E. 652; *Chicago B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, 122 U. S. 561; *Given v. Wright*, 117 U. S. 648; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, *affirming* 34 La. Ann. 954; *Southwestern R. Co. v. Wright*, 116 U. S. 231; *Memphis Gas Co. v. Shelby County*, 109 U. S. 398; *Hoge v. Railroad Co.*, 99 U. S. 348; *Morgan v. Louisiana*, 93 U. S. 217; *Minot v. Philadelphia, W. & B. R. Co.*, 18 Wall. 206; *Philadelphia & W. R. Co. v. Maryland* 10 How. 376; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Providence Bank v. Billings*, 4 Pet. 514.

Alabama. — *Mobile v. Stein*, 54

Ala. 23, *affirming* Stein *v.* Mobile, 17 Ala. 234.

Arizona. — Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122.

Colorado. — American Smelt. Co. *v.* People, 34 Colo. 240, 82 Pac. 531.

Delaware. — State *v.* Bank of Smyrna, 2 Houst. 99.

District of Columbia. — Alexandria Canal R. & B. Co. *v.* District of Columbia, 1 Mackey 217.

Illinois. — People *ex rel.* State Auditor *v.* Illinois Cent. R. Co., 6 N. E. 469.

Kentucky. — Kentucky Cent. R. Co. *v.* Bourbon County, 82 Ky. 497; Louisville, C. & L. R. Co. *v.* Com., 10 Bush 43.

Louisiana. — Augusti *v.* Citizens' Bank, 46 La. Ann. 529, 15 So. 74; Ivens & Son Mach. Co. *v.* Tax. Collector, 42 La. Ann. 1103, 8 So. 399; Benedict *v.* New Orleans, 44 La. Ann. 793, 11 So. 41; Shreveport Creosoting Co. *v.* Shreveport, 119 La. 637, 44 So. 325.

Mississippi. — Adams *v.* Stonewall Cotton Mills, 89 Miss. 865, 43 So. 65; Adams *v.* Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Nebraska. — Young Men's Christian Assn. *v.* Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123.

Nevada. — State *v.* Central Pac. R. Co., 19 Nev. 47.

New Jersey. — Hardin *v.* Morgan, 70 N. J. L. 484, 57 Atl. 155; Edison Phonograph Co. *v.* Assessors, 57 N. J. L. 520, 31 Atl. 1019.

New York. — People *ex rel.* 23d St. R. Co. *v.* Comrs. of Taxes, 95 N. Y. 554; People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708; Rochester *v.* Rochester R. Co., 182 N. Y. 99, 74 N. E. 953; People *ex rel.* Western F. I. Co. *v.* Davenport, 91 N. Y. 574.

Tennessee. — Knoxville & O. R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Street R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Nashville, C. & St. L. R. Co. *v.* Marion County, 75 Tenn. 663.

Virginia. — Norfolk, P. N. U. Co. *v.* Norfolk, 105 Va. 139, 52 S. E. 851; Lake Drummond Canal Co. *v.* Com.,

103 Va. 337, 49 S. E. 506, 68 L. R. A. 92.

Washington. — Thurston County *v.* Sisters of Charity, 14 Wash. 264, 44 Pac. 252.

Compare Mattern *v.* Canevin, 213 Pa. St. 588, 63 Atl. 131.

Abandonment of Power of Taxation Not To Be Presumed. — "That the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, (per Marshall, C. J.). See also *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665. And *City of Louisville v. Board of Trade*, 90 Ky. 409, 14 S. W. 408. See also *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502.

In *Philadelphia & W. R. Co. v. Maryland*, 10 How. (U. S.) 376, Chief Justice Taney said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms."

In *Bailey v. Magwire*, 22 Wall. (U. S.) 215, 227, it was said: "It is never for the interest of a state to surrender the power of taxation, and an intention to do so will not be imputed to it unless the language employed leaves no other alternative."

In *Idaho*, by express statute it is provided that in actions for the recovery of delinquent taxes the defendant must show by way of defense that the property in question is exempt from taxation. *Utah & N. R. Co. v. Crawford*, 1 Idaho 770,

that the property sought to be charged with the tax falls within the provisions of a statute exempting certain property from taxation, it is incumbent upon him clearly to establish his claim.⁸

holding further, that in view of that statute, a taxpayer sued for delinquent taxes cannot set up such exemption as a ground for enjoining in equity the prosecution of an action to recover taxes; that his proper remedy is to show such exemption as a defense to the action.

In *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587, 45 N. W. 536, which was an action brought to restrain the sale of the plaintiff's land for taxes on the ground of their unequal assessment in comparison with other lands and on account of certain exemptions in that year of taxable property and certain rebatements of taxes, it was held that under ch. 309, laws of 1883, exempting from taxation the real property of Turner societies "which is used exclusively for educational purposes," the presumption is that all of the real property of such a society which has been omitted from an assessment was so used.

6. *United States*.—*Davenport Nat. Bank v. Mittlebuscher*, 15 Fed. 225; *Ohio L. Ins. Co. v. Debolt*, 16 How. 416; *Bailey v. Magwire*, 22 Wall. 215; *Tucker v. Ferguson*, 22 Wall. 527, 575.

Georgia.—*Macon v. Central R. & Bkg. Co.*, 50 Ga. 620.

Illinois.—*People ex rel. State Auditor v. Illinois Cent. R. Co.*, 6 N. E. 469; *People ex rel. Pavey v. Wabash R. Co.*, 138 Ill. 85, 27 N. E. 694; *People v. Graceland Cem. Co.*, 86 Ill. 336; *Illinois Cent. R. Co. v. People*, 119 Ill. 137, 6 N. E. 451.

Indiana.—*Indianapolis v. Langsdale*, 29 Ind. 486.

Louisiana.—*Shreveport Creosoting Co. v. Shreveport*, 119 La. 637, 44 So. 325.

Maine.—*Bangor v. Masonic Lodge*, 73 Me. 428.

New York.—*Jamaica & B. R. v. Brooklyn*, 49 Hun 609, 1 N. Y. Supp. 830.

In order to establish the fact of exemption of a homestead from liability for taxes accruing upon other

property within the terms of the statute providing therefor, it must be shown that the homestead was listed separately as such. *Salter v. Burlington*, 42 Iowa 531.

In *Nugent v. Dilworth*, 95 Iowa 49, 63 N. W. 448, the court said: "It is generally, if not universally, expressed that taxation is the rule, and exemption the exception. Exceptions, to be available in legal procedure, must be pleaded and proven. If appellant is to come within the rule of exemption from taxation, he must meet its conditions; and one of them is that the title deed by which he holds the property shall be filed of record before there can be an exemption. There are no legal presumptions in his favor in this respect, and the fact should be made to appear."

In *In re Vineland Historical and Antiquarian Society*, 66 N. J. Eq. 291, 56 Atl. 1039, an action to recover a collateral inheritance tax, an appeal was taken on the part of the prosecutor of the pleas from an order discharging the Vineland Historical and Antiquarian Society from this tax. Upon the question as to whether or not this society was exempt from taxation, it was held that an incorporated society claiming to be exempt from taxation under the collateral inheritance tax law, as being within the exemptions enumerated in § 1 (Gen. Stats. p. 3339) must make out its claim by proof. When such society claims exemption as a "charitable institution," it must appear that the purposes and objects to which it is bound to devote its property are charitable within the doctrine of charitable uses. Property devoted to educational uses is within that doctrine. It will not be enough to show that the society is incorporated under the laws permitting the incorporation of societies for the promotion of learning. It must be shown that the property is in fact devoted to such purposes and has an educational character.

The decision of the board of su-

Municipal Corporations. — But it has been held that in cases involving the assessment of taxes by municipal corporations, the indentments are less liberal.⁷

g. Domicil or Residence of Alleged Delinquent. — (1.) **Presumptions and Burden of Proof.** — The general rule is that the domicil of origin, or one which is acquired, is presumed to continue until a new one is acquired.⁸ And where a party seeks to escape payment of taxes on the ground of non-residence,⁹ or that he has ac-

pervisors that certain property is not exempt from taxation does not preclude the owner, on an application by the collector for judgment for taxes against the property, from showing that the property was in fact exempt. *Peoria Fair Assn. v. People ex rel. Wiennett*, 111 Ill. 559.

7. *State Auditor v. Jackson County*, 65 Ala. 142.

Since municipal corporations can levy no taxes, general or special, unless the power so to do be plainly and unmistakably conferred, it devolves upon the people, in an application for judgment for a city tax, to show that such tax has the sanction of the law for its support. *English v. People*, 96 Ill. 566.

In respect of the power of municipalities to tax property for revenue, the general rule is that it will be presumed that the state has granted in clear and unmistakable terms all that it intended to grant, and that whatever authority the officers of the municipality assume to exercise, it devolves upon them to show their warrant therefor in the words of the grant. *Commissioners of Highways v. Newell*, 80 Ill. 587.

8. *Nugent v. Bates*, 51 Iowa 77, 50 N. W. 76; *Cover v. Hatten* (Iowa), 113 N. W. 470; *Bell v. Pierce*, 51 N. Y. 12. See also *Warren v. Board of Comrs.*, 72 Mich. 398, 40 N. W. 553, 2 L. R. A. 203; *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827.

In the absence of some evidence of an abandonment of residence by a taxpayer, the presumption is that that residence continues to be his residence for the purposes of taxation. *Cover v. Hatten* (Iowa), 113 N. W. 470.

In *People v. Moir*, 207 Ill. 180, 69 N. E. 905, a proceeding for the assessment of an inheritance tax on the

estate of a deceased person, defendants contended that the deceased was not a resident, at the time of his death, of the county in which the assessment was sought to be made, but that he had changed his residence. It was held that when a residence is once established the presumption is that it continues, and the burden of proof is upon the party to show a change who claims residence once established has been changed.

In *In re Dalrymple's Estate*, 215 Pa. St. 367, 64 Atl. 554, where the evidence showed that a decedent had begun business in a certain town, and was the owner of both real and personal property there at the time of his death, that this county was the only one in which he had ever voted or paid a personal tax, that he continued to vote and pay personal tax in this county until within a few years of his death, it was held that there was sufficient evidence to establish the decedent's domicil at the time of his death so as to render his estate liable to inheritance tax, although there was other evidence showing that he had other property in other states, and that he had declared that he expected to make his home in another state. His intention is disclosed by these declarations, but there not having been carried into effect by an actual change of habitation there was no change of domicil.

9. In *Kilburn v. Bennett*, 3 Met. (Mass.) 199, which was an action by a tax collector to recover the amount of a tax assessed upon the defendant, the only disputed question was as to whether the defendant was an inhabitant of the town in which the tax demanded was assessed. The court held that where it is admitted, as in this case, that the defendant had been an inhabitant of the town for

quired a new residence,¹⁰ he has the burden of proving his claim.

Decedents' Estates.—The presumption is that personal property belonging to the estate of a deceased person is, at least during the settlement of the estate, at the place where he died.¹¹

Residence of Corporation.—The statement in the articles of incorporation of a corporation as to its principal place of business is conclusive evidence of the residence of the corporation for purposes of taxation.¹² But this is not the rule where the statute does not re-

some time and continued to be so until the 27th of April, it must be presumed in the absence of any evidence to the contrary that he had not changed his residence, and that the burden of proof was on him to show that he ceased to be such inhabitant before the 1st of May.

Evidence as to Domicil.—In an action by a collector of taxes to recover a poll-tax assessed upon a person, although all the proceedings of the town including the warrant to the officer are upon their face formal and regular, the defendant is not estopped from showing his non-residence in defense; and where the evidence shows that the defendant was not a resident of the town in which he was assessed, at the time of assessment, the plaintiff's action must fail. *McCrillis v. Mansfield*, 64 Me. 198.

On the issue as to a party's liability of assessment for taxes on personal property in Nevada, which liability he seeks to avoid by a claim that he is a resident of another state, evidence to the effect that he escaped taxation in the latter state by declaring that his property was situated in Nevada is admissible as rebutting the presumption that he paid taxes on his personal property at the place of his claimed residence. *Bowman v. Boyd*, 21 Nev. 281, 30 Pac. 823.

10. A complainant in a suit in equity to enjoin the collection of school taxes on his personal property for non-residence within the school district, must show with distinctness and clearness that he was not a resident of the district when the assessor listed his property for taxes. *Blake v. Jordan*, 45 Ark. 265.

On an application for a judgment of sale against real estate for a delinquent personal property tax, where the collector has made a *prima facie*

case, the burden is upon the defendant then to show that he was not a resident within the jurisdiction of the assessor and had no personal property there subject to taxation at the time of the levy; the burden is not upon the collector to show these facts in the first instance. *King v. People ex rel. Raymond*, 193 Ill. 530, 61 N. E. 1035.

11. *Stanford v. San Francisco*, 131 Cal. 34, 63 Pac. 145; *San Francisco v. Lux*, 64 Cal. 481, 2 Pac. 254; *Millsaps v. Jackson*, 78 Miss. 537, 30 So. 756; *Rand v. Pittsfield*, 70 N. H. 530, 49 Atl. 88; *Staunton v. Stout*, 86 Va. 321, 10 S. E. 5.

12. *Austen v. Hudson R. Tel. Co.*, 73 Hun 96, 25 N. Y. Supp. 916.

In *People ex rel. Edison Elec. Light Co. v. Barker*, 91 Hun 594, 36 N. Y. Supp. 844, a certiorari to review the assessment of relator's personal property for the year 1894, it was held that in case a statute under which a corporation is organized requires that its principal place of business, or its principal office, shall be designated in its certificate of organization, the statement in the certificate in respect thereto is as against the corporation conclusive evidence of its residence unless its residence has been changed pursuant to some statute. It was not claimed in this case that a change was affected by any statute, nor was reference made to any statute which gave the right to a corporation in filing its certificate to qualify the statement which the law requires as to its designating its principal place of business, and therefore this must be treated as surplusage. See also *People ex rel. Knickerbocker Press v. Barker*, 87 Hun 341, 34 N. Y. Supp. 269.

In *Pelton v. Transportation Co.*, 37 Ohio St. 450, the Northern Transportation Company, a corporation or-

quire that the articles designate the principal place of business.¹³

(2.) **Mode of Proof.** — Of course, the fact of non-residence, or a change of residence, so as to escape taxation, may be proved in the same manner as in other cases where they are facts material to be established.¹⁴

ganized under the laws of that state, brought an action against the treasurer of Cuyahoga county to restrain the collection of certain taxes. The plaintiff for the year 1874 had listed in Brooklyn township, Cuyahoga county, its property consisting of sixteen steamboats employed in navigating in the waters between Ogdensburgh in the state of New York, and Chicago, in the state of Illinois, and certain other personal property situated in the city of Cleveland in Cuyahoga county. The property so returned was placed by the auditor of the county upon the duplicate and assessed as property subject to taxation in the city of Cleveland, a taxing district in said county other than the said township of Brooklyn. The transportation company offered in evidence a certificate of incorporation, which set forth the fact that its principle office was in Brooklyn. *Held*, that the certificate of incorporation which under the statute specifies the place where the principal office of the company is to be located is conclusive evidence as to the location of such office, and that therefore the transportation company should have been assessed in Brooklyn township.

13. *Austen v. Hudson River Tel. Co.*, 73 Hun 96, 25 N. Y. Supp. 916.

In *Portsmouth Twp. v. Cranage S. S. Co.*, 148 Mich. 230, 111 N. W. 749, the articles of incorporation of the defendant named the plaintiff township as the place of its general office for business, while, as a matter of fact, its place of business was in another municipality and it had no property located within the limits of the plaintiff township. It was held that the case was one merely of a mutual mistake of law, and that the doctrine of estoppel as to the defendant corporation denying that its place of business was as stated and contesting the validity of the tax, did not apply.

14. See *Norridgewock v. Walker*, 71 Me. 181; *Schmoll v. Schenck* (Ind. App.), 82 N. E. 805.

In *Kilburn v. Bennett*, 3 Met. (Mass.) 199, which was an action by a tax-collector to recover the amount of a tax assessed upon the defendant, the defendant, in order to establish the fact that he was not an inhabitant of the town in which he was assessed on the 1st day of May of the year when the tax demanded was assessed, testified that on the 27th of April he went to another town where he remained until after the 1st of May, and for the purpose of showing with what intent he so moved, he offered to prove that about three weeks before his removal he told the party in whose house he was then residing that he should leave his former place of residence before the 1st of May, and make his home temporarily in another town until he should leave the state. The court said: "The (lower) court held that this, being the mere declaration of the defendant, was not competent evidence in his favor, and it was rejected. The general rule undoubtedly is, that a party cannot give in evidence his own declarations in his favor, unless they accompany some act, and are a part of the *res gestae*. But it appears to us that the declarations offered to be proved are within the qualification of the rule. They were made in the ordinary course of business, and in relation to the defendant's removal; and they were made to the owner of the house in which he was at the time residing. This giving notice of his intended removal is to be considered an act, which he might prove in any case in which it became material; and, if so, all that he said, explanatory of his intention in relation to his removal, seems to us to be admissible in evidence."

In *Gregory v. Bugbee*, 42 Vt. 480, an action in favor of the collector of

h. *Conclusiveness of Judgments in Tax Proceedings.* — The general rule is that the validity of a judgment in a tax suit must be tested by the same rules, and is subject to attack in the same mode and by the same means as a judgment in an action of any other kind.¹⁵

the town of Burke to collect a tax by trustee process, the question was whether, on the 1st day of April, the defendant was so a resident of said Burke as to be liable to be listed there. It appeared that the defendant was a resident of Burke or of Chicopee, Massachusetts. The plaintiff's evidence tended to show the former and the defendant's, the latter, to be the domicil of the defendant. It was held that neither the fact that the defendant's name stood in the list of the town in favor of which the tax was claimed, nor the decision of the listers in setting the defendant in said list, was any evidence upon the question of defendant's residence.

15. *Louisville Water Co. v. Clark*, 94 Ky. 47, 21 S. W. 246; *McCann v. Jean*, 134 Ind. 518, 34 N. E. 316.

A Recital in the Decree "that all the owners and claimants of the property have been duly summoned to answer the complaint herein and have made default in that behalf," there being nothing contradictory to it in the record, is conclusive in a collateral proceeding, that the court acquired jurisdiction of the owner of the premises. *Eitel v. Foote*, 39 Cal. 439.

Judgments rendered in proceedings to collect taxes, where there is jurisdiction of the person and of the subject-matter are of like binding effect upon all parties as other judgments at law, and even though the judgment may be erroneous, if there was jurisdiction in the court rendering it, it is, until reversed, binding upon the parties to it as if it were free from error. *Warren v. Cook*, 116 Ill. 199, 5 N. E. 538, a bill in equity to enjoin the issuance of a tax deed.

§ 224 of the Illinois revenue law of 1879 declaring the conclusive effect of a judgment against land for taxes as to any defense that might have been made therein, does not apply to personal actions to recover the

tax itself. *Ohio & M. R. Co. v. Commissioners of Highways*, 117 Ill. 279, 7 N. E. 663.

A defective judgment roll may be introduced in evidence by the defendant on the trial of an action to recover taxes for the purpose of showing that the taxes were not legally assessed; but it is not so admissible in a collateral attack on the judgment. *Eitel v. Foote*, 39 Cal. 439.

A tax judgment cannot be impeached collaterally by showing that entries made therein were made after the rendition of the judgment. *Gribble v. Livermore*, 64 Minn. 396, 67 N. W. 213.

In Illinois, the rule is that a judgment against land for delinquent taxes is not conclusive upon the owner as to the liability of the property for taxes or the legality of the tax unless he appears and resists the application therefor, and where he does not so appear, it is open to him upon a subsequent proceeding to show that the land was not liable for the payment of the taxes, or that the tax was illegal. *Belleville Nail Co. v. People ex rel. Weber*, 98 Ill. 399; *Gage v. Bailey*, 102 Ill. 11; *Riverside Co. v. Howell*, 113 Ill. 256; *Gage v. Busse*, 114 Ill. 589, 3 N. E. 441; *Warren v. Cook*, 116 Ill. 199, 5 N. E. 538; *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320.

Where the evidence shows that the owner of land was not made a party to a suit to enforce taxes against land, such owner is not concluded by a judgment rendered thereunder. *Wood v. Smith*, 193 Mo. 484, 91 S. W. 85.

Compare Hoyt v. Clark, 64 Minn. 139, 66 N. W. 262, where it is held that if a judgment in proceedings to enforce taxes on real estate is in the form required by statute, the same presumption in favor of its regularity and validity exists as in respect to judgments in civil actions, but such presumption is not conclusive.

III. TAX SALES.—TAX TITLES.

1. Confirmation Proceedings.—A. IN GENERAL.—In many jurisdictions, notably Arkansas, the matter of confirming a tax sale is, by express statute, made a matter of judicial proceeding by proper action brought in the proper court for that purpose. The petition in such proceeding has been assimilated to a proceeding *in rem*, where the jurisdiction of the court over the controversy is founded on the presence of the property, and the decree becomes conclusive as well against the absent claimant as against any who may intervene and contest the petitioner's right.¹⁶

It may be shown by evidence dehors the record, that the court had not jurisdiction to render the judgment; as, for example, by showing that the delinquent list was not in fact published. But the presumption in favor of the validity of the judgment is not overcome by the mere fact that no affidavit of publication has been filed. *Bennett v. Blatz*, 44 Minn. 56, explained and qualified.

16. *Worthen v. Ratcliffe*, 42 Ark. 330.

In Arkansas the statute provides for a proceeding to confirm the sale of land for taxes. "The proceedings are commenced by the party who seeks confirmation of a sale publishing a notice, in which he states 'the authority under which the sale took place and gives the description of the land purchased and the nature of the title by which it is held,' and calls 'on all persons, who can set up any title to the lands so purchased in consequence of any informality or any irregularity connected with such sale, to show cause . . . why the sale so made should not be confirmed.' After this a petition for confirmation is filed. On the trial of the cause the petitioner exhibits 'to the court the tax receipts showing the payment of the taxes for at least three successive years, and the deed or deeds under which he claims title, or the record thereof, or a certified copy or copies from the record, and oral or written proof by one or more witnesses acquainted with the lands, showing that no one is in possession claiming adverse to the petitioner.' 'If the deed or deeds are in proper legal form and properly executed and the tax re-

ceipts show payment of the taxes, and if the evidence shows that no one is in possession adverse to the petitioner, then in case no one has appeared to show cause against the prayer of the petition, the petition is taken as confessed, and the court' renders a decree 'confirming the sale in question.' In case any person or persons claiming title to the land oppose the confirmation of sale, the court 'tries the validity of the sale, and if valid, confirms it, but if the sale has been made contrary to law, the court' annuls it. *Sand. & H. Dig. c. 25*. The issues to be tried and the judgments to be rendered are prescribed by the statutes. The only question involved in this proceeding is, is the sale in controversy valid? The statutes do not authorize the court to try any other issues. The right acquired by or incident to possession is not involved in or affected by the proceedings." *Beardsley v. Hill*, 71 Ark. 211, 72 S. W. 372.

In Maryland the statute (act of 1774, ch. 483, § 51) provides that "the collector shall report a sale and the proceedings in relation thereto to the courts mentioned in the act, and the court to which said report shall be made shall examine the said proceedings, and if the same appear to be regular and the provisions of law in relation thereto have been complied with, shall order notice to be given by advertising, etc., to show cause, if any they have, why said sale should not be ratified and confirmed; and if no sufficient cause be shown against the ratification of the said sale shall, by order of said court, be ratified and confirmed and

Purchaser of Wild Land Need Not Show Possession. — Under the Arkansas statute, a purchaser at a tax sale, on a proceeding in confirmation thereof, need not show that he was in actual possession of the property in question; and, this is especially true where the property consists of wild and unimproved land.¹⁷

B. PRESUMPTIONS AND BURDEN OF PROOF. — In a proceeding under the Arkansas statute for confirmation of a tax sale when the tax deed is in the usual form, it is to be taken as *prima facie* evidence, not merely of the qualification of the officer to act as such, but that the steps prerequisite to the sale, and which constituted the authority of the officer to sell, have been regularly taken, as well as on the description of the land and the price at which purchased; and the parties seeking to impeach the deed must prove the irregularities asserted in order to invalidate the sale.¹⁸

Under the Maryland statutes an order of the court ratifying a tax sale throws the burden of showing the illegality of the proceedings, incident to the tax sale, upon a party resisting the sale.¹⁹

the purchaser shall on payment of the purchase money have a good title to the property sold."

Defective Collector's Deed Must Be Aided by Extrinsic Evidence. A tax-collector's deed in the usual form within the meaning of the Arkansas statute is a deed which substantially recites the material steps which the law requires to constitute a valid tax sale, including the proper description of the land, price paid, with words granting the lands to the purchasers, etc., and, on a proceeding for confirmation under the statute if the deed fails to recite any fact material to the validity of the sale, the complainant relying upon the deed must aid the omission by evidence *abunde*. *Bonnell v. Roane*, 20 Ark. 114.

17. *Scott v. Watkins*, 22 Ark. 556; *Bonnell v. Roane*, 20 Ark. 114.

18. *Bonnell v. Roane*, 20 Ark. 114. **Collector's Deed Not Prima Facie Evidence of Non-Residence of Owner.** — On a petition for confirmation of tax title, the collector's deed reciting that the owner of the land was not a resident of the county at the time the land was assessed, will not be considered *prima facie* evidence of that fact, and the burden of proving that he was a non-resident of the county at the time is upon him. *Hunt v. McFadgen*, 20 Ark. 277.

19. *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711. *Cooper* was the owner of a life estate in about 300 acres of land. This land was assessed to him and in his name. The appellants were the owners of the remainder. *Cooper* failed to pay the state and county taxes for several years and the property was sold by the treasurer and collector of the county for the sum of \$550. After *Cooper's* death the remaindermen instituted an action of ejectment against the appellee, who claimed title under the collector's deed, and this appeal was taken from the judgment rendered against them in that case. Under the act of 1872, ch. 384, as amended and re-enacted by the act of 1874, ch. 483, code art. 81, § 52, it has been settled that when a sale has been made by a tax-collector and has been reported to the proper court and there finally ratified, "the order of confirmation operates only to relieve the purchaser of the onus of the proof, and to cast the onus of showing the illegality of the proceedings on the party resisting the sale. . . . Until such proof is offered by the assailing party the sale if ratified and confirmed stands good and effective by operation of the statute." By this legislation when an order of ratification is produced the burden of proof is changed, and it becomes necessary for the party assailing the

But it has been held that a statute making an order of the above character conclusive evidence of the regularity of a treasurer's proceedings, except in a case of fraud or collusion, was void, the decision being based upon the ground that it was not within the power of the legislature to make a mere claim of title conclusive evidence of its own validity.²⁰

Presumption That Assessment Roll Was Filed at the Proper Time.—In a suit to confirm a tax title to certain land, *prima facie* evidence having been introduced as to the validity of the assessment, it is held that if the assessment roll upon which the sale for taxes was based be introduced in evidence, upon its failure to show the time when the same was filed with the clerk of the chancery court the presumption must be that it was filed at the time required by law.²¹

C. DEFENSES.—A party opposing confirmation proceedings under the Arkansas statute is not required to show a valid title to any part of the land. No condition of this kind can be imposed upon his right to oppose confirmation or made necessary to defeat confirmation wholly or in part. He is not required to show anything except that he can claim some interest in the land in question and show cause why the sale should not be confirmed.²² It follows

proceedings to show some defect sufficiently gross to vacate them. But it is quite apparent that this is not required until such an order is shown.

The statute confers upon the courts designated a special and limited jurisdiction, which touches upon the report of the collector, and that the sale may be confirmed by the court the order of confirmation operates only to relieve the purchaser of the onus of proof, and to cast the onus of showing the illegality of the proceedings upon the party resisting the sale. The effect, therefore, of the order of ratification is only *prima facie* in support of the sale, and not conclusive, the sale under the order of confirmation affording evidence of a good title until successfully assailed by evidence showing illegality in the proceedings upon which it is founded. Until such proof is offered by the assailing party the sale if ratified and confirmed stands good and effective by operation of the statute, but where as in this case, it is clearly and affirmatively shown that no legal or sufficient notice was given of the place of sale, the *prima facie* effect of the order of ratification is overcome and the whole proceeding is

thereby rendered null and without effect. This would seem to be clearly the result of the authorities where the statutes do not declare the effect of the order of ratification to be conclusive of the legality of all the proceedings previously had. *Steuart v. Meyer*, 54 Md. 454.

20. *Baumgardner v. Fowler*, 82 Md. 631, 34 Atl. 537.

21. *Grayson v. Richardson*, 65 Miss. 222, 3 So. 579.

22. *Beardsley v. Hill*, 71 Ark. 211, 72 S. W. 372. In this case the party opposing confirmation proved a state of facts which showed that she might at least claim in good faith some interest in, or right to the land purchased from the commissioner of state by the petitioner; that the forfeiture of the lands to the state for taxes was void because the description by which it was assessed for taxation and forfeited was insufficient, and that the conveyance of it by the state to the petitioner was void for the same reason; yet the trial court, in effect, refused to annul the sale as to a part of the land, because Beardsley did not prove that she had a valid title to all of it, but held that petitioner had acquired title to a part of the land by adverse possession, and thereby

that unless a party opposing a confirmation can show that he is to some extent interested adversely, he cannot be heard to make such opposition.²³

D. CONCLUSIVENESS OF ADJUDICATION.—In Arkansas every question with respect to the assessment of land for taxes, the non-payment of taxes, or the regularity of the proceedings of the taxing officers, is concluded by a decree of confirmation if the court which rendered it had jurisdiction of the subject-matter, and provided the decree was not obtained by a fraudulent misrepresentation or concealment of facts.²⁴ Before a confirmation of a tax sale can be set aside on the ground of fraud, proof must be made by the attacking party that some fraud or imposition was practiced by the petitioner or his attorney upon the court for procuring a decree.²⁵

determined a question that was not legally involved or presented by the proceeding. It was held that the action of the court in this respect was error.

In *Thweatt v. Howard*, 68 Ark. 426, 59 S. W. 764, it is said: "If no one claiming adversely is in possession, and the other conditions prescribed by the statute are complied with, and any one claiming title to the land opposes confirmation of the sale, then it is the duty of the court to try the validity of the sale. No investigation or inquiry into the validity of the title of the person opposing confirmation is required by the statute. The person claiming title must, however, do so in good faith. He should not be permitted to contest the validity of the sale solely for the purpose of defeating confirmation. The privilege granted to him is for the purpose of enabling him to protect his interest in the land; and it is necessary and sufficient for him to allege and prove such a state of facts as will show that he might claim in good faith some interest or right to the land." See also *Beardsley v. Hill*, 71 Ark. 211, 72 S. W. 372.

^{23.} *Thweatt v. Howard*, 68 Ark. 426, 59 S. W. 764; *People v. Otis*, 74 Ill. 384; *Senichka v. Lowe*, 74 Ill. 274; *Peterson v. Kittredge*, 65 Miss. 33, 3 So. 65, 5 So. 824.

Thus, where a party opposing a confirmation described himself as simply "tenant in possession," it was held that he was not entitled to be heard. *Black v. Percifield*, 1 Ark. 472.

^{24.} *Worthen v. Ratcliffe*, 42 Ark. 330; *Porter v. Dooley*, 66 Ark. 1, 49 S. W. 1083; *Boehm v. Buttsford*, 52 Ark. 400, 12 S. W. 786; *Wallace v. Brown*, 22 Ark. 118; *Buckingham v. Hallett*, 24 Ark. 519.

In *McCarter v. Neil*, 50 Ark. 188, an action of ejectment, the plaintiff's title was derived from a sale of the land for taxes under a decree of the circuit court in chancery exercising its jurisdiction pursuant to special power conferred by the overdue tax law, and it was held that the defendant could not in such an action show payment of the taxes for which the sale was made. The court said: "Proceedings to enforce payment of delinquent taxes are always summary and essentially *in rem*, all persons being presumed to be parties. *M'Carroll's Lessee v. Weeks*, 5 Hayw. (Tenn.) 246. Such being the essential nature of the tax suit provided for by the overdue tax law, the jurisdiction of the court as to a particular tract was not affected by the fact that the taxes upon that tract had previously been paid. And since the objection does not go to the jurisdiction, the decree of the court, condemning the land to sale, is, so long as it stands unreversed and not vacated or set aside, conclusive upon the point that taxes were due. This has been ruled several times in states, which have by statute established judicial proceedings for the enforcement of taxes.

^{25.} *Boynton v. Ashabanner*, 75 Ark. 415, 88 S. W. 566, 91 S. W. 20.

In no event is evidence admissible, in a collateral proceeding, impeaching the validity of a decree of confirmation, by showing fraud or any irregularity in the tax proceedings.²⁶ It is further held that where an attack is made upon a decree of confirmation on the ground of fraud, the fraud must relate to the procurement of the judgment and not merely to the original cause of action upon which it was based.²⁷

To What Conclusiveness Extends.—A decree affirming a sale of land for taxes obtained under the Arkansas statute providing for the confirmation of sales of land for taxes does not confirm the title, or vest any title in the purchaser, but merely declares the sale to be valid.²⁸

2. Proceedings Involving the Validity of Tax Sales.—A. PRESUMPTIONS AND BURDEN OF PROOF.—a. *In General.*—It is well settled that in order to sustain a title derived under a tax sale by a collector or other taxing officer, the onus is upon the purchaser to prove affirmatively that the proceedings by such taxing officer were regular and in conformity to the statute, the provisions of which

26. *Porter v. Dooley*, 66 Ark. 1, 183 S. W. 1083.

A decree in an overdue tax suit enforcing a lien upon lands for taxes cannot be questioned collaterally, where the court had jurisdiction, by showing that illegal taxes had been assessed against the lands or that the lands had been placed upon the assessment books for years when they were not liable for taxes. *Burcham v. Terry*, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42. See also *Williamson v. Mimms*, 49 Ark. 336, 5 S. W. 320; *Wallace v. Brown*, 22 Ark. 118.

27. In *Boynton v. Ashabranner*, 75 Ark. 415, 88 S. W. 566, 91 S. W. 20, the court said: "The confirmation decree which was rendered at the January term, 1898, recited that the petitioner therein presented to the court his tax receipts showing payment of taxes for three years next preceding. Upon the testimony the chancellor found that said decree purporting to confirm the title of plaintiff's ancestor to said lands was procured by 'fraud and deception practiced upon the court by the petitioner therein, inasmuch as petitioner had paid no taxes on the land for three years immediately preceding the application for confirmation thereof,' and canceled said confirmation decree. Does the evidence in

this record warrant that conclusion of the chancellor? It is settled that a judgment or decree of court may be canceled on account of fraud practiced on the court in the procurement thereof. The relief may be granted by the court which rendered the judgment or decree. . . . But the fraud must be in the procurement of the judgment, and not merely in the original cause of action upon which it was based. . . . The confirmation decree recites the exhibition by the petitioner of tax receipts and the courts necessarily found before entering the decree that petitioner had paid the taxes. It is not sufficient to show now that that finding was erroneous, because in the absence of fraud that finding is conclusive. And another trial of the question cannot be permitted. The court may have reached its conclusion upon false or incompetent testimony as to payment of taxes; yet that would not constitute grounds for re-opening the question and trying it anew. In other words, it must be shown that some fraud or imposition was practiced by the petitioner or his attorney upon the court for procuring a decree before it can be set aside."

28. *Updegraff v. Marked Tree Lumb. Co.* (Ark.), 103 S. W. 606. See also *Wilson v. Gaylord*, 77 Ark. 477, 92 S. W. 26.

must be shown to have been in all respects substantially complied with.²⁹ It is further held that the burden is upon the party claim-

29. *United States*.—Overman v. Parker, Hempst. 692, 18 Fed. Cas. No. 10,623; Stead's Exrs. v. Course, 4 Cranch 403; Parker v. Rule's Lessee, 9 Cranch 64; Williams v. Peyton's Lessee, 4 Wheat. 77; Ronkendorff v. Taylor's Lessee, 4 Pet. 349; Early v. Doe, 16 How. 610.

Alabama.—Boykin v. Smith, 65 Ala. 294.

California.—Preston v. Hirsch (Cal. App.), 90 Pac. 965; Chapman v. Zobelein, 92 Pac. 188.

Maine.—Brown v. Veazie, 25 Me. 359.

North Carolina.—Tucker v. Tucker, 110 N. C. 333, 14 S. E. 860.

Virginia.—Nalle v. Fenwick, 4 Rand. 585; Allen v. Smith, 1 Leigh 231; Yancey v. Hopkins, 1 Munf. 419; Christy v. Minor, 4 Munf. 431; Jesse v. Preston, 5 Gratt. 120; Flanagan v. Grimmet, 10 Gratt. 421.

West Virginia.—Dequasie v. Harris, 16 W. Va. 345.

This was the rule in Maryland prior to the act of 1872. Guisebert v. Etchison, 51 Md. 478; Polk v. Rose, 25 Md. 153; Beatty v. Mason, 30 Md. 409; Dyer v. Boswell, 39 Md. 465.

Where an action was brought to recover personal property, plaintiff claiming under a tax title, it was held that the presumption that one who makes a sale of land for taxes has complied with the requirements of the law regulating such sales does not arise until after the deed to be made thereupon has been executed. If there was any doubt upon this question it would vanish upon the familiar principle so often laid down by the courts, that one whose claim is based upon a sale for taxes must show that the taxes were due, and that every other material requirement has been complied with. In this case, there being no deed, the presumption of law therefore is against the plaintiff. Tucker v. Tucker, 110 N. C. 333, 14 S. E. 860.

In *Columbia Finance & Trust Co. v. Fierbaugh*, 59 W. Va. 334, 53 S. E. 468, it was held that where the validity of a tax sale of land for de-

linquent taxes is attacked by proper suit in equity to set the sale aside before deed to the purchaser is made and recorded, for material irregularities and failure to comply with material provisions of the statute in relation to the proceedings leading up to and including the sale, and the existence of said irregularities and failures is put in issue between the plaintiff and said purchaser and defendant by proper pleadings in the cause, the burden is on such a purchaser claiming under a tax-sale to show substantial compliance with all material provisions of the statutes in relation to the proceedings leading up to and including the sale. The court in this case cited as authority 2 Cooley Tax'n, 914, 916; Black on Tax Titles (2d Ed.) 443; Blackwell on Tax Titles § 1125. See also *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465; *Stark v. Shupp*, 112 Pa. St. 395, 3 Atl. 864.

Certain Facts Not Required To Be Proved.—*Greene v. Martin*, 101 Me. 232, 63 Atl. 814. This was a real action to recover parts of two lots of land in an unincorporated township, no. 3, range 2, B. K. P., known as Jerusalem Township, in Franklin County, and comes before the law court on report. The defendants claim title under a tax sale for non-payment of a tax assessed upon the lots for the repairing of county roads in the unincorporated townships and tracts of land in that county. The parties agree that the decisive question in the case is whether the defendant has made out *prima facie* proof of title under the law in force at the time. Rev. Stats. 1883, ch. 6, art. 83, now Rev. Stats. 1903, ch. 9, art. 61. It was held that to establish his title under the statute above cited it was not necessary for the claimant under a tax sale to affirmatively prove that the agent appointed to expend the money on the roads gave the bond required by law, or that the sum assessed was expended on the roads, or that the land owners themselves did not repair the roads and so superseded the tax, or that

ing under a tax sale to show that the property sold was subject to sale under the statute.³⁰

Rule Not Changed Where Deed Was Recorded Pending Suit.—Where suit is brought to set aside a tax sale for irregularities before the deed was issued, it is held that the rule requiring the purchaser to assume the burden of proof of showing substantial compliance with the letter is not changed by the fact that the deed to such purchaser was recorded pending the suit.³¹

If an ordinary suit in equity is brought to remove a cloud from title, defendant's claim being based upon tax sale certificates, the burden of proof is, of course, upon the plaintiff in this form of action to show an invalidity in defendant's claim; whereas, under the same facts if the action had been brought to determine conflicting claims, the plaintiff need only set forth his title and thenceforth the burden would rest upon the defendant of proving the validity of his claim.³²

Certificates of Sale and Tax Leases are sometimes made by statute *prima facie* evidence of the regularity of the tax sale and of the proceedings preliminary thereto. The burden of proof is thereby placed upon the party impeaching the validity of a tax sale to show facts constituting such invalidity.³³

the sum assessed was ordered to be expended on the roads, or that the agent in fact repaired the roads.

30. *Kennedy v. Sanders* (Miss.), 43 So. 913.

31. *Columbia Finance & Tr. Co. v. Fierbaugh*, 59 W. Va. 334, 53 S. E. 468.

32. *Shuttuck v. Smith*, 6 N. D. 56, 69 N. W. 5. The object sought to be attained by this action was in effect the cancelation of certain tax sale certificates upon realty in the City of Fargo, and to permanently enjoin the issuance of any deeds upon such certificates. The plaintiff was the representative of the fee owners of the realty, and the defendant was the tax sale purchaser. The court said: "Thus it is that under § 5904, Rev. Codes, being § 5449, Comp. Laws, a party may bring an action to determine conflicting claims to real estate, in which he need only set forth his title, and allege that the defendant claims estate or interest in the land. To this challenge the defendant must respond setting forth the basis of his estate or interest, and, of course, the burden is upon him to establish his affirmative allegations, but this procedure was never exclusive. A party

always had the right to bring an ordinary action in equity to remove a cloud from his title, and in that form of action it was always necessary for him to set forth the matters constituting the cloud and establish their illegality. In this case plaintiff chose the latter method. He set forth defendant's claim of title and set forth in detail the facts, which, from his standpoint, rendered such claim invalid. The defendant might content himself with a denial of these facts, and upon the trial of such issue the ordinary rules of evidence would prevail. The burden was upon the plaintiff, and the presumptions against him."

33. Under the North Dakota Revised Codes, 1899, § 1345 (laws 1897, ch. 67, § 15, p. 85), a certificate of sale for taxes is *prima facie* evidence of a valid sale without proof of a preceding judgment; and in an action to quiet title against the holders of such certificates the burden is upon the plaintiff to show that there was no valid judgment. *Nind v. Myers*, 15 N. D. 400, 109 N. W. 335.

Parsons v. Parker, 80 Hun 281, 30 N. Y. Supp. 134. This action was to recover possession of two lots of land. *Hawley and his wife conveyed*

b. *Presumptions Arising From Official Acts.* — The fact that land was assessed as belonging to an unknown owner when the records disclosed the name of the owner, will not invalidate a sale of the land for taxes. The presumption is that the assessor did his duty, and that the name of the owner was in fact unknown to him.³⁴ Where it is required by law that property shall be taxed in the name of the owner or original proprietor and it is taxed in the name of an individual, it will be presumed that the taxing officer did his duty and that the individual in whose name the property was taxed was the owner or original proprietor.³⁵ It is also to be presumed that a collector was properly sworn,³⁶ and that the assessors caused their assessment and a copy of the invoice or valuation to be lodged in the office of the town clerk.³⁷

Presumption That Collector Sold Property at Time Advertised and Only So Much as Was Necessary. — Where a collector's sale was advertised at a particular time and place, and the collector's return states it to have been held in the town and on the day designated, it will be presumed, in the absence of proof to the contrary, that it was held at the precise time and place specified.³⁸ Under the statutes it is usually provided that a sale for taxes shall be of such undivided interest in the property sold as shall be sufficient to satisfy the whole of the taxes and commissions. A collector will be pre-

the lots in question to Parsons, the plaintiff's husband, in 1871, and in 1874 they were conveyed to the plaintiff. The defendant was in possession and claimed title under two tax leases made by the supervisors of the town pursuant to a sale of the lots for unpaid taxes. Neither the assessment nor the taxes upon which either of these leases rested was proven, nor did they appear in the case, but reliance was placed upon the statutory provision that "such lease shall be presumptive evidence that such taxes are legally imposed and of the regularity of all proceedings and of the sale." Laws 1874, ch. 610, § 6. *Held*, that this presumption is rebutted by proof that the taxes for which the lots were sold had been previously paid.

34. *Corning Town Co. v. Davis*, 44 Iowa 622.

35. In *Jaquith v. Putney*, 48 N. H. 138, it was held that if in the list of non-resident taxes land is taxed in the name of an individual, it is to be presumed, until the contrary appears, that the name thus

inserted is that of the owner or original proprietor.

36. *Blossom v. Cannon*, 14 Mass. 177, this action was brought to recover land. The tenant claimed to hold the demanded premises under a collector's sale for non-payment of taxes assessed thereon. "The two objections which were principally relied upon by the defendant's counsel were, — 1. That there was no evidence of the collector's being sworn; 2. That it did not appear that the assessors had caused their assessment and a copy of the invoice or valuation to be lodged in the office of the town clerk, as required by Stat. 1785, c. 50, § 1. The collector in this case was appointed by the assessors of the town, pursuant to the provision in the Stat. 1785, c. 46, in the place of the person originally elected to that office, who had died before perfecting his collection. . . . The court were of opinion that, if a collector thus appointed was required to be sworn, it was competent for the jury to presume that fact."

37. *Blossom v. Cannon*, 14 Mass. 177.

38. *Spear v. Ditty*, 8 Vt. 419.

sumed, in the absence of evidence to the contrary, to have sold only so much as the statutes indicate.³⁹

c. *Payment of Taxes.* — Ordinarily, in order to maintain an action to set aside a tax sale certificate, it is incumbent upon the plaintiff to show that he has paid or tendered all taxes embraced therein which the public records show are valid and which he is

39. *Jaquith v. Putney*, 48 N. H. 138.

Ives v. Lynn, 7 Conn. 505. This was an action of trespass. The defendant set up as a defense title to the property in question by deed from a collector of state taxes, on sale of the property. The plaintiff maintained that the deed in question was not sufficient evidence of title on the ground that it did not appear by the return of the officer or by the deed that the sale of all the land disposed of was necessary to raise the sum for which it was sold, or that a part of the land was first offered for sale and found to be insufficient. The court said: "It is a presumption of law that the collector did his duty; and if he did not, it rests on the objector to prove the obliquity of his conduct. No proof has been offered to establish the fact alluded to. It is required of the collector, that he act with fairness, and sell no more property than is requisite to pay the tax and charges. But the specific mode in which he is to act, the law does not prescribe. When he says, as he does in his return, that he sold what was necessary and no more; and when he affirms, as he does, that he sold sufficient to pay the tax and charges, the inference is equally clear, that he disposed of no more than was sufficient. A different construction can alone be founded on a new principle, that is, that returns are to be expounded most strictly against the officer, on the unheard of presumption that he did not do his duty. On the contrary, the inference is legal, that the auction was fairly and legally conducted; and the presumption of fact derived from the defendant's silence, in respect of proof, terminates in the same result." See also *Duerr v. Snodgrass*, 58 W. Va. 472, 52 S. E. 531.

Sale Rendered Void by Reason of

Excessive Amount Sold. — When it is sought to set aside a sheriff's deed upon the ground of the excessiveness of the levy, and the undisputed evidence shows that the land in question was capable of subdivision into lots of sufficient value to discharge the *fi. fa.* and the amount of taxes and costs was less than \$86, the least estimate of the value of the entire lot being about \$250, under these circumstances the levy upon the entire tract was excessive and the sale was void. *Stark v. Cummings*, 127 Ga. 107, 56 S. E. 130.

Where a suit was brought to set aside and cancel a tax sale of oil well supplies, including a large amount of iron casing, and to recover the amount sold on the ground that the distress by the sheriff was unreasonable, it was argued that there was no evidence of unreasonable distress, but the very tax ticket the sheriff held and on which he endorsed his levy showed that the property, the taxes on which he was seeking to collect, was assessed at the valuation of \$8,000, and there was competent testimony that at the time of the sale and after part had been destroyed by fire the property was worth in the neighborhood of \$5,000. A number of the separate items of property, according to the evidence, each exceeded in value the total amount of the taxes. The casing was alone estimated to be worth \$2700 at its market price. These facts precluded the idea that the price at which this property was sold *en masse* justified a levy upon and sale of the whole for the mere pittance of the taxes. The sheriff made no effort to sell in parcels as was his duty under the law to do for the protection of the owner."

Independent of statute, general law will exact fairness in the conduct of the officer in such cases. The court cited *Meachem on Public Offices* and

under obligation to pay.⁴⁰ But a presumption arises from the payment of all taxes assessed upon property for years subsequent to the year for the taxes of which the sale was made, although this presumption is not conclusive.⁴¹

B. NATURE AND SUFFICIENCY OF EVIDENCE. — a. *Defective Descriptions in Assessments.* — The general rule which governs in determining the sufficiency of a description of property embraced in an assessment for taxes is that such description is sufficient when it furnishes the means by which the property can be identified from the description itself, or by the use of extrinsic evidence to apply that description to the property.⁴² It follows that if such extrinsic

Officers, §§ 755, 773; *Handy v. Clipper*, 50 Mich. 355, 15 N. W. 507; *Murfree on Sheriffs*, § 527. *Younger v. Meadows* (W. Va.), 59 S. E. 1087. *Compare State v. Harman*, 57 W. Va. 447, 50 S. E. 828.

40. *Pritchard v. Madren*, 24 Kan. 486; *Miller v. Ziegler*, 31 Kan. 417, 2 Pac. 601.

In an action to set aside a sale of land for personal property taxes on the ground of a want of demand upon the owner for the tax, it is incumbent upon the complainant to prove a tender of the amount necessary to redeem. *McWhinney v. Brinker*, 64 Ind. 360.

The tender of a sum of money for the purpose of redeeming real estate from a tax sale is an admission that the amount tendered is due, and is a waiver of any irregularity in the assessment or sale. *Burton v. Hint-rager*, 18 Iowa 348.

41. **Presumption as to Payment of Taxes.** — *Hodgdon v. Wight*, 36 Me. 326. This was a petition for partition. The petitioner represented that he was seized in fee simple of a certain tract of land, holding the same in common and undivided with persons to him unknown, and prayed that his portion of the tract be set off to him in severalty. The court said: "The title of the petitioner is derived from the state, and its title from a forfeiture of the title of the former owners, occasioned by neglect to pay a state tax assessed upon the lands for the year 1842. An objection is made, that the state could not thus acquire a title, because the state tax for that year has been paid. The presumption arising from the payment of all taxes assessed for

subsequent years is relied upon as proof of it. This presumption may be rebutted. A transcript from the books of the treasurer of the state, exhibiting the payments made for taxes assessed upon the township and the times when and by whom they were made, was received as testimony. The receipts introduced by the respondents correspond to the entries made on those books. There is no proof, that any payments made were omitted to be entered or that any error was committed in making the entries. Under such circumstances the presumption cannot prevail."

42. *Eustis v. Henrietta*, 90 Tex. 468, 39 S. W. 567; *Chapman v. Zobe-lein* (Cal.), 92 Pac. 188; *Hughes v. Thomas* (Miss.), 29 So. 74; *Smith v. Hickman* (Miss.), 24 So. 973.

Baird v. Monroe, 150 Cal. 560, 89 Pac. 352. This action was to quiet title to certain real property, defendant claiming under a tax deed. The assessment of the taxes for which the property was sold was assailed by plaintiff. The assessment was introduced in evidence. The description of the property herein was as follows: "In Los Angeles County, in Pellissier Tr.," and in the column headed "City and Town Lots," under the sub-heading "Lot" the figure "5," and under the sub-heading "block" the letter "K." No city or town was named, and it did not appear whether or not at the time of the assessment the property was included in any city or town. It was stipulated that a map of the Pellissier tract was recorded in the year 1887 in the recorder's office of Los Angeles county, and that it showed

that said lot 5 in block "K" was about fifty-four feet front by one hundred twenty-one feet deep. The valuation of the property was placed in the column headed "value of city and town lots." The principal contention against this assessment was that the description of property was insufficient. It was apparent from the face of the assessment that the property assessed was lot 5 in block "K" in the Pellissier tract in Los Angeles county. The court said: "It was however, permissible to show in aid of this description, that it was in fact sufficient to identify the land, and in this behalf to show the recorded map of said Pellissier tract, designating with certainty the property referred to in the assessment. If by this evidence it was made to appear that there was such a recorded map, and only one such map, or if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract and the extent of its boundaries was well known by that name."

Buckner v. Sugg, 79 Ark. 442, 96 S. W. 184. The plaintiff, H. A. Sugg and others were the owners of fractional section 7, township 15, north range 13 east in Mississippi County, containing 350 acres as shown by the original government survey. This tract bordered upon Buford Lake, a body of water mentioned and platted upon said public survey, and it seemed that the land in controversy was formerly within the bed of this lake, but became uncovered many years ago by gradual recession of the waters. This land was claimed by the owners of said section 7, by virtue of their rights as riparian owners of the adjoining lands. Had the lines of the survey been extended so as to embrace this land, it would be described properly according to said survey as the south half of sec. 12 in township 15, north, range

12 east. It seemed that twenty years previous to the commencement of this action this land had been commonly known and designated by the above description, and in the year 1893 the lines thereof were run and established by the county surveyor. The court said: "It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in an assessment for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner, without recourse to the superior knowledge peculiar to him as owner, that a particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid. . . . Lands now within the meandered bounds of the lake have not been officially surveyed and platted, though the lines were run by the county surveyor by extension of the lines of the original public survey, and the tract in question has been popularly known by the description thus afforded. The controlling question in this case, therefore, is whether a description otherwise than by reference to plats of the original public survey or to other recorded plats properly identifying the plats or lots of land, can be aided by extrinsic evidence of facts which served to connect the description with the particular tract or lot sought to be charged. The affirmative of this proposition seems to be established by the great weight of authority. . . . This court is already committed to the rule that evidence *aliunde* is admissible to connect the land with the description used in the assessment list and other tax proceedings."

Parol evidence is admissible, not for the purpose of adding to or varying the description contained in a certificate of purchase under a tax sale, but of applying that description to its subject-matter. *Judd v. Anderson*, 51 Iowa 345, 1 N. W. 677.

When a description in an assessment is of such a character as not to come up to the foregoing standard, the assessment is fatally defective and

evidence is not offered the description remains *prima facie* defective.⁴³

b. *Notice of Sale*. — It is usually held under the statutes that it

a sale for taxes thus assessed is void. *Levenworth v. Greenville Wharf & Storage Co.*, 82 Miss. 578, 35 So. 138.

For a description that cannot be cured *aliunde*, see *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117.

Wright v. Fox, 150 Cal. 680, 89 Pac. 832. This action was brought to quiet title to land, defendant claiming under a tax deed. The assessment under which the deed was made described the property in question as being in the county of Los Angeles in some city or town, and upon Jefferson Street therein, lot 5 in block 3. *Held*, that this assessment was defective, and that the tax deed was therefore void. This assessment pretended to fix property, not as in any tract, but as on Jefferson street. It would seem impossible, even if an effort has been made, to aid so defective a description by evidence of a map. See also *McQueen v. Bush*, 76 Miss. 283, 24 So. 196.

43. *Wright v. Fox*, 150 Cal. 680, 89 Pac. 832.

Chapman v. Zobelein (Cal.), 92 Pac. 188. "In the assessment book there is the following general introductory heading: 'Assessment book of the property of Los Angeles County for the year 1898,' etc." Under the heading "Description of property in the City of Los Angeles, city and town lots," etc., appeared the entry, "University Addition Tct," and under the heading "City Town Lot" the figures "34." "From this it appears with sufficient certainty that the property assessed is lot 34 in University addition tract in the city of Los Angeles in Los Angeles county. There is no reference to any map of said tract, nor anything to indicate the character of the 'University addition tract,' the location in the city of the addition, nor the relative location of lot 34 thereof." It was held that such a description is *prima facie* insufficient to make a valid assessment. "It has been decided that, while a similar description

is presumptively invalid, it may be explained and supplemented by proof on the trial that there is a definite tract known by the name given, that a survey and map thereof has been made, and that the lot designated by number constitutes a known and certain subdivision thereof, and that when so explained, the assessment will be held good. . . . The only difference between this case and one where there is a reference to some map is that maps are of such customary use that it will be presumed that one exists to answer a description and give it certainty, whereas if there is no reference thereto the presumptions against tax proceedings prevail, and there must be proof sufficient to make the description certain."

Fox v. Townsend (Cal.), 91 Pac. 1004. This action was to quiet title to certain lots of land in Los Angeles county, and was brought by plaintiff, claiming title under certain tax sales to the state of California and deeds from the state to him, against various persons who were the owners thereof, if the tax proceedings were ineffectual to vest title in plaintiff. It was contended by defendant that the description of property in the assessment was insufficient to make a valid assessment (the description being "In Los Angeles County in Electric Ry. Homestead Assn. Tr. Lot 17, Block 20," and the same practically as to lot 17 block 24). It was held that a party relying on an assessment containing such a description might supplement his case by showing that the description in the assessment was in fact sufficient to identify the land. The record failed to make it appear if any evidence whatever was introduced tending to show that the descriptions were in fact sufficient to identify the land. It necessarily followed that the conclusion of the trial court that the descriptions in the assessment were insufficient and the assessment void, must be upheld.

must appear in evidence that proper notice was given of a tax sale.⁴⁴ It is sometimes held that there is a presumption to this effect.⁴⁵ Ordinarily, the tax officer is required to furnish proper proof that the notice of tax sale was, in form, sufficient and that the sale was advertised according to law. Such proof is usually made by his affidavit or certificate.⁴⁶ But this is not conclusive.⁴⁷ Where no proof of service or publication of notice has been made either by the tax officer's certificate or by any other means, the tax sale is therefore void.⁴⁸ In some instances parol evidence is admissible

44. *Williams v. Chaplain*, 112 La. 1075, 36 So. 859.

45. Where a lot of wild land was sold for taxes by virtue of an execution issued by the comptroller-general under the provisions of the act of February 28, 1874 (Acts of 1874, p. 105), the presumption, in the absence of sufficient evidence to the contrary, is that the comptroller-general complied with his duty as to advertising as required by the 6th section of that act, as amended by the act of March 2d, 1875 (Acts of 1875, p. 119); and this presumption is not overcome by exhibiting three copies of a newspaper dated, respectively, in three successive weeks, and published at the capital of the state, in each of which appears a proper advertisement that the lot in question was in default for taxes, without also exhibiting other copies of the newspaper printed during the weeks immediately after the three weeks mentioned, and not containing such advertisement, or else showing that no such copies were issued. The mere fact that the files of the newspaper, kept in the office in which it was printed, contained no copies of given dates, would not, of itself, be sufficient evidence that no copies of the paper were in fact printed and issued on those dates. *Bedgood v. McLain*, 94 Ga. 283, 21 S. E. 529.

46. *Arkansas*.—*Taylor v. State*, 65 Ark. 595, 47 S. W. 1055.

Georgia.—*King v. Sears*, 91 Ga. 577, 18 S. E. 830.

Indiana.—*Doe v. Sweetser*, 2 Ind. 649.

Maine.—*Bowler v. Brown*, 84 Me. 376, 24 Atl. 879.

Minnesota.—*Cook v. Schroeder Lumb. Co.*, 85 Minn. 374, 88 N. W. 971.

New Jersey.—*Jones v. Landis Twp.*, 50 N. J. L. 374, 13 Atl. 251; *Landis v. Vinland*, 60 N. J. L. 271, 37 Atl. 1099.

Ohio.—*Magruder v. Esmay*, 35 Ohio St. 221.

47. In *Riddle v. Messer*, 84 Ala. 236, 4 So. 185, which was an action of ejectment, the question arose as to whether the proceedings, under which the plaintiff's title was acquired, were regular and in conformity to the statute regulating the sale of lands for payment of delinquent taxes in force when the sale was made. The statute required that a notice of the proceeding of condemnation should be served on the owner. Upon the question as to whether or not the return of the collector is conclusive evidence as against the owner that the notice had been served, the court held that, in this action the owner had a right to show that the return was false, and that no jurisdiction had been acquired over his person, the court remarking that "much injustice might often be done if taxpayers were precluded from thus protecting themselves against the sheer negligence of an officer in failing to notify them of the pendency of a proceeding by which lands of great value might be sacrificed for a trifling amount."

48. In *Carpenter v. Sawyer*, 17 Vt. 121, under the third section of the statute of 1807, relative to the sale of lands for non-payment of taxes, which required the town clerk to record within a specified time after the sale "the advertisements at length, and the title, the column, the number and the date of the papers in which they were inserted," it was held that a record of such advertisements, made by the town clerk from

to show proper service of notice.⁴⁹ The manager, printer, or publisher of the newspaper in which the notice of the tax sale was published may also furnish proof to the same effect by their affidavits or certificates.⁵⁰ And parol evidence is sometimes held admissible to show that such an affidavit was made and deposited with the

the copy of the same, certified by him, in the sales book of the collector, was not a compliance with the statute, and that the collector's deed of land sold, when the record had been thus made, was of no effect to prove the title.

In *Bowler v. Brown*, 84 Me. 376, 24 Atl. 879, the court said: "The statute, R. S. ch. 6, § 193, requires the collector of taxes, as one step in the procedure, to 'lodge with the town clerk a copy (of his notice of intended sale), with his certificate thereon,' that he has given notice of the intended sale as required by law. The plaintiff put in evidence the copy of notice so lodged with the town clerk in 1882, upon which copy the only certificate is as follows, 'I hereby certify the following to be a true copy of the notice of the aforesaid as required by law.' There is a total lack of any 'certificate that he has given notice of the intended sale as required by law,' or that he has given any notice. The paper he lodged with the town clerk is merely certified to be a copy of another paper, which latter may, or may not, have been posted as required by law. The statute further provides that the 'copy and certificate shall be recorded by the clerk, and the record so made, shall be open to the inspection of all persons interested.' The land owner by inspecting this record would not learn that any notice had been posted or otherwise given. The statute plainly requires the certificate above described, and the omission to make it is the omission of a necessary step in the procedure."

In *Ayers v. Lund* (Or.), 89 Pac. 806, the court said: "There is no evidence before the court that the property was advertised for sale or sold to the county. At the trial the officer who made the sale identified as his return on the tax warrant what we understand was a copy of the printed notice of the tax sale cut

from the newspaper, headed "Sheriff's Sale for Delinquent Taxes," which was attached to the delinquent tax roll, and upon which was interlined or written at the time of or after the sale, opposite the name and description of the property, the name of the purchaser and the selling price in each case. This so-called return is dated September 18, 1899, the date of the notice, but to which is attached this certificate of the officer: 'The foregoing return of delinquent tax sales for the year 1898 is true and correct in every detail. Dated the 27th of October, 1899.' This does not show advertisement of the property for sale or a sale."

49. Suit to annul a tax sale and to recover damages for an alleged eviction. One ground of action, as stated in the petition, was to the effect that no notice of the proposed sale was ever sent to or received by the petitioner. *Held*, that the testimony of a deputy sheriff to the effect that he mailed a tax notice in compliance with §§ 50 and 51 of act no. 85, p. 129, of 1888, sufficiently proves that fact when he proves that he prepared and mailed notices to all delinquents and double-checked them, although he is unable to locate the particular notice. *Tieman v. Johnston*, 114 La. 112, 38 So. 75.

In *Rodgers v. Gaines*, 73 Ala. 218, which was an action of trover, plaintiff relying on a tax title, it was held that oral evidence of the fact and contents of notices of sale, posted in exposed places more than a year before the trial, is admissible for him, without proof of loss or destruction, the presumption being that they had been destroyed.

50. *Herr v. Graden*, 33 Colo. 527, 81 Pac. 242; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231, 29 Pac. 802; *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042, reversing 7 Colo. App. 301, 43 Pac. 455; *Fox v. Cross*, 39 Kan. 350, 18 Pac. 300; *Mann v. Car-*

county clerk as required by law, although it is not to be found in his office.⁵¹

c. *Lack of Personalty*. — As a general rule before real estate can be legally sold for taxes, it must appear in evidence from the return of the proper officer that there was not sufficient personal property out of which to satisfy the tax.⁵² The return itself is, as a rule, *prima facie* evidence of the fact of an insufficiency of the personalty,⁵³ and sometimes conclusive.⁵⁴

d. *Fraud on the Part of Bidders*. — Where it appears from the evidence that the bidders at a tax sale entered into a fraudulent combination not to bid against each other, such evidence is admissible for the purpose of impeaching the validity of the sale,⁵⁵ but

son, 120 Mich. 631, 79 N. W. 941; *Daniel v. Taylor*, 33 Fla. 636, 15 So. 313.

51. In *Herr v. Graden*, 33 Colo. 527, 81 Pac. 242, the court said: "While it is well settled that the fact of the publication of notice of a tax sale can be proved only by the affidavit provided in the statute, and unless so proved the sale is void, and the absence of such affidavit and notice from the office of the county clerk may be sufficient to overcome the *prima facie* presumption furnished by the tax deed that such proof was made, nevertheless, if the necessary affidavit was made and deposited in compliance with the requirements of the statute, this fact may be established by satisfactory parol testimony. The ultimate and controlling fact to be determined is, was the notice of the tax sale proved as the law requires, and was this proof placed in the designated depository? What we decide is that the mere fact that the affidavit and notice was not found in the office of the county clerk is not conclusive of this question, but that parol evidence may be resorted to to ascertain whether the proof was originally made and deposited as the statute requires. Our conclusion is that the evidence offered was admissible and that the trial court erred in excluding it. This conclusion in no way contravenes the former rulings of this court that the proof of publication of a tax sale can only be made in the manner provided by the statute."

52. *Belden v. State*, 46 Tex. 103; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

Where under a statute, the affidavit which a collector is required to subscribe at the end of his docket, as to his inability to find personal property, is not required to be dated, if it is in proper form, though without date, it will not be presumed to have been made subsequent to sales for unpaid taxes. *Riddle v. Messer*, 84 Ala. 236, 4 So. 185.

Under the statutes in Alabama the affidavit which is required to be made and filed by the officer relating to his inability to find personal property is a fact of a jurisdictional character without which the court has no power to grant an order to sell land, and in case the affidavit is not made until after the sale no retroaction takes place so as to impart validity to the decree and sale. *Simms v. Greer*, 83 Ala. 263, 3 So. 423; *Feagin v. Jones*, 94 Ala. 597, 10 So. 537; *Wartensleben v. Haithcock*, 80 Ala. 565, 1 So. 38; *Fleming v. McGee*, 81 Ala. 409, 1 So. 106.

53. *King v. People*, 193 Ill. 530, 61 N. E. 1035. See also *Goodrich v. Minonk*, 62 Ill. 121.

54. *Marsh v. Nelson*, 101 Pa. St. 51.

55. Where a combination is entered into between the purchasers at a tax sale to the effect that they will not bid against each other, but that they will bid in turn, the sale is void, and evidence that such a course was pursued at the sale is admissible in the first instance, although it is not shown that the defendant, who was the purchaser thereat, was a party to such combination, where it nevertheless appeared that he could not have taken part in the sale without being aware of the manner in

only when it appears that such conduct was connected in some way with the property in controversy.⁵⁶

C. CONCLUSIVENESS OF ADJUDICATION. — A judgment decreeing a sale for taxes cannot be attacked in a collateral proceeding by the introduction of evidence showing irregularities in the assessments, or of matters pertaining thereto,⁵⁷ or by evidence showing

which it was being conducted and becoming a party thereto by taking his turn in bidding. *Kerwer v. Allen*, 31 Iowa 578.

The fact that there were three bidders at a tax sale and that they did not bid against each other, is not of itself sufficient evidence to establish a fraudulent combination amongst them so as to invalidate the sale. *Beeson v. Johns*, 59 Iowa 166, 13 N. W. 97.

56. Evidence that the purchaser at a tax sale by his conduct prevented competition with him by the bidders present in reference to many pieces of land bid for by him is not admissible to impeach the validity of a sale to him where it is not shown that such conduct extended to or was in some way connected with the land in controversy. *Eldridge v. Kuehl*, 27 Iowa 160.

57. *Carpenter v. Auditor General*, 144 Mich. 251, 107 N. W. 878; *Mayo v. Foley*, 40 Cal. 281; *Eldridge v. Kuehl*, 27 Iowa 160; *Reeves v. Alter* (Pa.), 12 Atl. 551. *Compare Gage v. Pumpelly*, 115 U. S. 454.

In *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713, it was held that it is not competent for the court to inquire whether the evidence of the facts alleged in the petition and found by the court in the tax suit were sufficient to warrant the judgment there entered. No inquiry can be made in this case as to any supposed irregularities occurring in the progress of that suit or errors of the court as to the sufficiency of evidence adduced therein. The court derived its jurisdiction to hear and determine the case in which the state, to the use of the collector, sued for the taxes therein claimed, from the constitution and laws of this state. It was a court of general jurisdiction proceeding according to the courts of common law. Its jurisdiction once obtained, as it was in that case, upon

a petition stating a cause of action after due notification of the defendant by an order of publication regularly ordered and published, cannot be questioned in a collateral suit by the proofs that some of its findings are erroneous. Its judgments are no less conclusive in tax suits than in any other cases over which it has jurisdiction by virtue of the constitution and the laws of the state. See also *Boyd v. Ellis*, 107 Mo. 394, 18 S. W. 29.

Carson v. Titlow, 38 Wash. 196, 80 Pac. 299, was a suit to remove a tax deed as a cloud on title, plaintiff contending that the taxes for which the land in question was sold were based on an excessive assessment. From a judgment in the lower court in favor of defendants, plaintiff appealed. § 1767, 1 Ballinger's Ann. Codes & Stats. provides: "And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objection thereto, or to the tax title based thereon which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid or the real estate was not liable to the tax or assessment." Laws 1897, p. 190. *Held*, that if appellants had shown any diligence at all in reference to their taxes on these lands they would have known of the proceedings and could have litigated the alleged excessive assessment with the county in the foreclosure action. It is not claimed that any part of the tax has been

an erroneous tax,⁵⁸ or by proof of irregularities in the proceedings relating to the adjudication, especially after a long lapse of time,⁵⁹ or usually by the introduction of any other evidence which might have been introduced at the trial of the action in which the tax judgment was rendered.⁶⁰ Such a judgment can generally, under the statutes, only be set aside by proof showing either that the taxes for which the property had been sold were paid,⁶¹ or that the court

paid or that the lands were not subject to taxation. Under the allegations of the complaint and the rules stated above appellants were clearly estopped to litigate the question of excessive assessment in this action.

58. Eldridge v. Kuehl, 27 Iowa 160.

Chicago Theological Seminary v. Gage, 12 Fed. 398. This suit was brought to set aside a tax sale as a cloud upon complainant's title. No irregularity or illegality is charged in the levy of such taxes and the judgment and sale, except that certain of the state taxes were illegally levied. There was no dispute but what a very large proportion of these taxes were legally levied and a charge upon this property. The court said: "The law provides for a hearing as to the validity of taxes at the time the judgment is asked for. The proceedings to enforce the payment of taxes by the sale of the lots is in a certain sense a proceeding *in rem* against the property, but the owner has the right to be heard, and if he has any reason to urge against the validity of the tax or against any portion of it, it is his duty to make it known then. He has his day in court at that time and if he fails to appear and make known his objections it seems upon every principle of judicial action he must be concluded and barred by the judgment. After the judgment has been rendered, and the property sold in pursuance thereof, the owner ought not to be allowed to go behind the judgment and dissect the tax; and if he can find an illegal item of expenditure, for which the municipality has made an appropriation, which has been included in the levy, to have the whole assessment and the proceedings of judgment and sale declared void."

59. Denegre v. Buchanan, 47 La. Ann. 1559, 18 So. 501.

60. Owens v. Auditor General, 147 Mich. 683, 111 N. W. 354; Carpenter v. Auditor General, 144 Mich. 251, 107 N. W. 878; Hoyt v. Clark, 64 Minn. 139, 66 N. W. 262; Riddle v. Messer, 84 Ala. 236, 4 So. 185; Coombs v. Crabtree, 105 Mo. 292, 16 S. W. 830.

While, in a tax title foreclosure proceeding against the land of an unknown owner, under the Iowa code of 1851, a failure to state, in the affidavit for publication required by §1826 thereof, the facts showing diligence in endeavoring to ascertain the name and residence of the owner of the lands sold at the tax sale, would be good cause for the reversal of the judgment, on appeal, yet such failure will not render the decree void on its face when collaterally assailed. Little v. Chambers, 27 Iowa 522.

Driggers v. Cassady, 71 Ala. 529. This was a statutory real action in the nature of an ejectment. In construing an act entitled "An act to provide for the sale of land and other real estate for delinquent taxes, and the redemption thereof," it was laid down, as a general rule, that where the lands of an owner had been judicially condemned to the payment of taxes, by a judgment of the probate court rendered in conformity to the provisions of this act, the record *prima facie* showing jurisdiction, such judgment would be conclusive on the taxpayer, and could not ordinarily be attacked on any ground which could have been pleaded in defense on the trial, or in bar of the rendition of such judgment of condemnation. See also Mayo v. Foley, 40 Cal. 281.

61. Carpenter v. Auditor General, 144 Mich. 251, 107 N. W. 878; Carson v. Titlow, 38 Wash. 196, 80 Pac.

had no jurisdiction of the subject-matter by reason of the fact that the property in question was exempt from taxation,⁶² or that the court had no jurisdiction for some other reason.⁶³ But in Missouri it is held that the title of a purchaser under a tax judgment cannot be defeated by evidence showing that the tax for which the judgment was rendered was paid at any time whatsoever.⁶⁴ And in Michigan the original owner of property sold for taxes is absolutely concluded from offering evidence for the purpose of setting aside a judgment decreeing such sale, at the expiration of six months from the rendition of the judgment.⁶⁵

3. Actions in Which Tax Titles Are Questioned.—A. PRESUMPTIONS AND BURDEN OF PROOF.—a. *In General.*—As in proceedings in which the validity of tax sales are brought in controversy, so also in actions in which tax titles are questioned, the well established rule, when not modified by statute, is that the burden of proof is on the holder of the tax title to maintain his title by affirmatively showing that the provisions of the law have been complied with.⁶⁶

299; *Drake v. Ogden*, 128 Ill. 603, 21 N. E. 511; *Watson v. Kent*, 78 Ala. 602, *distinguishing* *Driggers v. Casady*, 71 Ala. 529.

^{62.} *Carpenter v. Auditor General*, 144 Mich. 251, 107 N. W. 878.

^{63.} *Mayot v. Auditor General*, 140 Mich. 593, 104 N. W. 19; *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299.

In *Foohs v. Bilby* (Ark.), 103 S. W. 386, the plaintiff claimed title to the land in controversy under a tax sale, and introduced in evidence the deed of the commissioner to his immediate grantor; and it was held error to refuse to permit the defendant to introduce in evidence the record of the chancery court of the overdue tax proceeding, showing that the tract of land in question was not embraced in the warning order entered on the record by the clerk, inasmuch as the entry describing the lands proceeded against is a jurisdictional matter, and a failure in this respect is fatal to the jurisdiction and renders the proceedings void. See also *Gregory v. Bartlett*, 55 Ark. 30, 17 S. W. 344; *Pope v. Campbell*, 70 Ark. 207, 66 S. W. 916.

^{64.} *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713; *Jones v. Driskill*, 94 Mo. 191, 7 S. W. 111; *Hill v. Sherwood*, 96 Mo. 125, 8 S. W. 781.

Evarts v. Missouri Lumb. & Min. Co., 193 Mo. 433, 92 S. W. 372. This action was brought under § 650 Rev. Stats. 99, to ascertain and declare

the rights of the parties hereto to certain land, defendant claiming an interest therein by virtue of a sheriff's deed purporting to convey the land for alleged delinquent taxes. Upon the ground as to whether or not evidence was admissible in this case to show that the taxes in question were paid before the institution of the tax suit or judgment therein or sale thereunder, and thereby to defeat the defendant's title acquired by the tax sale, it was held that the title of a purchaser under a tax judgment could not be defeated by showing that the tax for which the judgment was rendered had been paid before the institution of the suit, before the judgment was rendered, or before the sale under the judgment.

^{65.} Under Act No. 84, p. 110, Pub. Acts 1903 (Mich.) the owner of the original title to property sold for taxes is given six months after said act took effect in which to attack the sale. These provisions were intended to fix a period limiting a time after which tax sales cannot be attacked. *Owens v. Auditor General*, 147 Mich. 683, 111 N. W. 354.

^{66.} *United States.*—*Dunn v. Games*, 1 McLean 321, 8 Fed. Cas. No. 4,176.

Illinois.—*Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320.

Indiana.—*Rich Creek v. Russell*, 34 Ind. App. 217, 72 N. E. 617.

This rule is limited in its application to actions between the owner of a tax title and an original owner of the property taxed, or those who are in privity with him.⁶⁷

b. *Presumptions Arising From Official Acts.* — In the list of non-resident taxes it is not necessary to state that the original proprietor and owner are unknown, when the fact is so. When their names are not stated in the list they will be presumed to be unknown until the contrary appears.⁶⁸

It is incumbent upon a party defending against a tax title to offer some evidence of failure to give notice and of failure of the tax collector to offer at the sale the least quantity of property, to rebut the presumption of regularity before the tax purchaser has thrown

Maine. — *Baker v Webber*, 102 Me. 414, 67 Atl. 144.

Oregon. — *Ayers v. Lund*, 89 Pac. 806.

Texas. — *Woody v. Strong* (Tex. Civ. App.), 100 S. W. 801.

Utah. — *Moon v. Salt Lake County*, 27 Utah 435, 76 Pac. 222; *Eastman v. Gurrey*, 15 Utah 470, 49 Pac. 310; *Hamer v. Weber County*, 11 Utah 1, 37 Pac. 741; *Olsen v. Bagley*, 10 Utah 492, 37 Pac. 739.

The power to sell property for taxes is altogether statutory; it must be strictly pursued. And in an action of ejectment against a purchaser at a tax sale where the defendant relies upon his tax title, he must show by competent evidence, save so far as his adversaries may by doing so relieve him from this necessity, that the statutory steps were taken which are necessary to a valid tax sale. *Smith v. Ryan*, 88 Ky. 636, 11 S. W. 647.

Where an action was brought to determine title to land, defendant claiming under a tax deed, it appeared that the statutory form of the tax deed did not make provisions for an assignment. It was held that the burden was upon the defendant in this case, who was the claimant under the tax deed, but who was not the purchaser at the tax sale, to prove the assignment to him. *Smith v. Philips* (Fla.), 41 So. 527.

In *Moore v. Cooke*, 40 Iowa 290, an action to set aside a tax deed on the ground that no levy was made, it was held that the introduction of the records showing that they con-

tained no record of any levy as claimed overcomes the presumption of a levy which the execution and recording of a tax deed creates, and that the burden of proving a levy in fact was thrown upon the party claiming under the deed, which he could do only by proving that the record once existed and has been lost or destroyed.

Glos v. Kelly, 212 Ill. 314, 72 N. E. 378. This action was brought by a party to establish and confirm title in himself to certain lands under the "burnt records act." (Hurd's Rev. Stats. 1903, p. 1484, ch. 115), which provides for such an action when the records pertaining to a title have been destroyed by fire. Defendant claimed title to the property in question by virtue of a certain tax deed. Held, that the burden of proof was upon the defendant of showing the validity of his title.

67. In *Kries v. Holladay-Klotz Land & Lumb. Co.*, 121 Mo. App. 184, 98 S. W. 1086, it was held that the rule to the effect that the burden of proof is upon those who claim title under a tax sale is limited to controversies between the owner of a tax title and an original owner of the land or those who are in privity with him, and its application is never made in favor of an intruder upon the land as a mere trespasser who cuts timber or does any other injury to the inheritance, or is a stranger showing in the premises sold for taxes no interest or title.

68. *Cardigan v. Page*, 6 N. H. 182.

upon him the burden of sustaining by proof compliance with the legal requirements in such particulars.⁶⁹

c. *Presumption as to Collector's Authority.* — In an action to recover land, defendant claiming under a tax deed, where the evidence shows the election of a tax-collector and the fact that tax bills were committed to him, it will be presumed that all other prerequisites for giving him authority were complied with.⁷⁰

B. NATURE AND SUFFICIENCY OF EVIDENCE. — a. *In General.* A tax title may be set aside by proof showing that the taxes or levies for which property was sold were not properly chargeable thereon, or that the taxes and levies properly chargeable thereon had been paid.⁷¹

69. *Slattery v. Heilperin*, 110 La. 86, 34 So. 139.

70. Such as the fact that the collector was duly chosen at a legal town meeting and that he acted by virtue of assessments committed to him by assessors, also duly chosen at a legal town meeting. *Pejepscut v. Ransom*, 14 Mass. 145.

This is especially true after a long lapse of time. *Pejepscut v. Ransom*, 14 Mass. 145.

71. In *Joslyn v. Rockwell*, 13 N. Y. Supp. 311, 35 N. Y. St. 888, it was held that in a proceeding under the laws of New York of 1885, ch. 448, which provides for the sale of non-resident lands for non-payment of taxes, the fact of the non-residence of the owner as well as the fact of non-payment of taxes are of a jurisdictional character. Proof of occupancy under the owner, and of payment of taxes before the collector's return of non-payment, is admissible on the part of the defendant to invalidate the assessment and sale.

Brown v. Bradshaw, 100 Va. 124, 40 S. E. 617. In support of the contention that the taxes for 1887 had been paid the plaintiff showed by a certified copy of a delinquent list for the year 1887 from the office of the auditor of public accounts that the land in controversy was not returned delinquent for that year. This certified list showed that the name of one Ferguson had been entered thereon but without any land being mentioned delinquent. A line was drawn through the entire entry in red ink, with the following endorsement thereon in like ink. "No lot

listed in this name." The evidence tended to show that the county treasurer in his settlement with the auditor was charged with the taxes of 1887, on the land in question as paid. It was further shown by the plaintiffs that beside the name of Ferguson on the original delinquent list for 1887 in the clerk's office the word "paid" appeared. It was further shown that the taxes assessed against the land in question since the year 1887 had been paid by Ferguson or his alienees. *Held*, that this evidence was sufficient to show the fact that the tax had been paid.

Constitutional Provision in Louisiana. — One Exception to Rule. Where a suit was brought to confirm a tax title to certain lands, it was held under article 233 of the constitution of 1898, a tax sale made in 1899 cannot be set aside except on proof of dual assessment or prior payment of the taxes for which the property was sold, where no proceedings to annul were instituted within three years from the date of the adoption of said constitution. The only exception to this limitation recognized by jurisprudence is where the tax debtor was in actual and corporeal possession at the date of the tax sale and continued in possession. To extend this doctrine to the case at bar where the tax debtor was not in actual possession at the time of the tax sale or at the date of the adoption of the constitution of 1898, would be to create another exception to article 233 of the constitution of 1898, and to greatly impair its well-recognized curative properties in re-

b. *Notice To Redeem*.—Statutes usually require notice of expiration of the period of redemption from a tax sale to be served at the time of expiration of such period upon the occupant of the property. Such notice must be served by the grantee at the tax sale, or a person claiming under him, before a tax deed can be lawfully issued. Where it appears from the evidence that a tax deed was issued and that no notice to redeem was served, the deed is held to be void.⁷² In some instances a notice is also required to be served upon the party in whose name the property was taxed at the time when the period allowed for redeeming the property from the tax sale would expire; but where it appears from the evidence that at this time the property was taxed to an unknown owner, no notice to redeem is required.⁷³ It is sometimes required by statute that an affidavit of service of notice to redeem from a tax sale shall be filed with the treasurer as a condition precedent to his issuing a tax deed. The law presumes that such notice was in due form where the affidavit shows proper service and a deed has been issued thereon.⁷⁴

lation to defective tax titles. *Little River Lumb. Co. v. Thompson*, 118 La. 284, 42 So. 938; *In re Seim*, 111 La. 554, 35 So. 744, *reaffirmed*.

72. *People v. Ladew*, 189 N. Y. 355, 82 N. E. 431. Motion for re-argument denied, 82 N. E. 1092.

In Kansas the redemption notice required to be given prior to the execution of a tax deed and the proof of publishing and posting the same should be filed and preserved in the office of the county clerk, and a copy of such a notice certified to by the county treasurer, who is not the official custodian thereof, is not receivable in evidence with the same effect as the original under §372 of the Kansas code. *Bergman v. Bullitt*, 43 Kan. 709, 23 Pac. 938.

73. *Burdick v. Connell*, 69 Iowa 458, 29 N. W. 416. The statute required that the notice be served upon the person in possession and upon the one in whose name it is taxed. Code §894. As the land was not taxed in the name of the persons named in the notice and they were not in possession, no notice was required to be served on them and it is clear that the service of the notice on them did not answer the requirements of the statute if the circumstances were such as that notice was required to be served on some other person. Appellant claimed that the

land was in fact taxed in the name of one Medallow and that the notice should have been served on him. The assessment in force at the time was introduced in evidence. The page of the book on which the assessment of the property in question is shown contained the description of thirty-six tracts of land, and following each description, under the proper headings, were written the proper items of the assessment in such case, except that under the heading "Owners' Names" there was no name written except after the first, and the successive descriptions, the corresponding spaces after all the other descriptions being blank. *Held*, that the assessments in all the cases where no owner's name was entered must be regarded as being made to unknown owners.

74. In *Knudson v. Litchfield*, 87 Iowa 111, 54 N. W. 199, it was held that the affidavit of service of notice to redeem from the tax sale required by the statute to be filed with the treasurer as a condition precedent to his issuing a tax deed need not in all respects state what the notice contained. Neither is it required that a copy of the notice be attached to the affidavit or filed with the treasurer. When the affidavit shows proper service of such notice and a deed has been issued thereon, the law pre-

c. *Defective Descriptions in Tax Deeds.*—In the sale and conveyance of real property for taxes, the description is sufficient if it indicates such property with ordinary and reasonable certainty; but if it appears from the evidence that it is so inapt and uncertain as to mislead the owner, or will not afford fair notice of the tax levied against his property, or how much of it was sold for taxes, the conveyance will be invalid,⁷⁵ and it cannot be aided by extrinsic evidence,⁷⁶ except where there is enough in the description to be applied

sumes that the notice was in due form until such presumption is overcome by an affirmative showing to the contrary.

75. *Bank of Lemoore v. Fulgham* (Cal.), 90 Pac. 936; *Smith v. Philips* (Fla.), 41 So. 527; *Kruse v. Fairchild*, 73 Kan. 308, 85 Pac. 303.

76. *McLemore v. Anderson* (Miss.), 43 So. 878; *Gibbs v. Hall* (Miss.), 38 So. 369.

In *Pearce v. Perkins*, 70 Miss. 276, 12 So. 205, which was a bill seeking confirmation of certain tax titles, the bill setting out a number of purchases from the state of distinct tracts of land, it was held that a patent ambiguity in the description of land in a tax deed made in 1875 cannot be aided by reference to an assessment roll if no such reference is contained in the deed itself. The mention of the reputed owner's name in the deed is not such a reference in aid of the description.

Hughes v. Thomas (Miss.), 29 So. 74. This was an action to confirm a tax title to certain lots of land. The complainant's bill alleged that the lots of land, the tax title to which he sought to have confirmed, were sold by the tax-collector, and that said tax-collector in his deed as tax-collector to the complainant as a purchaser, described said land as follows: "The following land situated in the said county assessed to Thos. McNamara, to wit, part of lots 19, 20 and 21 in square B, J. B. Walker's Survey." A copy of this deed was exhibited with the bill. Ann. Code (§§ 3775, 3776, Miss.) provides that upon the failure to observe all of the requirements as to the description of land when assessing it, such failure will not vitiate the assessment if it is possible to identify the land by parol evidence, which shall always be admissible to

apply a description of land in an assessment roll or in a tax conveyance. The court said: "We are of the opinion that an assessment of a parcel of land as 'part of lots 19, 20 and 21, in square B, J. B. Walker's Survey,' etc., is void on the face. We are asked to give 'careful attention' to *Dodds v. Marx*, 63 Miss. 443. We endeavored to follow that case. The court there said: 'The roll (assessment roll) must furnish the clue which, when followed by the aid of parol testimony, conducts certainly to the land intended. It is admissible only to apply the description of the roll which must give the start and suggest the course, which, being followed, will point out the land intended to be assessed.' The description in the tax deed, which is presumably a copy from the assessment roll, gives no start. It suggests no course. Whether the north part, or the east part, or the south part or the west part, is not given on the roll. If the legislature have power to authorize parol testimony to fix this uncertain description upon a parcel of land not described upon the assessment roll or otherwise indicated by any fact or circumstance which may lead to its identification, and so legislate a man out of his property without any fault upon his part, certainly it has not done so by sections 3775 and 3776 of the annotated code."

Smith v. Hickman (Miss.), 24 So. 973. This was a bill in chancery to confirm tax title to a parcel of land. Defendant answered and averred that said deed was void and vested no title in complainant because of its ambiguity in description of land so assessed and sold, and denied that complainant acquired at said sale either a legal or equitable title to this land. On the hearing the land assessment

to and identify a particular tract of land by aid of such evidence.⁷⁷

d. *Admissibility of Miscellaneous Documents.* — (1.) *To Substantiate a Tax Title.* — (A.) *Tax Books.* — Where a party claims property under a tax deed, the official tax books of the taxing district are admissible for the purpose of showing a valid assessment of the property in question.⁷⁸

(B.) *ASSESSOR'S RETURN CORRECTED BY BOARD OF APPEAL.* — In an action to recover real estate, defendant claiming under a tax deed, it is held that the return of the assessors having been examined and corrected by the board of appeal and then handed over to the register constituted sufficient evidence of an authority in the assessors to act as such.⁷⁹

roll for 1892, the list of the land sold for taxes in 1893, and the tax collector's deed to complainant were introduced in evidence by complainant. The assessment roll showed that the whole of the east one-half, south-west one-quarter, sec. 3, twp. 14, range 3 east, was assessed to W. P. Hickman. The list of lands sold in 1893 showed that twenty acres in the east one-half, southwest one-quarter, sec. 3, twp. 14, range 3 east, was sold to W. P. Hickman, and the deed from the tax-collector to complainant described the land as twenty acres in twenty acres in east one-half of southwest one-quarter, sec. 3, twp. 14, range 3 east. From a decree confirming plaintiff's tax title and granting other relief sought plaintiff appealed. Code 1892, § 3776, provides that parol testimony is admissible to apply a description to lands on an assessment roll or in a conveyance for taxes in cases where there is enough in the description on the roll or in the conveyance to be applied to a particular tract of land by the aid of such testimony. *Held*, that the evidence showed that the description of the land was wholly insufficient. The whole of the east one-half was assessed to the purchaser. The case does not fall within § 3776, code of 1892. The land involved was not assessed at all sufficiently. There was but one assessment. No clue was furnished by the roll or the tax conveyance within the meaning of said § 3776. Decree reversed and cause remanded.

77. *Smith v. Hickman* (Miss.), 24 So. 973.

Blair Town Lot & Land Co. v.

Scott, 44 Iowa 143. In this case the tract was listed as "in S.E.S. W. Sec. 2, Tp. 83, R. 24 — 15 acres," while in the certificate and deed it was described as "15 acres in the S. side S. E. quarter of the S. W. quarter of Sec. 2, Tp. 83, R. 24." *Held*, that the two descriptions did not necessarily contemplate the same parcel, and that in the absence of evidence *aliunde* showing them to be the same, no right was acquired by the purchaser either under the sale or deed.

In *Davis v. LeMesnager* (Cal.), 92 Pac. 76, action was brought to obtain decrees quieting plaintiff's title to certain lots located in the city of Los Angeles. That title rested upon certain deeds from the state of California executed by authority of the revenue laws of the state after non-payment of taxes and sale to the state. Plaintiff disclaimed title from one W. H. Wheeler to whom the state made the deeds. The trial court held that the deeds from the state of California to Wheeler were void for certain irregularities in the proceedings leading up to them, and decreed title in the defendants. Maps of the subdivisions and surveys of the several lots and tracts referred to in the various deeds contained in the record were introduced in evidence supplementing the description in the assessments and the deeds. *Held*, that these were admissible for the purpose indicated.

78. *Ronkendorff v. Taylor's Lessee*, 4 Pet. (U. S.) 349.

79. In *Ronkendorff v. Taylor's Lessee*, 4 Pet. (U. S.) 349, to show the taxes assessed on the property in question, the defendant below pro-

(C.) OFFICIAL RECORDS OF TAX SALES.—Where a claim of title is made to property by virtue of a tax deed, for the purpose of proving such claim the official record of tax sales is admissible in evidence.⁸⁰

(D.) TAX RECEIPTS.—Tax receipts are, under certain circumstances, by statute made conclusive evidence of the fact of payment of all prior taxes. For cases involving the provisions of such a statute, see the note.⁸¹

duced in evidence the official tax books of the corporation, regularly made up by its officers, from which it appeared that the plaintiff stood charged with certain taxes. It was contended by plaintiffs in the lower courts that the original lists of the assessors should be produced, and also that the defendants should offer proof of the assessors' appointment. Mr. Justice M'Lean, in delivering the opinion of the court in reference to the necessity of proof of the assessors' authority, said: "The court recognized the correctness of the principle contended for by the counsel for the plaintiff in error that in an *ex parte* proceeding of this kind under special authority great strictness is required. To divest the individual of his property against his consent every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceeding, and the proof of regularity in the procedure devolves upon the person who claims under a collector's sale. In this case was it necessary to exhibit proof of the regular appointment of the assessors? They acted under the authority of the corporation, and the highest proof of this fact is the sanction which it has given to their return. This return has been examined and corrected by the board of appeal, and was then handed over to the register. What better proof can be required of the assessors' authority to act? The municipal powers of the corporation are conferred by a public law and all courts are bound to notice that. Is it necessary in any case to go into the proof of the election of the mayor or any of the other officers of this corporation? This

has not been contended, nor can it be necessary to approve the appointment of an officer of a corporation who has acted under its authority, and whose proceedings, as in the present case, have received its express sanction."

80. French v. Spalding, 61 N. H. 395.

81. Rochford v. Fleming, 10 S. D. 24, 71 N. W. 317. This was an action by plaintiff, who was the owner of lot 10 in block 20 of the original plat of the city of Madison, to quiet his title thereto. The action was tried by the court below, and it was found that plaintiff was the owner of the said lot, but further found that Lake county had a lien thereon for the taxes for the years 1890, 1891 and 1892, and that there was due said county \$649.03 for the taxes of those years, for which sum judgment was rendered in favor of the county against the plaintiff. From this judgment the plaintiff appealed. The lot in question was sold in 1893 by the county treasurer for the taxes of the three years mentioned and was bid in by the county. Subsequently it was sold under a foreclosure of a mortgage, plaintiff becoming the owner of the certificate of sale by purchase, receiving the sheriff's deed in due form. In 1894 plaintiff paid taxes on the lot for the year 1893, and received a receipt therefor in due form, at the bottom of which receipt were the words "sold for taxes of 1893." Appellant contended that the receipt given was conclusive evidence that all prior taxes had been paid. This contention was based upon §§ 82, 83, ch. 14, laws of 1891, which provided that the possession of a tax receipt issued by the county treasurer should be conclusive evidence that the prior taxes chargeable against the lands in such

(2.) **To Invalidate a Tax Title.** — (A.) **VERIFIED COPY OF A COPY OF THE ASSESSMENT ROLL.** — Even a copy of a copy of an assessment roll may be admissible where it is shown that neither the original nor the first copy can be produced.⁸²

(B.) **BOOK OF STUBS OF TAX SALE CERTIFICATES.** — A bound book of stubs of tax sale certificates is inadmissible in evidence for the purpose of avoiding a tax deed, without a further showing that it was found in the tax official's office and was the stub book of tax sale assignments.⁸³

(C.) **TAX DIGESTS.** — Tax digests are admissible in evidence for the purpose of showing payment of taxes and thereby setting aside a tax deed; but secondary evidence is not admissible without a showing that the digests had been lost or destroyed.⁸⁴

(D.) **CERTIFIED COPY OF SALE AND REDEMPTION RECORD.** — For the pur-

receipt described had been fully paid, and should be a bar to the collection of any prior tax thereon unless otherwise stated in the receipt. No particular form for the statement in the receipt was prescribed, and the statement "sold for taxes in 1893" was such a statement as fully notified plaintiff that the payment made by him was not accepted nor intended to be accepted, by the county treasurer of Lake county in full payment, and in effect was notice to him that the payment was received subject to the prior sale of the property for taxes. See also *Danforth v. McCook County*, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808.

82. Where a plaintiff claimed title to land by virtue of a tax deed and the defendant sought to show that the taxes for which the land was sold were paid before the return of non-payment of taxes was made to the comptroller, under whose deed the plaintiff claimed, and for this purpose introduced in evidence a copy of a copy of the assessment roll filed in the town clerk's office, it was held that since the roll for that year filed in the county treasurer's office had been destroyed by fire and that the copy thereof filed in the town clerk's office had been lost, such being the case, the verified copy of the copy in the town clerk's office was the best evidence which the nature of the case admitted. *Joslyn v. Rockwell*, 13 N. Y. Supp. 311, 35 N. Y. St. 888.

83. *Noble v. Douglas*, 56 Kan. 92, 42 Pac. 328.

84. *Livingston v. Hudson*, 85 Ga. 835, 12 S. E. 17. This was an action brought for the recovery of a certain parcel of land. Plaintiff claimed title by virtue of a sheriff's deed. In the lower court the defendant pleaded not guilty. The plaintiff recovered judgment and the defendant moved for a new trial on the general ground and on those stated in the opinion. The court said: "The next ground of error complained of is, that the court erred in ruling out and excluding from the jury the evidence of the defendant, to wit, that he had returned the land in dispute to the tax receiver, and had paid the taxes on the same to the tax-collector, for the years 1875 and 1876, and the receipts for the same were lost; the court ruling that the digests were the only evidence that could be introduced. We think, as the case then stood before the jury, that this ruling of the court was correct. If the tax digests had been lost or mislaid so that the same could not be found, we think this evidence should have been admitted; but there is no pretense in this case that the tax digests were lost or could not be produced. And it may be that if the digests, when produced, failed to show that the land was given in and the taxes paid by the defendant, this testimony would then have been admissible."

pose of showing a second sale of the property in question a certified copy of a "sale and redemption record" is admissible.⁸⁵

(E.) SWORN COPIES OF RECORDS OF PROCEEDINGS UPON WHICH TAX DEEDS WERE BASED. — In Illinois, under the statute in that state, copies of records of proceedings upon which tax deeds were based, sworn to by creditable witnesses, are admissible on behalf of a party attacking the validity of tax deeds.⁸⁶

C. TAX DEEDS AS EVIDENCE. — a. *At Common Law.* — At the common law a tax deed was not admissible in evidence for the purpose of showing a compliance with the necessary legal requirements leading up to its existence. It was not even held to be *prima facie* evidence of these facts, and consequently where a party claimed under a tax deed the burden of proof rested upon him of showing affirmatively the regularity of all the proceedings.⁸⁷ It was held

85. In *Gage v. Davis* (Ill.), 14 N. E. 36, which was an action to set aside certain tax deeds, it appeared that § 194 of the revenue law (Rev. St. 1874) provides that the county clerk shall, before the day of sale, make a record of the lands and lots against which judgment is rendered, which shall set forth name of owner, description of the property, amount of judgment on each tract, and the year for which same is due; in the same descriptive order as said property may be set forth in the judgment book, and shall attach thereto a copy of the order of the court, and his certificate that such record is correct. Said record, so attested, shall be the process on which real property shall be sold. § 197 provides: "When any tract or lot shall be sold, it shall be the duty of the clerk to enter on the record aforesaid the quantity sold, and the name of the purchaser opposite each tract, in the blank columns provided for that purpose; and when such property shall be redeemed from the sale the clerk shall enter the name of the person redeeming, date, and amount of redemption, in the proper column." § 198 provides that the book of such record shall be furnished at the expense of the county; § 200 provides that the book shall be known as "The Sale and Redemption Record," and be kept in the office of the county clerk. For the purpose of showing a second sale of the property, complainant put in evidence a certified copy of the book authorized by the sections of the

statute, *supra*, which was designated "Process, record of sale, and judgment for city taxes." This record showed a sale of the property on the thirty-first day of October, 1873. It was held that the record was one authorized by the statute, and that it was competent evidence to prove any fact disclosed which the record itself discloses on inspection.

86. *Glos v. Holmes*, 228 Ill. 436, 81 N. E. 1064. This was a bill in chancery filed by the appellee against the appellants in the circuit court of Cook county to cancel certain tax deeds alleged to be clouds upon her title. The appellee offered in evidence the original records and papers in the county clerk's office of Cook county in the proceedings upon which the tax deeds sought to be canceled were based. Objection was made to the introduction of said records and papers on the ground that they were originals and not certified copies, whereupon the appellee offered in evidence sworn copies thereof which were admitted in evidence. *Held*, that these sworn copies were properly admitted under authority of Hurd's Rev. Stats. 1905, ch. 51, art. 18, which provides that such records and the records therein may be proved by copies examined and sworn to by creditable witnesses.

87. *United States v. Gage v. Kaufman*, 133 U. S. 471; *Webb v. Den*, 17 How. 576; *Thomas v. Lawson*, 21 How. 331; *Pillow v. Roberts*, 13 How. 472; *Ogden v. Saunders*, 12 Wheat. 213; *Lamb v. Gillett*, 6 Mc-

Lean 365; Williams v. Kirtland, 13 Wall. 306; Overman v. Parker, Hempst. 692, 18 Fed. Cas. No. 10,623; Huntington v. Central Pac. R. Co., 2 Sawy. 503; Tilton v. Oregon Cent. Military Rd. Co., 3 Sawy. 22.

Alabama.—Riddle v. Messer, 84 Ala. 236, 4 So. 185; Lassitter v. Lee, 68 Ala. 287; Stoudenmire v. Brown, 57 Ala. 481.

Arkansas.—Hill v. Denton, 74 Ark. 463, 86 S. W. 402; Sawyer v. Wilson, 99 S. W. 389; Alexander v. Bridgford, 59 Ark. 185, 27 S. W. 69; Scott v. Mills, 49 Ark. 266, 4 S. W. 908; Thornton v. Smith, 36 Ark. 508; Cairo & Fulton R. Co. v. Parks, 32 Ark. 131, 147; Thweatt v. Black, 30 Ark. 732; Bonnell v. Roane, 20 Ark. 114; Hunt v. McFadgen, 20 Ark. 277; Biscoe v. Coulter, 18 Ark. 423; Merrick v. Hutt, 15 Ark. 331; Steadman v. Planter's Bank, 7 Ark. 424.

California.—Klumpke v. Baker, 131 Cal. 80, 63 Pac. 137, 676; Wetherbee v. Dunn, 32 Cal. 106; Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; O'Grady v. Barnhisel, 23 Cal. 287; Norris v. Russell, 5 Cal. 249.

Colorado.—Richards v. Beggs, 31 Colo. 186, 72 Pac. 1077; United States Security & B. Co. v. Wolfe, 27 Colo. 218, 60 Pac. 637; Duggan v. McCullough, 27 Colo. 43, 59 Pac. 743; Waddingham v. Dickson, 17 Colo. 223, 29 Pac. 177.

Florida.—Mundee v. Freeman, 23 Fla. 529, 3 So. 153; Stieff v. Hartwell, 35 Fla. 606, 17 So. 899; Paul v. Fries, 18 Fla. 573.

Idaho.—Co-Operative Sav. etc. Assn. v. Green, 5 Idaho 660, 51 Pac. 770.

Illinois.—Glos v. Mulcahy, 210 Ill. 639, 71 N. E. 629; Taylor v. Wright, 121 Ill. 455, 13 N. E. 529; Roby v. Chicago, 64 Ill. 447; Burbank v. People, 90 Ill. 554; Townsend v. Radcliffe, 63 Ill. 9; Sullivan v. Oneida, 61 Ill. 242; Illinois Cent. R. Co. v. Phillips, 55 Ill. 194; Graves v. Bruen, 11 Ill. 431; Irving v. Brownell, 11 Ill. 402; Job v. Tebbetts, 10 Ill. 376; Rhinehart v. Schuyler, 7 Ill. 473; Messinger v. Germain, 6 Ill. 631; Vance v. Schuyler, 6 Ill. 160.

Indiana.—Green v. McGraw, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832; Richcreek v. Russell, 34 Ind. App. 217, 72 N. E. 617; Wilson v.

Carrico, 155 Ind. 570, 58 N. E. 847; Doren v. Lupton, 154 Ind. 396, 56 N. E. 849; Richard v. Carrie, 145 Ind. 49, 43 N. E. 949; Scarry v. Lewis, 133 Ind. 96, 30 N. E. 411; Wines v. Woods, 109 Ind. 291, 10 N. E. 399; Hearick v. Doe, 4 Ind. 164; Doe v. Himelick, 4 Blackf. 494.

Iowa.—Chicago, M. & St. P. R. Co. v. Hemenway, 117 Iowa 598, 91 N. W. 910; Chicago, B. & Q. R. Co. v. Kelley, 105 Iowa 106, 74 N. W. 935; Fuller v. Armstrong, 53 Iowa 683, 6 N. W. 61; Soukup v. Union Inv. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317; Genther v. Fuller, 36 Iowa 604; Clark v. Connor, 28 Iowa 311; Fitch v. Casey, 2 Greene 300.

Kansas.—Smith v. Hobbs, 49 Kan. 800, 31 Pac. 687; Ide v. Finneran, 29 Kan. 569; City R. Co. v. Chesney, 30 Kan. 199, 1 Pac. 520; Young v. Rheinecher, 25 Kan. 366; Gardenhire v. Mitchell, 21 Kan. 83; McCauslin v. McGuire, 14 Kan. 234; Hobson v. Dutton, 9 Kan. 477; Bowman v. Cockrill, 6 Kan. 311; Sprague v. Pitt, McCahon 212.

Kentucky.—Griffin v. Sparks, 24 Ky. L. Rep. 849, 70 S. W. 30; Metcalfe v. Com. Land & L. Co., 24 Ky. L. Rep. 527, 68 S. W. 1100; Oldhams v. Jones, 5 B. Mon. 458; Terry v. Bleight, 3 T. B. Mon. 271, 16 Am. Dec. 101; Graves v. Hayden, 2 Litt. 61.

Louisiana.—Simoneaux v. White Castle Lumb. & S. Co., 112 La. 221, 36 So. 328; Muller v. Mazerat, 109 La. 116, 33 So. 104; Tensas Delta Land Co. v. Sholars, 105 La. 357, 29 So. 908; State v. Herron, 29 La. Ann. 848; Winter v. Atkinson, 28 La. Ann. 650; Coco v. Thienman, 25 La. Ann. 236.

Maine.—Orono v. Veazie, 57 Me. 517; Freeman v. Thayer, 33 Me. 76; Falles v. Wadsworth, 23 Me. 553.

Maryland.—Young v. Ward, 88 Md. 413, 41 Atl. 925.

Massachusetts.—Com. v. Thurlow, 24 Pick. 374; Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Kendall v. Kingston, 5 Mass. 524.

Michigan.—Hoffman v. H. M. Loud & Sons Lumb. Co., 138 Mich. 5, 100 N. W. 1010, 104 N. W. 424; Anderson v. Besser, 131 Mich. 481, 91 N. W. 737; Beard v. Sharrick,

that a tax deed was not admissible in evidence unless there was evidence in the case showing either the essentials of its validity, or that it had been executed under legal sanction.⁸⁸ In accordance with the foregoing it was necessary that the evidence should show

67 Mich. 321, 34 N. W. 585; *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. 900; *Wright v. Dunham*, 13 Mich. 414; *Groesbeck v. Seeley*, 13 Mich. 329; *Palmer v. Rich*, 12 Mich. 414.

Minnesota.—*Taylor v. Winona & St. P. R. Co.*, 45 Minn. 66, 47 N. W. 453; *Madland v. Benland*, 24 Minn. 372; *Broughton v. Sherman*, 21 Minn. 431; *Baker v. Kelley*, 11 Minn. 480.

Mississippi.—*Wallace v. Lyle*, 37 So. 460; *Coffee v. Coleman*, 85 Miss. 14, 37 So. 499; *Herndon v. Mayfield*, 79 Miss. 533, 31 So. 103; *Mixon v. Clevenger*, 74 Miss. 67, 20 So. 148; *Burroughs v. Vance*, 75 Miss. 696, 23 So. 548; *Lochte v. Austin*, 69 Miss. 271, 13 So. 838; *Hardie v. Chrisman*, 60 Miss. 671; *Greene v. Williams*, 58 Miss. 752; *Beirne v. Burdett*, 52 Miss. 795; *Meeks v. Whatley*, 48 Miss. 337; *Ray v. Murdock*, 36 Miss. 692; *Virden v. Bowlers*, 55 Miss. 1; *Minor v. Natchez*, 4 Smed. & M. 602, 43 Am. Dec. 488.

Missouri.—*State v. Richardson*, 21 Mo. 420; *Morton v. Reeds*, 6 Mo. 64.

New Jersey.—*Doremus v. Cameron*, 49 N. J. Eq. 1, 22 Atl. 802; *Woodbridge Twp. v. State*, 43 N. J. L. 262.

New York.—*Colman v. Shattuck*, 62 N. Y. 348; *Rathbone v. Hooney*, 58 N. Y. 463; *Brown v. Allen*, 57 Hun 219, 10 N. Y. Supp. 714; *Forbes v. Halsey*, 26 N. Y. 53; *Curtiss v. Follett*, 15 Barb. 337; *Jackson v. Shepard*, 7 Cow. 88, 17 Am. Dec. 502.

North Carolina.—*Martin v. Lucey*, 5 N. C. 311.

North Dakota.—*Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97.

Ohio.—*Rhodes v. Gunn*, 35 Ohio St. 387; *Woodward v. Sloan*, 27 Ohio St. 592; *Stanbery v. Sillon*, 13 Ohio St. 571; *Jones v. Devore*, 8 Ohio St. 430; *Carlisle v. Longworth*, 5 Ohio 368; *Turney v. Yeoman*, 14 Ohio 207.

Oregon.—*Brentano v. Brentano*,

41 Or. 15, 67 Pac. 922; *Strode v. Washer*, 17 Or. 50, 16 Pac. 926.

Pennsylvania.—*Lee v. Jeddo Coal Co.*, 84 Pa. St. 74; *Coxe v. Deringer*, 78 Pa. St. 271, 82 Pa. St. 236; *Deringer v. Coxe*, 10 Atl. 412.

South Carolina.—*Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517; *Bull v. Kirk*, 37 S. C. 395, 16 S. E. 151; *State v. Thompson*, 18 S. C. 538.

South Dakota.—*Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944.

Tennessee.—*Sheafer v. Mitchell*, 109 Tenn. 181, 71 S. W. 86; *Thompson v. Lawrence*, 2 Baxt. 415; *Randolph v. Metcalf*, 6 Coldw. 400.

Texas.—*Earle v. Henrietta (Tex. Civ. App.)*, 41 S. W. 727.

Virginia.—*Flanagan v. Grimmet*, 10 Gratt. 421.

Washington.—*Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

West Virginia.—*Dequasie v. Harris*, 16 W. Va. 345, 354.

Wisconsin.—*Hotsen v. Wetherby*, 88 Wis. 324, 60 N. W. 423; *Hiles v. Cate*, 75 Wis. 91, 43 N. W. 802; *Marshall v. Benson*, 48 Wis. 558, 4 N. W. 385; *Bemis v. Weege*, 67 Wis. 435, 30 N. W. 938; *Hart v. Smith*, 44 Wis. 213, 223; *Stewart v. McSweeney*, 14 Wis. 468.

In *Illinois* even under the law of 1827 which provided that the auditor's tax deed shall vest in the purchaser a perfect title unless the land shall be redeemed according to law, or unless the former owner shall show that the taxes for which the land was sold had been paid, or that the land was not legally subject to taxation, the authority had to be shown under which the auditor acted in making the sale. *Garrett v. Wiggins*, 2 Ill. 335; *Hill v. Leonard*, 5 Ill. 140; *Wiley v. Bean*, 6 Ill. 302. ⁸⁸ *United States*.—*Shearer v. Corbin*, 1 McCrary, 306.

Illinois.—*Dukes v. Rowley*, 24 Ill. 210.

Minnesota.—*Madland v. Benland*, 24 Minn. 372.

a valid notice had been given, judgment rendered and precept issued.⁸⁹

It has been held that at best a tax deed is merely evidence of the regularity of the sale and does not constitute in itself proof of title unless other evidence is introduced showing that the proceedings anterior and incident to the sale were in accordance with the provisions of the statutes relating thereto,⁹⁰ although it has been held

Texas.—*Houston v. Washington*, 16 Tex. Civ. App. 504, 41 S. W. 135; *Earle v. Henrietta*, 91 Tex. 301, 43 S. W. 15.

Virginia.—*Flanagan v. Barnes*, 3 Rand. 473; *Flanagan v. Grimmet*, 10 Gratt. 421; *Hobbs v. Shumates*, 11 Gratt. 516.

In *Keane v. Cannovan*, 21 Cal. 291, an action of ejectment wherein the defendant relied upon tax deeds as his title, it was held that the tax deeds were inadmissible without preliminary proof that all the requirements of the law authorizing their execution had been complied with, inasmuch as the statute making the tax deed *prima facie* evidence of the transfer of the title of the delinquent had not then been enacted. The court said: "Nor was any presumption to be indulged that the treasurer and the officers whose acts preceded his, had complied with the law. It was not a case in which presumptions could be indulged that the officers had done their duty. They acted under a naked statutory power, with a view to divest, upon certain contingencies, the title of the citizen, and in all such cases the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed. (*Williams v. Peyton's Lessee*, 4 Wheat. 78; *Varick v. Tallman*, 3 Barb. 113). Nor was any presumption to be indulged that *all* the preliminary steps had been followed from the length of time the deed had been executed and the grantee had been in the possession of the premises. . . . The assessment consisting in the listing and valuation of the property for the purpose of taxation, was also matter of record kept by the assessor, and delivered by him to the auditor of the county. From it, after it had been corrected by the board of equalization of the county, the dupli-

cate was prepared upon which the treasurer proceeded to demand the tax and sell the property. This record of the assessment was not produced, nor was any evidence offered of the assessment, or of any of the acts made by the statute essential prerequisites to the sale. The validity of the deed of the treasurer was rested upon presumptions in favor of the acts of public officers, and the lapse of time since it was executed and the grantee has been in possession of the premises."

⁸⁹. *United States*.—*Little v. Herndon*, 10 Wall. 26.

Arkansas.—*Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442.

California.—*People v. Doe*, 31 Cal. 220.

Georgia.—*Shackleford v. Hooper*, 65 Ga. 366.

Illinois.—*Perry v. Burton*, 126 Ill. 599, 18 N. E. 653; *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572; *Eagan v. Connelly*, 107 Ill. 458; *Gage v. Lightburn*, 93 Ill. 248; *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777; *Cottingham v. Springer*, 88 Ill. 90; *Williams v. Underhill*, 58 Ill. 137; *Buck v. Delafeld*, 55 Ill. 31; *Wilding v. Horner*, 50 Ill. 50; *Holbrook v. Dickinson*, 46 Ill. 285; *Elston v. Kennicott*, 46 Ill. 187; *Dukes v. Rowley*, 24 Ill. 210; *Baily v. Doolittle*, 24 Ill. 577; *Spellman v. Curteneus*, 12 Ill. 409; *Atkins v. Hinman*, 7 Ill. 437; *Hinman v. Pope*, 6 Ill. 131.

Indiana.—*Parker v. Smith*, 4 Blackf. 70; *Burt v. Hasselman*, 139 Ind. 196, 38 N. E. 598.

Kentucky.—*Terry v. Bleight*, 3 T. B. Mon. 271, 16 Am. Dec. 101.

Nevada.—*Bolan v. Bolan*, 4 Nev. 150.

Virginia.—*Miller v. Williams*, 15 Gratt. 213.

⁹⁰. *Latimer v. Lovett*, 2 Dougl. (Mich.) 204; *Scott v. Detroit Y. M. Soc.*, 1 Dougl. (Mich.) 119; *Coxe v. Deringer*, 82 Pa. St. 236.

by some of the courts that a tax deed is *prima facie* evidence of title as against an intruder or mere trespasser.⁹¹

In Case of Statute's Repeal.—Where a statute has been passed making a tax deed *prima facie* evidence of certain facts, if such statute is repealed, a party cannot, by offering in evidence a tax deed made under the former statute, establish title thereby, unless he first proves that the preliminary steps were taken.⁹²

Recitals in Tax Deeds Concerning Official Acts.—And even where there is a recital in a tax deed setting forth the performance of official acts necessary to cause the deed to be effective, the deed under these circumstances is not, in itself, sufficiently effective as evidence that independent proof can be dispensed with,⁹³ although it has been held in several cases that recitals in a tax deed relating to the official acts of tax officers are *prima facie* evidence as to such acts.⁹⁴

91. *Troutman v. May*, 33 Pa. St. 455; *Smith v. Bodfish*, 27 Me. 289; *Dejarnett v. Haynes*, 1 Cushm. (Miss.) 600; *Still'e v. Shull*, 41 La. Ann. 816, 6 So. 634; *Foust v. Ross*, 1 Watts & S. (Pa.) 501; *Foster v. M'Divitt*, 9 Watts (Pa.) 341.

92. *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356.

93. *Alabama*.—*Stoudenmire v. Brown*, 48 Ala. 699; *Davis v. Minge*, 56 Ala. 121.

California.—*Pierce v. Low*, 51 Cal. 580.

Louisiana.—*Smith v. Corcoran*, 7 La. 46.

Maine.—*Libby v. Mayberry*, 80 Me. 137, 13 Atl. 577; *Phillips v. Sherman*, 61 Me. 548; *Rackliff v. Look*, 69 Me. 516; *Worthing v. Webster*, 45 Me. 270, 71 Am. Dec. 543; *Ladd v. Dickey*, 84 Me. 190, 24 Atl. 813; *Crooker v. Jewell*, 31 Me. 306, 313; *Smith v. Bodfish*, 27 Me. 289.

Maryland.—*Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773.

Mississippi.—*Dejarnett v. Haynes*, 1 Cushm. 600.

New Hampshire.—*Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491.

New York.—See *Jackson v. Esty*, 7 Wend. 148; *Jackson v. Shepard*, 7 Cow. 88, 17 Am. Dec. 502.

North Carolina.—*Fox v. Stafford*, 90 N. C. 296.

Pennsylvania.—*Wheeler v. Winn*, 53 Pa. St. 122, 91 Am. Dec. 186; *Troutman v. May*, 33 Pa. St. 455; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455; *Rockland & V.*

Coal Co. v. McCalmont, 72 Pa. St. 221; *Johnston v. Johnson*, 70 Pa. St. 164; *Crum v. Burke*, 25 Pa. St. 377; *Foust v. Ross*, 1 Watts & S. 501; *Huston v. Foster*, 1 Watts 477.

Vermont.—*Bellows v. Elliot*, 12 Vt. 569.

Virginia.—*Robinett v. Preston's Heirs*, 4 Gratt. 141.

In *Hill v. Draper*, 10 Barb. (N. Y.) 454, it is held that a recital in a deed is merely evidence against parties and privies in blood, in estate and in law. The deed is not evidence against strangers, nor against one claiming under the party executing the reciting deed, by title prior thereto, or adversely to him, but only against those claiming under him by title subsequent.

94. *Shackleford v. Hooper*, 65 Ga. 366; *Morton v. Waring*, 18 B. Mon. (Ky.) 72; *Hall v. Collins*, 4 Vt. 316; *Smith v. Corcoran*, 7 La. 46; *Baker v. Crabb*, 73 Iowa 412, 35 N. W. 484.

The Arkansas statute (Kirby's Digest, § 7105) provides that a tax deed duly executed by the clerk of the county court 'shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also the right, title and claim of the state and county thereto and shall be *prima facie* evidence that all the prerequisites of the law have been complied with, . . . and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done.' *Osceola Land Co. v.*

Lapse of Time as Constituting a Presumption.—It has frequently been held that after a long lapse of time, and more particularly where the owner of the property under the tax deed has acquiesced during such period, a presumption will be indulged in that the tax proceedings incident to the tax deed were in every way legally conducted.⁹⁵

b. Under the Statutes.—(1.) **Prima Facie Evidence.**—It is within the power of the legislature to provide that a tax deed shall consti-

Chicago Mill & Lumb. Co. (Ark.), 103 S. W. 609.

Where an action was brought to try title to land, plaintiff claiming under a tax deed, it was held that the tax deed upon being introduced in evidence, if regular upon its face, should be presumed to have been executed in compliance with every legal requisite essential to its validity. *Hughes v. Owens*, 29 Ky. L. Rep. 140, 92 S. W. 595.

In *Gibson v. Hammerburg*, 72 Kan. 363, 83 Pac. 23, which was an action to recover real estate, defendant claiming title under a tax deed, and plaintiff under a conveyance from the original owner, it was contended by plaintiff that the tax deed was invalid because it did not show the notice of tax sale and that a certificate of sale was given, and that the certificate was presented to the county clerk preliminary to the execution of the deed. *Held*, that while these details are mentioned in the statute, they are not prescribed in a statutory form of deed. Where the statute prescribed the form of a deed a compliance with that form is sufficient. The deed in question closely follows the statutory form, and being good on its face, it furnishes *prima facie* evidence that the legal notices were given, that the proceedings were regular, and that every step necessary to its validity was taken. There was further a recital in the deed as prescribed by the statute that the sale was made in substantial conformity with all the requisites of the statute.

Where the statute provided (Act 1873, § 894) that before a tax deed is issued the holder of the certificate shall serve on the person in possession and the person in whose name the land was taxed notice of the ex-

piration of the time of redemption and authorizing service by publication in case of non-residents, it was held that the presumption arises from the tax deed under which the defendant in this case claimed title, that the notice was given as required by law. *McQuity v. Doudna*, 101 Iowa 144, 70 N. W. 99.

In *Livingston v. Hudson*, 85 Ga. 835, 12 S. E. 17, it was held that a sheriff's deed to wild land, regular on its face, was properly admitted to evidence over objections that the party offering and claiming under it had not first shown that the comptroller-general had advertised the land conveyed for the proper time before issuing the writ for taxes under which it was sold, and that the recital in the deed did not show that it was ever advertised in any particular newspaper published at the capitol. It was held that recitals in such a deed with respect to the conduct of the sheriff are presumed to be correct, and that the law will further presume that the comptroller-general did his duty before issuing the execution, especially in reference to furnishing to the clerk of the superior court a list of all wild lands in his county.

⁹⁵ *Sheafer v. Mitchell*, 109 Tenn. 181, 71 S. W. 86; *Lasher v. McCreery*, 66 Fed. 834; *Lennig v. White* (Va.), 20 S. E. 831.

In *Maine* it has been held that where a tax deed is more than thirty years old, such deed is to be accepted as evidence of the recitals therein, but only when the grantee takes and holds possession of the premises under the deed. *Worthing v. Webster*, 45 Me. 270, 71 Am. Dec. 543; *McAllister v. Shaw*, 69 Me. 348. See also *Freeman v. Thayer*, 33 Me. 76.

tute in itself *prima facie* evidence of certain facts.⁹⁶ This power has often been exercised, sometimes to one extent and sometimes to another and different extent. And in Louisiana this subject has been provided for by constitutional enactment.⁹⁷ At the present time there exist in nearly all the states statutes making a tax deed *prima facie* evidence either as to the facts recited therein or of the tax proceedings upon which it is based, and where such a deed is offered in evidence the burden of proof is thereby thrown upon the adverse party to show the non-existence or the irregularity of such tax proceedings.⁹⁸ For a collection of cases illustrating what evi-

96. *Fox v. Stafford*, 90 N. C. 296.

97. *Coco v. Thiemann*, 25 La. Ann. 236; *Prescott v. Payne*, 44 La. Ann. 650, 11 So. 140; *Iberia Cypress Co. v. Thorngeson*, 116 La. 218, 40 So. 682; *Muller v. Mazerat*, 109 La. 116, 33 So. 104; *Tensas Delta Land Co. v. Sholars*, 105 La. 357, 29 So. 908; *Winter v. Atkinson*, 28 La. Ann. 650; *State v. Herron*, 29 La. Ann. 848; *Slattery v. Heilperin*, 110 La. 86, 34 So. 139.

Simoneaux v. White Castle Lumb. & S. Co., 112 La. 221, 36 So. 328. This is a petitory action to recover an undivided third interest in the lands described in a petition, alleged to be in the wrongful possession of the defendant company. Plaintiffs are the legal heirs of Honore Simoneaux, through whom defendant claims title through mesne conveyance by virtue of a tax sale made in 1888. The decision of the case rests on the validity of said tax sale, supported by the prescription of three years provided by art. 233 of the constitution of 1898. There is no evidence of possession in plaintiffs at the date of the said tax sale or subsequently. The tax deed duly recorded recites that the property was adjudicated to Edward Vives and Thomas Blanchard. The first contention of plaintiff's is that there was no tax sale because Blanchard did not bid on the property and did not pay the price. See also *Little River Lumb. Co. v. Thompson*, 118 La. 284, 42 So. 938.

98. *United States*.—*Gage v. Kaufman*, 133 U. S. 471; *Webb v. Den*, 17 How. 576; *Thomas v. Lawson*, 21 How. 331; *Pillow v. Roberts*, 13 How. 472; *Williams v. Kirtland*, 13 Wall. 306; *Ogden v. Saunders*, 12

Wheat, 213; *Lamb v. Gillett*, 6 McLean 365; *Overman v. Parker*, Hempst. 692, 18 Fed. Cas. No. 10,623; *Tilton v. Oregon Cent. Military Rd. Co.*, 3 Sawy. 22; *Huntington v. Central Pac. R. Co.*, 2 Sawy. 503, 513.

Alabama.—*Brannan v. Henry*, 142 Ala. 698, 39 So. 92; *Riddle v. Messer*, 84 Ala. 236, 4 So. 185; *Lassitter v. Lee*, 68 Ala. 287; *Stoudenmire v. Brown*, 57 Ala. 481.

Arkansas.—*Sawyer v. Wilson*, 99 S. W. 389; *Hill v. Denton*, 74 Ark. 463, 86 S. W. 402; *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69; *Scott v. Mills*, 49 Ark. 266, 4 S. W. 908; *Thornton v. Smith*, 36 Ark. 508; *Cairo & Fulton R. Co. v. Parks*, 32 Ark. 131, 147; *Thweatt v. Black*, 30 Ark. 732; *Towmbly v. Kimbrough*, 24 Ark. 459; *Hunt v. McFadger*, 20 Ark. 277; *Bonnell v. Roane*, 20 Ark. 114; *Biscoe v. Coulter*, 18 Ark. 423; *Merrick v. Hutt*, 15 Ark. 331; *Steadman v. Planters' Bank*, 7 Ark. 426.

California.—*Klumpe v. Baker*, 131 Cal. 80, 63 Pac. 137, 676; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Wetherbee v. Dunn*, 32 Cal. 106; *O'Grady v. Barnhisel*, 23 Cal. 287; *Norris v. Russell*, 5 Cal. 249.

Colorado.—*Richards v. Beggs*, 31 Colo. 186, 72 Pac. 1077; *United States Security & B. Co. v. Wolfe*, 27 Colo. 218, 60 Pac. 637; *Duggan v. McCullough*, 27 Colo. 43, 59 Pac. 743; *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177.

Florida.—*Cowan v. Skinner*, 42 So. 730; *Stieff v. Hartwell*, 35 Fla. 606, 17 So. 899; *Mundee v. Freeman*, 23 Fla. 529, 3 So. 153; *Paul v. Fries*, 18 Fla. 573. See also *Ropes v. Minshew*, 47 Fla. 212, 36 So. 579.

Georgia.—See *Vickers v. Haw-*

kins, 128 Ga. 794, 58 S. E. 44 "Civil Code of 1895, § 3628, provides that 'a registered deed shall be admitted in any court of this state without further proof, unless the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that the said deed is a forgery, to the best of his knowledge and belief, when the court shall arrest the cause and require an issue to be made and tried as to the genuineness of the alleged deed.' Its provisions are applicable only to registered deeds. . . . It is limited to the one issue of genuineness of the deed, and there is no authority of law for drawing into the trial of that issue questions foreign to the factum of the execution of the deed. . . . A sheriff's deed to property sold for taxes, even if registered, is not admissible as a muniment of title without the *fi. fa.* under which the sale was made accompanies it, or its loss is shown. But the law does not require that the *fi. fa.* shall be recorded along with the deed before it will be admitted in evidence."

Idaho.—Co-Operative Sav. & L. Assn. *v.* Green, 5 Idaho 660, 51 Pac. 770.

Illinois.—Tift *v.* Greene, 211 Ill. 389, 71 N. E. 1030; Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629; Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; Burbank *v.* People, 90 Ill. 554; Roby *v.* Chicago, 64 Ill. 447; Townsend *v.* Radcliffe, 63 Ill. 9; Sullivan *v.* Oneida, 61 Ill. 242; Illinois Cent. R. Co. *v.* Phillips, 55 Ill. 194; Irving *v.* Brownell, 11 Ill. 402; Graves *v.* Bruen, 11 Ill. 431; Job *v.* Tebbetts, 10 Ill. 376; Rhinehart *v.* Schuyler, 7 Ill. 473; Messinger *v.* Germain, 6 Ill. 631.

Indiana.—Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832; Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617; Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847; Doren *v.* Lupton, 154 Ind. 396, 56 N. E. 849; Richard *v.* Carrie, 145 Ind. 49, 43 N. E. 949; Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Wines *v.* Woods, 100 Ind. 291, 10 N. E. 399; Doe *v.* Himelick, 4 Blackf. 494; Hearick *v.* Doe, 4 Ind. 164.

Iowa.—Baker *v.* Crabb, 73 Iowa 412, 35 N. W. 484; Blair Town Lot

& L. Co. *v.* Scott, 44 Iowa 143; Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450; Chicago, M. & St. P. R. Co. *v.* Hemenway, 117 Iowa 598, 91 N. W. 910; Chicago, B. & Q. R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935; Soukup *v.* Union Inv. Co., 84 Iowa 448, 51 N. W. 167; Fuller *v.* Armstrong, 53 Iowa 683, 6 N. W. 61; Genther *v.* Fuller, 36 Iowa 604; Fitch *v.* Casey, 2 Greene 300; Clark *v.* Connor, 28 Iowa 311.

Kansas.—Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938; City R. Co. *v.* Chesney, 30 Kan. 199, 1 Pac. 520; Ide *v.* Finneran, 29 Kan. 569; Smith *v.* Hobbs, 49 Kan. 800, 31 Pac. 687; Young *v.* Rheinecher, 25 Kan. 366; McCauslin *v.* McGuire, 14 Kan. 234; Hobson *v.* Dutton, 9 Kan. 477; Bowman *v.* Cockrill, 6 Kan. 311; Sprague *v.* Pitt, McCahon 212.

Kentucky.—Griffin *v.* Sparks, 24 Ky. L. Rep. 849, 70 S. W. 30; Metcalfe *v.* Com. Land & L. Co., 24 Ky. L. Rep. 527, 68 S. W. 1100; Terry *v.* Bleight, 3 T. B. Mon. 271, 16 Am. Dec. 101; Graves *v.* Hayden, 2 Litt. 61; Oldhams *v.* Jones, 5 B. Mon. 458.

Louisiana.—Iberia Cypress Co. *v.* Thorgeson, 116 La. 218, 40 So. 682; Little River Lumb. Co. *v.* Thompson, 118 La. 284, 42 So. 938; Simoneaux *v.* White Castle Lumb. & S. Co., 112 La. 221, 36 So. 328; Muller *v.* Mazerat, 109 La. 116, 33 So. 104; Tensas Delta Land Co. *v.* Sholars, 105 La. 357, 29 So. 908; Winter *v.* Atkinson, 28 La. Ann. 650; Coco *v.* Thienman, 25 La. Ann. 236; State *v.* Herron, 29 La. Ann. 848; Lisso & Bro. *v.* Unknown Owner, 114 La. 392, 38 So. 282.

Maine.—Orono *v.* Veazie, 57 Me. 517; Falles *v.* Wadsworth, 23 Me. 553; Freeman *v.* Thayer, 33 Me. 76.

Maryland.—Young *v.* Ward, 88 Md. 413, 41 Atl. 925.

Massachusetts.—Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381; Com. *v.* Thurlow, 24 Pick. 374; Kendall *v.* Kingston, 5 Mass. 524.

Michigan.—Hoffman *v.* H. M. Loud & Sons Lumb. Co., 138 Mich. 5, 100 N. W. 1010, 104 N. W. 424; Beard *v.* Sharrick, 67 Mich. 321, 34 N. W. 585; Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900; Palmer *v.* Rich, 12 Mich. 414; Wright *v.* Dunham, 13 Mich. 414; Groesbeck *v.*

Seeley, 13 Mich. 329. See also Hoffmann v. Silverthorn, 137 Mich. 60, 100 N. W. 183.

Minnesota.—Taylor v. Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453; Broughton v. Sherman, 21 Minn. 431; Baker v. Kelley, 11 Minn. 480; Madland v. Benland, 24 Minn. 372.

Mississippi.—Smith v. Denny & Co., 43 So. 479; Wallace v. Lyle, 37 So. 460; Coffee v. Coleman, 85 Miss. 14, 37 So. 499; Virden v. Bowers, 55 Miss. 1; Herndon v. Mayfield, 79 Miss. 533, 31 So. 103; Lochte v. Austin, 69 Miss. 271, 13 So. 838; Hardie v. Chrisman, 60 Miss. 671; Beirne v. Burdett, 52 Miss. 795; Greene v. Williams, 58 Miss. 752; Ray v. Murdock, 36 Miss. 692; Meeks v. Whatley, 48 Miss. 337; Minor v. Natchez, 4 Smed. & M. 602, 43 Am. Dec. 488; Burroughs v. Vance, 75 Miss. 696, 23 So. 548; Mixon v. Clevenger, 74 Miss. 67, 20 So. 148.

Missouri.—State v. Richardson, 21 Mo. 420; Morton v. Reeds, 6 Mo. 64, 74.

New Jersey.—Doremus v. Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Woodbridge Twp. v. State, 43 N. J. L. 262.

New York.—Rathbone v. Hooney, 58 N. Y. 463; Colman v. Shattuck, 62 N. Y. 348; Forbes v. Halsey, 26 N. Y. 53; Brown v. Allen, 57 Hun 219, 10 N. Y. Supp. 714; Curtiss v. Follett, 15 Barb. 337; Jackson v. Shepard, 7 Cow. 88, 17 Am. Dec. 502.

North Carolina.—Martin v. Lucey, 5 N. C. 311.

North Dakota.—Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97.

Ohio.—Jones v. Devore, 8 Ohio St. 430; Rhodes v. Gunn, 35 Ohio St. 387; Stanbery v. Sillon, 13 Ohio St. 571; Woodward v. Sloan, 27 Ohio St. 592; Carlisle v. Longworth, 5 Ohio 368; Turney v. Yeoman, 14 Ohio 207.

Oregon.—Strode v. Washer, 17 Or. 50, 16 Pac. 926; Brentano v. Brentano, 41 Or. 15, 67 Pac. 922.

Pennsylvania.—Lee v. Jeddo Coal Co., 84 Pa. St. 74; Cox v. Deringer, 78 Pa. St. 271; Deringer v. Cox, 10 Atl. 412.

South Carolina.—State v. Thompson, 18 S. C. 538; Wilson v. Cantrell,

40 S. C. 114, 18 S. E. 517; Bull v. Kirk, 37 S. C. 395, 16 S. E. 151.

South Dakota.—See Easton v. Cranmer, 19 S. D. 224, 102 N. W. 944.

Tennessee.—Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86; Thompson v. Lawrence, 2 Baxt. 415; Randolph v. Metcalf, 6 Coldw. 400.

Texas.—Earle v. Henrietta (Tex. Civ. App.), 41 S. W. 727.

Virginia.—Flanagan v. Grimmet, 10 Gratt. 421.

Washington.—Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

West Virginia.—Dequasie v. Harris, 16 W. Va. 345, 354; Hogan v. Piggott, 60 W. Va. 541, 56 S. E. 189.

Wisconsin.—Manseau v. Edwards, 53 Wis. 457, 10 N. W. 554; Hotson v. Wetherby, 88 Wis. 324, 60 N. W. 423; Hiles v. Cate, 75 Wis. 91, 43 N. W. 802; Bemis v. Weegee, 67 Wis. 435, 30 N. W. 938; Hart v. Smith, 44 Wis. 213, 223; Marshall v. Benson, 48 Wis. 558, 4 N. W. 385, 762; Stewart v. McSweeney, 14 Wis. 468.

The presumption of regularity which under the Arkansas statute (Kirby's Digest, §§7103, 7104) arises in favor of a tax deed executed substantially in accordance with the statutory form, does not attach to a deed in which the recital of the land offered for sale and sold differed from the description of the land in the granting clause. Gannon v. Moore (Ark.), 104 S. W. 139, holding, however, that although such a deed does not, as required by statute, recite that the land conveyed was sold for taxes, yet, inasmuch as the land conveyed was in fact the land sold as shown by the certificate of purchase, the deed was sufficient to enable the grantees to acquire title by adverse possession under the Arkansas statute. See Gibbs v. Southern, 116 Mo. 204, 22 S. W. 713.

In Green v. McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, suit was brought to quiet title to a certain parcel of real estate, plaintiff claiming title under a tax deed. §8624 Burn's Ann. Stats. 1901, provides that a tax deed executed as there prescribed shall be *prima facie* evidence of the regularity of the

dence is sufficient to rebut the presumption of regularity in a tax deed, see the note.⁹⁹

sale of the premises described in the deed, and of the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in fee simple in the grantee. *Held*, that such *prima facie* evidence was not sufficient to establish title, where, as in this case, it was affirmatively proved that in the sale or conveyance the description was so imperfect as to fail to describe the land or lot with reasonable certainty. *Chard v. Holt*, 136 N. Y. 30, 32 N. E. 740; *May v. Dobbins*, 166 Ind. 331, 77 N. E. 353; *Lamb v. Connolly*, 122 N. Y. 531, 25 N. E. 1042.

Tax Deed Prima Facie Evidence of Assessment.—*Jenkins v. McTigue*, 22 Fed. 148.

Prima Facie Evidence of Notice of Sale.—*Matthews v. Fry*, 141 N. C. 582, 54 S. E. 379. This action was brought to recover a tract of land, defendant claiming under a tax title. The case turned upon the construction of §§ 51, 64 and 65, ch. 169, pp. 268, 272 and 273 of the acts of 1897, a sale having been made and the deed of the sheriff to the defendant having been executed under the provisions of that act. It is required by § 51 that if any real estate shall be sold for taxes the sheriff shall personally serve notice of such sale on the delinquent taxpayer or his agent at least thirty days before said sale, if the defendant resides in the state. If he is a non-resident the sheriff is required to notify him by mail and also by publication in the newspaper in his county once a week for four successive weeks preceding the sale, and if there is no newspaper in the county, then by a like notice for four successive weeks by posting the same on the door of the court house of the county. Provision is made for the form of the notice. According to the construction placed by the court on sub-section 7, § 69, ch. 169, p. 265 of the aforesaid act, the sheriff's deed is only *prima facie* evidence that the notice to the owner or delinquent taxpayer has been given and the publication made as required by § 51.

Held, that the defendant acquired no title to the property by his purchase, as the sheriff failed to serve the notice.

Not Necessary That Deed Should Recite Name of Owner.—Where a tax deed was duly acknowledged and recorded as required by law, it is *prima facie* evidence of the facts recited on its face; and in the absence of a statute requiring it, it is not necessary in order that a tax deed should be admissible in evidence, that it should recite the name of the owner of the land sold. *Riddle v. Messer*, 84 Ala. 236, 4 So. 185.

⁹⁹ *Arkansas*.—*Patrick v. Davis*, 15 Ark. 363.

Iowa.—*Fenton v. Way*, 40 Iowa 196; *Long v. Burnett*, 13 Iowa 28, 81 Am. Dec. 420; *Easton v. Savery*, 44 Iowa 654.

New York.—*Parsons v. Parker*, 80 Hun 281, 30 N. Y. Supp. 134.

North Carolina.—*Peebles v. Taylor*, 121 N. C. 38, 27 S. E. 999.

North Dakota.—*Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97.

Oregon.—*Brentano v. Brentano*, 41 Or. 15, 67 Pac. 922; *Harris v. Harsch*, 29 Or. 562, 46 Pac. 441.

Washington.—*Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

Wisconsin.—*Orton v. Noonan*, 25 Wis. 672.

In an action to quiet title to a lot under a tax deed, made pursuant to a sale for a special tax levied by a city for sidewalk purposes, the tax deed was *prima facie* evidence that the tax was duly levied; but this presumption was fairly rebutted, where it appeared that, under the charter and ordinances of the city, the levy, if made, should appear of record in a book kept in the office of the city recorder for the purpose of showing the proceedings of the city council, and such book, being produced, duly authenticated and un mutilated, and covering the time when the levy should have been made, contained a record of certain action of the council in relation to the sidewalk in question, but no record of the levy of the tax on which

These statutes have been universally recognized and upheld by the courts.¹ Where the statute requires a tax deed to recite certain facts and it is further provided that such deed shall constitute *prima facie* evidence of the facts therein stated, the *prima facie*

the tax deed was based. *Hintrager v. Kiene*, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910.

Bettison v. Budd, 21 Ark. 578, where it was held proper to permit proof that the owner's name in the assessment of the taxes was not the same as in the advertisement and sale of the land.

A deed of land under a tax sale is only *prima facie* evidence that no redemption was made, and the party who makes the redemption may, in an action of ejectment by the holder of the tax deed, prove that a redemption was in fact made. *Cooper v. Shepardson*, 51 Cal. 298; *Ropes v. Minshew*, 47 Fla. 212, 36 So. 579.

Evidence Not Overcoming Presumption.—A deed executed by the commissioner of state lands for lands forfeited to the state for non-payment of taxes is, by the provisions of the Arkansas statute under which it is executed, made *prima facie* evidence of title in the purchaser to the land conveyed and that everything necessary to vest title in the state was done, and the certificate of the clerk that he could not find in his office certain records or evidence as to the assessment and forfeiture of the lands does not overcome this *prima facie* evidence. The only effect of it, if admissible for any purpose, is to show that so much of the records or evidence as were required to be filed or of record in the clerk's office was lost. *Scott v. Mills*, 49 Ark. 266, 4 S. W. 908. And see further *Mundee v. Freeman*, 23 Fla. 529, 3 So. 153; *Mixon v. Clevenger*, 74 Miss. 67, 20 So. 148; *Lee v. Newland*, 164 Pa. St. 360, 30 Atl. 258; *Early v. Whittingham*, 43 Iowa 162; *Barrett v. Kevane*, 100 Iowa 653, 69 N. W. 1036.

Evidence To Overcome Evidence Rebutting Presumption.—*Baker v. Crabb*, 73 Iowa 412, 35 N. W. 484. At the time the notice of the expiration of the time for the redemption of the land in question from a tax sale was given, it was taxed to one

E. S. Baker, a non-resident of the county. Subsequent to the time the treasurer's deed was issued it appeared that no affidavit was made by the holder of the tax sale certificate, his agent or attorney, showing any service of the notice upon said Baker, nor was any record thereof found in the treasurer's office, but an affidavit of the publisher of a newspaper was found on file, which showed the publication of a notice addressed to H. Baker. This action was brought to set aside the deed. There was direct and positive evidence, supported by that of a corroborative nature, to the effect that the affidavit of the holder of the certificate was filed making due proof of the fact that E. S. Baker was personally served with a sufficient notice in the county while on or near the land. It was held that under code § 897 the deed itself raised the presumption of due service and proof of service of such notice, and that if the absence from the record in the treasurer's office of any proof of such service is to be looked upon as evidence tending to negative the presumption arising from the deed, such evidence was overcome by the evidence of service above referred to.

1. *United States*.—*Pillow v. Roberts*, 13 How. 472; *Marx v. Hanthorn*, 148 U. S. 172.

Alabama.—*Stoudenmire v. Brown*, 48 Ala. 699.

California.—*Clarke v. Mead*, 102 Cal. 516, 36 Pac. 862.

Iowa.—*Allen v. Armstrong*, 16 Iowa 508.

Michigan.—*Groesbeck v. Seeley*, 13 Mich. 329.

Mississippi.—*Belcher v. Mhoon*, 47 Miss. 613.

Missouri.—*Cook v. Hacklemann*, 45 Mo. 317; *Abbott v. Lindenbower*, 42 Mo. 162.

New York.—*White v. Wheeler*, 51 Hun 573, 4 N. Y. Supp. 405; *Hand v. Ballou*, 12 N. Y. 541; *Board of Supervisors v. Betts*, 53 Hun 638, 6

effect relates only to so much as is required to be stated.² As to other facts the common law rule prevails.³

Proof of Omitted Recitals.—Where a tax deed is made by statute *prima facie* evidence of certain facts recited therein, if the deed

N. Y. Supp. 934; *Hickox v. Tallman*, 38 Barb. 608.

North Carolina.—*Kelly v. Craig*, 27 N. C. 129.

Pennsylvania.—*M'Call v. Lorimer*, 4 Watts 351.

Virginia.—*Nalle v. Fenwick*, 4 Rand. 585.

Washington.—*State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119.

Wisconsin.—*Smith v. Cleveland*, 17 Wis. 556; *Lumsden v. Cross*, 10 Wis. 282; *Delaplaine v. Cook*, 7 Wis. 44.

2. *Carnahan v. Sieber Cattle Co.*, 34 Colo. 257, 82 Pac. 592.

In *County Bank v. Jack*, 148 Cal. 437, 83 Pac. 705, the court said: "The statement that the deed should be *prima facie* evidence of all facts recited therein cannot enlarge the office of such recitals so as to make them evidence of facts not required to be recited therein. The requirement that the deed shall recite the facts necessary to authorize the sale and conveyance refers only to the facts necessary to authorize the tax collector to sell the title of the state, the title which the state had previously acquired. It does not authorize or require the recital of the chain of title or of the facts and proceedings whereby the state obtained title to the property. Evidence of those facts, is provided for by section 3787, referring to the deed of the tax collector to the state when a tax sale is not redeemed. It declares said deed to be 'conclusive evidence of the regularity of all the other proceedings from the assessment by the assessor inclusive up to the execution of the deed.' The recitals required by the provisions of section 3898 above quoted refer to the authorization of the sale by the comptroller and the proceedings for the sale made in pursuance of such authority and purpose to the fact of the filing of the deed in the office of the comptroller, those being acts occurring subsequently to the vesting of title in the state, and

the latter being necessary to give the comptroller authority to act in the matter. So far as it recites other matters it is ineffectual as evidence."

Overman v. Parker, Hempst. 692, 18 Fed. Cas. No. 10,623. The court said: "The statute enacts that in this proceeding the deeds shall be taken and considered by the court as sufficient evidence of the authority under which the sale was made, the description of the land and the price at which it was purchased. The deed is to be received as *prima facie* evidence of these three facts and casts the burden of proof as to them on the defendant. The term 'sufficient' is evidently used in the statute as a synonym for *prima facie* and not for conclusive."

Where a suit was brought under the burned record act to establish title to certain property, the question arose as to whether a tax deed introduced by defendant was sufficient evidence to prove title. The court said: "A tax deed introduced in evidence is not sufficient to pass title unless the notice as required by statute is also introduced in evidence. The tax deed is only color, in itself, together with *prima facie* proof of certain facts enumerated by the statute, the tax deed being the creature of the statute, and must be given that meaning and intentment, only, which the statute directs. The deed is made *prima facie* evidence of the facts enumerated in the statute, and this court cannot extend it further. The deed being merely evidence of color of title, she should have introduced the notice on which it was founded." *Glos v. Mulcahy*, 210 Ill. 639, 71 N. E. 629. See also *Kepley v. Fouke*, 187 Ill. 162, 58 N. E. 303; *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572.

3. See note 87, next preceding, and cases cited.

In *Fox v. Stafford*, 90 N. C. 296, §3198, Rev. Stats. of the United States, "requires that the certificate of purchase shall set forth four facts:

does not contain such recitals it will not be admissible in evidence as *prima facie* evidence of omitted recitals, unless they are shown by supplemental proof.⁴

Tax Deed Void Upon Its Face.—Where a statute makes a tax deed evidence *prima facie* as to some matters, this is only true in case of a deed properly executed; a tax deed void upon its face is inadmissible as evidence.⁵

1. The real estate purchased. 2. For what taxes the same was sold. 3. The name of the purchaser. 4. The price paid therefor. And it requires that the deed when it is executed shall recite these facts. There is no provision that it shall recite any other facts, and it is only required, in other respects, to conform to the laws of the state where the sale was made." §3199 Rev. Stats. United States "provides that the deed shall be *prima facie* evidence of the facts therein stated, that is, of the facts required by the statute to be stated. . . . This provision of the statute is in derogation of the general rule of evidence, and it cannot be extended beyond its plain, reasonable meaning. It cannot be construed to mean that the deed is to be received as evidence of any and every fact, beyond the recitals required by the statute to be made in it. Other recitals of facts in it, if there be such, must be proved as required by the general laws of evidence. . . . All these things are required to be done and are prerequisites to a sale of the land, but the statute does not require that the fact that they have been done shall be set forth and recited in the deed, nor does it provide that the deed shall be *prima facie* evidence of such facts. They must be proved by evidence *de hors* the deed, and as to them the statute does not change the burden of proof, and it therefore rests on the purchaser."

4. *Alabama*.—Riddle v. Messer, 84 Ala. 236, 4 So. 185.

Arizona.—Hereford v. O'Connor, 5 Ariz. 258, 52 Pac. 471.

Arkansas.—Jacks v. Chaffin, 34 Ark. 534; Lawrence v. Zimpleman, 37 Ark. 643; Bonnell v. Roane, 20 Ark. 114; Gossett v. Kent, 19 Ark. 602; Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442.

California.—Pierce v. Low, 51 Cal. 580; Wetherbee v. Dunn, 32 Cal. 106; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94.

Indiana.—Farrar v. Clark, 85 Ind. 449; Keepfer v. Force, 86 Ind. 81; Langohr v. Smith, 81 Ind. 495; Woolen v. Rockafeller, 81 Ind. 208; Bender v. Stewart, 75 Ind. 88; Reid v. State, 74 Ind. 252; Steeble v. Downing, 60 Ind. 478; Smith v. Kyler, 74 Ind. 575; Ward v. Montgomery, 57 Ind. 276.

Maine.—Nason v. Ricker, 63 Me. 381.

Minnesota.—Taylor v. Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453.

Missouri.—State v. Mantz, 62 Mo. 258.

New Jersey.—Woodbridge Twp. v. State, 43 N. J. L. 262.

Simoneaux v. White Castle Lumb. & S. Co., 112 La. 221, 36 So. 328. In this case the court said: "Under article 210 of the constitution of 1879 all tax deeds are *prima facie* evidence of 'valid sales' and of the regularity of proceedings not recited in a deed. Hence a party assailing or defending against a tax title must adduce some evidence of the failure of the tax-collector to comply with requirements not recited in the deed, such as giving notice or first offering the least quantity," the court citing *Slattery v. Heilperin*, 110 La. 86, 34 So. 139; *Cane v. Herndon*, 107 La. 591, 32 So. 33.

5. *United States*.—Johnston v. Sutton, 45 Fed. 296.

Alabama.—Reddick v. Long, 124 Ala. 260, 27 So. 402.

Arkansas.—Twombly v. Kimbrough, 24 Ark. 459; Merrick v. Hutt, 15 Ark. 331.

California.—Hubbell v. Campbell, 56 Cal. 527; O'Grady v. Barnhisel, 23 Cal. 287; Ferris v. Coover, 10 Cal. 589; Kelsey v. Abbott, 13 Cal. 609.

Scope of Presumptions.— Under some of the statutes, the things of which a tax deed is made *prima facie* evidence relate to facts which occurred before or at the time of the sale and not to acts which the purchaser at the sale is required to perform subsequent to the sale; and as a further condition precedent to his right to a deed,⁶ and so a failure to redeem must be shown.⁷ It is sometimes provided that a tax deed shall only be *prima facie* evidence of the regularity of the sale,⁸ although in some instances a tax deed is made

Florida.— *Mundee v. Freeman*, 23 Fla. 529, 3 So. 153.

Georgia.— *Bedgood v. McLain*, 89 Ga. 793, 15 S. E. 670.

Louisiana.— *Reeves v. Towles*, 10 La. 276.

Maine.— *Allen v. Morse*, 72 Me. 502; *Wiggin v. Temple*, 73 Me. 380; *Orono v. Veazie*, 57 Me. 517.

Michigan.— *Ball v. Busch*, 64 Mich. 336, 31 N. W. 565.

Minnesota.— *Taylor v. Winona & St. P. R. Co.*, 45 Minn. 66, 47 N. W. 453; *Sherburne v. Rippe*, 35 Minn. 540, 29 N. W. 322; *Farnham v. Jones*, 32 Minn. 7, 19 N. W. 83; *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *Cogel v. Raph*, 24 Minn. 194.

Missouri.— *Loring v. Groomer*, 142 Mo. 1, 43 S. W. 647; *Burden v. Taylor*, 124 Mo. 12, 27 S. W. 349; *Duff v. Neilson*, 90 Mo. 93, 2 S. W. 222; *State v. Mantz*, 62 Mo. 258.

Nebraska.— *Merriam v. Dovey*, 25 Neb. 618, 41 N. W. 550; *Haller v. Blaco*, 10 Neb. 36, 4 N. W. 362.

Ohio.— *Woodward v. Sloan*, 27 Ohio St. 592.

Tennessee.— *Hightower v. Freedle*, 5 Sneed 312.

Texas.— *Kelly v. Medlin*, 26 Tex. 48; *Kilpatrick v. Sisneros*, 23 Tex. 113.

A tax deed, made by Revision 1877, ch. 28, § 74 (Comp. Laws § 1639) "conclusive evidence of the truth of all the facts therein recited," is void on its face where it recites that the tax sale was at a certain time, at which, under Revision 1877, ch. 28, § 62, as amended by Sess. Laws 1879, ch. 49, the sale could not legally be held, or that two lots required by Comp. Laws §§ 1593, 1595 to be assessed separately, and therefore required to be sold separately, were sold as one parcel. The tax deed was not admissible as conclusive evi-

dence. *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570.

6. *Williams v. Kirtland*, 13 Wall. (U. S.) 306; *Bunner v. Eastman*, 50 Barb. (N. Y.) 639; *Sanborn v. Mueller*, 38 Minn. 27, 35 N. W. 666; *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229; *Parnahan v. Sieber Cattle Co.*, 34 Colo. 257, 82 Pac. 592.

7. *California.*— *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Miller v. Miller*, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229.

Minnesota.— *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229.

New York.— *Westbrook v. Willey*, 47 N. Y. 457; *Doughty v. Hope*, 3 Denio 594; *Beekman v. Bigham*, 5 N. Y. 366; *Jackson v. Esty*, 7 Wend. 148.

8. *Illinois.*— *Doe v. Leonard*, 5 Ill. 140.

Indiana.— *Keepfer v. Force*, 86 Ind. 81; *Wilson v. Lemon*, 23 Ind. 433, 85 Am. Dec. 471; *Richcreek v. Russell*, 34 Ind. App. 217, 72 N. E. 617.

Louisiana.— *Cucullu v. Brakenridge Lumb. Co.*, 49 La. Ann. 1445, 22 So. 409.

Michigan.— *Scott v. Detroit Y. M. Soc.*, 1 Dougl. 119; *Ives v. Kimball*, 1 Mich. 308; *Rowland v. Doty*, Harr. 3; *Latimer v. Lovett*, 2 Dougl. 204.

New York.— *Rathbone v. Hooney*, 58 N. Y. 463; *Marsh v. Brooklyn*, 59 N. Y. 280; *Beekman v. Bigham*, 5 N. Y. 366; *Tallman v. White*, 2 N. Y. 66; *Leggett v. Rogers*, 9 Barb. 406; *Bunner v. Eastman*, 50 Barb. 639; *Striker v. Kelly*, 2 Denio 323, 7 Hill 9.

Texas.— *Yenda v. Wheeler*, 9 Tex. 408; *Devine v. McCulloch*, 15 Tex.

prima facie evidence of all proceedings anterior to its execution.⁹

As to Parties.—Under some of the statutes the deed is *prima facie* evidence against the former owner of the property sold; while as to all other parties it is conclusive.¹⁰

In Oregon the statute provides that a tax deed shall be *prima facie* evidence that the provisions of the law incident thereto have been fully complied with in case of a tax sale to a private purchaser. This statute does not apply to a purchase by a county.¹¹

Limitation Statutes.—It is held in some instances that a tax deed good upon its face and duly recorded invests the tax title holder with constructive possession of the land, and such constructive possession when uninterrupted by actual possession of the adverse claimant perfects the tax deed at the expiration of the statutory period as against affirmative assaults upon it for defects in the proceedings upon which it is based.¹²

488; *Robson v. Osborn*, 13 Tex. 298; *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340.

Wisconsin.—*Bridge v. Bracken*, 3 Pin. 73.

9. Where it is admitted in an action to set aside a tax deed that the land was unoccupied and the record is silent on the question as to whether or not it was taxed to any person, it must be presumed from the treasurer's deed that it was taxed as unknown, such deed being *prima facie* evidence of the regularity of all proceedings anterior to its execution. *Chambers v. Haddock*, 64 Iowa 556, 21 N. W. 32.

10. *Rich v. Braxton*, 158 U. S. 375.

11. *Ayers v. Lund (Or.)*, 89 Pac. 806.

12. *John v. Young*, 74 Kan. 865, 86 Pac. 295. See also *Penrose v. Cooper (Kan.)*, 84 Pac. 115; *Robertson v. Lombard Liquidation Co.*, 73 Kan. 779, 85 Pac. 528.

In *Jones v. Sadler*, 75 Kan. 380, 89 Pac. 1019, the court said: "A tax deed of vacant land, good upon its face, and duly recorded, invests the tax-title holder with constructive possession of the land; and such constructive possession, when uninterrupted by the actual possession of the adverse claimant, perfects the tax deed at the expiration of the statutory period, as against affirmative assaults upon it for defects in the proceedings upon which it is based."

Stump v. Burnett, 67 Kan. 589, 73 Pac. 894. A tax deed which has force enough to draw to the holder a constructive possession of land admitted to be in fact unoccupied, has also force enough, in the absence of any evidence whatever on the subject, to raise a presumption of possession by the grantee. The deed is regarded as valid, and if valid the law presumes the holder, as the legal owner of the property, to have enjoyed its possession. The burden of proof was on the plaintiff to show that there had been adverse occupancy, rather than upon the defendant to show that there had been none."

Where a tax deed conveying two tracts of land recites as a consideration therefor not a separate amount for each tract for which they were conveyed, as required by Gen. Stats. 1902, § 7677, but recites the total amount of taxes, interest and costs, in an action commenced more than five years after the recording thereof it was held that to support the deed it will be presumed either that the two tracts continued to be separately taxed in equal amounts or subsequent to the sale were taxed together as one tract, in either of which cases the consideration for the conveyance is one-half the total consideration. Presumptions and inferences are not to be indulged to defeat, but are to be indulged to sustain the validity of the tax deed after it has been of rec-

Statutes Strictly Construed.—Statutes making tax deeds *prima facie* evidence of title, or of particular recitals therein set forth, are to be strictly construed.¹³

(2.) **Conclusive Evidence.**—By some of the statutes it is provided that a tax deed shall be conclusive evidence as to its recitals.¹⁴

ord five years. *Nagle v. Tieperman* (Kan.), 88 Pac. 969.

In *Gibson v. Trisler*, 73 Kan. 397, 85 Pac. 413, which was an action in ejectment, defendant claiming under a tax deed, it was held that where a tax deed has been filed of record for more than five years before it is attacked, all presumptions are in favor of the regularity of the prior tax proceedings.

Carson v. Platt (Kan.), 92 Pac. 705. The plaintiff commenced this action to recover the possession of two eighty-acre tracts of land to which he held the patent title. The defendant was then in possession of the land and had been for more than five years, under a tax deed recorded September 6, 1897. This deed purported to convey 480 acres including the land in controversy. The description is of eighty and forty-acre subdivisions, all of which were contiguous. The recitals in the deed show the sale of all these lands for taxes as one tract, and the lower court refused to receive evidence offered by the plaintiff to show that they were in fact patented as three separate tracts, and had been owned and conveyed as such up to the date of the tax sale. The court said: "The plaintiff contends that this deed is void upon its face, and therefore insufficient to stay the five years' limitations of the tax law in operation, because from the description given it must be presumed that the lands were not patented, held or patented as a single tract, but as several tracts. In support of this contention it is said: 'In noting the form of this body of land a single farm is not suggested, nor can it occur to one that it is used and occupied as a single tract of land.' It is urged that the outlines of these lands and its intersection by section lines suggests highways and lines between different holders and occupants. We can arrive at such a con-

clusion only by a presumption, but under the decisions of this court presumptions and inference are not to be indulged in to defeat, but are to be indulged in to sustain the validity of a tax deed after it has been of record five years. . . . It is certainly not impossible that this body of land could have been owned and occupied as an entire tract. The exterior lines of farms may be such as will suit the convenience and purposes of the owner and no presumption of separation of contiguous lots can be indulged in merely because of an unusual boundary. The presumption of regularity in the tax proceedings will overthrow any possible presumption from peculiarity of contour. §§ 138 and 141 of the Tax Law, Gen. Stats. 1901, §§ 7676 to 7680. In several of the cases in this court where similar questions had been considered the lands were referred to as comprising a compact body, but the tax deeds were upheld because of the presumption that the land comprised an entire tract and not because they were in compact form."

13. *United States*.—*Games v. Stiles*, 14 Pet. 322.

Arkansas.—*Parr v. Matthews*, 50 Ark. 390, 8 S. W. 22.

California.—*Bucknall v. Story*, 36 Cal. 67.

Missouri.—*Stierlin v. Daley*, 37 Mo. 483.

Ohio.—*Hannel v. Smith*, 15 Ohio 134; *Carlisle v. Longworth*, 5 Ohio 368.

Tennessee.—*Shoalwater v. Armstrong*, 9 Humph. 217.

West Virginia.—*Dequasie v. Harris*, 16 W. Va. 345.

14. *United States*.—*Jenkins v. McTigue*, 22 Fed. 148.

California.—*Klumpke v. Baker*, 131 Cal. 80, 63 Pac. 137, 676.

Mississippi.—*Bell v. Coats*, 54 Miss. 538.

New Jersey.—*Doremus v. Cameron*, 49 N. J. Eq. 1, 22 Atl. 802.

Other statutes make the tax deed conclusive as to the regularity of the sale and of certain tax proceedings incident thereto.¹⁵

The Legislature Has the Power To Make a Tax Deed Conclusive Evidence as to matters which in the first instance the legislature might not have required to be done, and which are therefore in their nature

New York.—Bennett v. Kovarick, 23 Misc. 73, 51 N. Y. Supp. 752, affirmed, 44 App. Div. 629, 60 N. Y. Supp. 1133; Wells v. Johnston, 171 N. Y. 324, 63 N. E. 1095, affirming 55 App. Div. 484, 67 N. Y. Supp. 112.

Texas.—Eustis v. Henrietta, 91 Tex. 325, 43 S. W. 259.

Wisconsin.—Cousins v. Allen, 28 Wis. 232.

Conclusion That the Grantee Named in the Deed Was the Purchaser.—Farmers' Loan & Trust Co. v. Wall, 129 Iowa 651, 106 N. W. 160. This action was brought to quiet title to certain land, plaintiff claiming under a tax deed. Plaintiff had judgment in the lower court, from which defendant appealed. The appellants contended that any sale made was not consummated in that the grantee named in the tax deed was not the purchaser at the sale. Held, that this is met by § 1444 of the code, declaring the deed conclusive evidence that the grantee named therein was the purchaser.

15. *United States.*—Callanan v. Hurley, 93 U. S. 387.

California.—Haaren v. High, 97 Cal. 445, 32 Pac. 518; Brady v. Dowden, 59 Cal. 51.

Iowa.—Phelps v. Meade, 41 Iowa 470; Bullis v. Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Gould v. Thompson, 45 Iowa 450; Chandler v. Keiler, 44 Iowa 371; Sibley v. Bullis, 40 Iowa 429; Martin v. Cole, 38 Iowa 141; Clark v. Thompson, 37 Iowa 536; Smith v. Easton, 37 Iowa 584; Madison v. Sexton, 37 Iowa 562; Ware v. Little, 35 Iowa 234; Rima v. Cowan, 31 Iowa 125; Bulkley v. Calanan, 32 Iowa 461; Stewart v. Corbin, 25 Iowa 144.

Louisiana.—Dibble v. Leppert, 47 La. Ann. 792, 17 So. 309; *In re Lake*, 40 La. Ann. 142, 3 So. 479.

New Jersey.—Woodbridge Twp. v. State, 43 N. J. L. 262.

Ayers v. Lund (Or.), 89 Pac. 806.

This was an action brought to recover real estate, defendant claiming that the sheriff had sold the property in question to the county by virtue of a delinquent tax warrant and that he had obtained the title thus acquired by the county pursuant to the terms of §§ 3133, 3136, B. & C. Comp., and that a deed had been executed to him thereafter under the provisions of § 3135 *Id.* Defendant also claims that the burden is upon the plaintiffs to establish the invalidity of the tax sale. By legislative act of 1901 (Gen. Laws 1901, p. 72; sec. 3131-3136, inclusive, B. & C. Comp.) provision is made for the disposition of property purchased by the county at tax sales. Sec. 3131, *Id.*, provides that, 'if no redemption shall be made, title to the lands so sold shall vest in the county . . . without issuance of deed or other formality.' By sections 3133, 3136 *Id.*, the sheriff is authorized on the first Monday in July of each year to sell to the highest bidder the lands theretofore bid in by the county for taxes, and to which it shall have acquired title, as provided in section 3131, *Id.* Section 3135, *Id.*, is curative of the irregularities occurring in tax proceedings resulting in the county's title, and also provides for a deed to the purchaser at the sale of the county's title, under section 3133, *Id.*, and makes such deed 'conclusive evidence of the regularity and existence of all proceedings necessary to pass title to the lands therein conveyed, and of title in the grantee, except' as to certain matters relating to the assessment, previous payment of the tax, etc." The court said: "Defendant relies upon his deed and its effect under section 3135, B. & C. Comp., as casting the burden upon the plaintiffs to show the invalidity of the tax sale. The well established rule, when not modified by statute, is that the burden of proof is on the holder of the tax title to

non-essentials,¹⁶ but the legislature has not the power to make a tax deed conclusive evidence as to any of the essentials of the tax

maintain his title by affirmatively showing that the provisions of the law have been complied with.

By section 3127, B. & C. Comp., in case of a tax sale to a private purchaser, the deed is made *prima facie* evidence that the provisions of the law have been fully complied with, but this does not apply to a purchase by the county, as no deed is provided for in such case. Nor is there any other statute that has that effect, unless it is section 3135 above quoted, in which the deed is made conclusive evidence; but the part of the section referring to the evidentiary effect of the deed can only apply to the regularity and existence of such proceedings as are the foundation of the deed, and cannot operate as evidence of the regularity and existence of the proceedings necessary to transfer a tax debtor's title to the county. To give it that effect would make it evidence of facts with which it has no connection. The limit of its effect in that regard is to such facts as constitute a compliance with the law in the sale to the defendant, as prescribed by section 3133, *Id.*, and therefore in this case the rule above quoted is not changed by statute, and the burden is on the defendant to prove the regularity of the tax sale proceedings." See *Joslyn v. Rockwell*, 13 N. Y. Supp. 311, 35 N. Y. St. 888.

Conclusive as to Regularity of Proceedings, Except as Against Fraud.—Where an action was brought to quiet title to certain land, defendant claiming under a tax deed, it appeared that the tax deed itself recited the fact that the assessment of taxes for which the property was sold was made under a certain act. In reference to a tax deed, it is provided by act 1897 (Stats. 1897, p. 271, sec. 48), that "such deed is (except as against actual fraud) conclusive evidence of the regularity of all proceedings from the assessment by the assessor inclusive up to the execution of the deed." Plaintiff introduced in evidence a letter of the grantee in the deed, in which the

grantee stated that the assessment in question was under another act than that recited in the deed. *Held*, that this was not sufficient evidence showing that the assessment was made under the latter act, in which case the assessment would be irregular. *Commercial Nat. Bank v. Schlitz* (Cal. App.), 91 Pac. 750.

In Michigan, under the statutes, it is held that a tax deed shall be evidence of title in fee simple, after the right to give the deed has been shown by proof of a valid decree. *Taylor v. Deveaux*, 100 Mich. 581, 59 N. W. 250; *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 997; *McKinnon v. Meston*, 104 Mich. 642, 62 N. W. 1014.

In West Virginia under § 29, ch. 31, code 1899, a tax deed is conclusive evidence against strangers to the tax sale to show that such title as was sold as delinquent was vested in the person in whose name it was sold. *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465.

16. United States.—*Kelly v. Herrall*, 20 Fed. 364.

California.—*Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58.

Iowa.—*Shawler v. Johnson*, 52 Iowa 473, 3 N. W. 604; *Farmers' Loan & Trust Co. v. Wall*, 129 Iowa 651, 106 N. W. 160; *Robinson v. First Nat. Bank*, 48 Iowa 354; *Phelps v. Meade*, 41 Iowa 470; *Jeffrey v. Brokaw*, 35 Iowa 505; *Hurley v. Powell*, 31 Iowa 64; *McCready v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214; *Parker v. Sexton*, 29 Iowa 421; *Allen v. Armstrong*, 16 Iowa 508.

Missouri.—*Raley v. Guinn*, 76 Mo. 263.

New York.—Board of Supervisors *v. Betts*, 53 Hun 638, 6 N. Y. Supp. 934.

North Dakota.—*Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049.

Oregon.—*Ferguson v. Kaboth*, 43 Or. 414, 73 Pac. 200, 74 Pac. 466.

In *Bank of Lemoore v. Fulgham* (Cal.), 90 Pac. 936, the court said: "Section 3680 of the Political Code provides that whenever property has

proceedings, *i. e.*, the listing, valuation, apportionment or notice.¹⁷ It therefore follows that though a statute expressly provides that a tax deed shall be conclusive evidence of the truth of the facts therein set forth and shall vest a perfect and unassailable title, never-

been sold for taxes, and remains unredeemed, upon each subsequent assessment the assessor must enter the fact that the property has been sold for taxes, and the date of the sale, and upon all bills or statements there must be written or stamped the words, 'Sold for taxes,' and the date of sale. This memorandum was not made. The parties paying the subsequent taxes did not receive this notice that the property had been sold. It is urged that this was a notice which the law required to be given to the owner of the property, and that a failure to give this notice amounted to a deprivation by him of his property without due process of law, since the law had provided this means of notice. But section 3787 of the Political Code makes the deed from the state conclusive evidence upon this matter. Of course, it is true that the legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of the listing, valuation, apportionment, or notice (Cooley on Taxation, pages 355-356; 1 Blackwell on Tax Titles, §640), but it can make the certificate or deed conclusive as to matters or things which in the first instance the legislature might not have required to be done, and which are in their nature, therefore, non-essentials. The notice here under consideration differs entirely from the notice of proposed sale given by publication—a notice designed to afford the property owner protection, and enable him to pay his taxes before title shall pass from him. Such notice he is entitled to receive, and such notice in the case at bar he did receive. The requirement for the stamping upon the subsequent assessment or tax receipts of the words, 'Sold to the state,' may have been designed to serve a twofold purpose—that of convenience to the fiscal officers, and of continued notification to the taxpayer that his property had been sold. But there is

nothing in the law which makes the giving of such a notice essential. No rights of the taxpayer would be violated if such a provision for notice were not required at all, and therefore, as we have said, it is but a convenience and not a right which the legislature has provided for. It is quite within its power to do away with this provision, or, as here, to hold that the tax deed shall be conclusive evidence that it was given."

17. *United States*.—Marx v. Hanthorn, 148 U. S. 172; Kelly v. Herrall, 20 Fed. 364; Bannon v. Burnes, 39 Fed. 892.

Alabama.—Doe v. Minge, 56 Ala. 121; Stoudenmire v. Brown, 48 Ala. 699.

California.—Bank of Lemoore v. Fulgham, 90 Pac. 936.

Iowa.—Gardner v. Early, 69 Iowa 42, 28 N. W. 427; Immegart v. Gorgas, 41 Iowa 439; Martin v. Cole, 38 Iowa 141; Powers v. Fuller, 30 Iowa 476; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214; Allen v. Armstrong, 16 Iowa 508.

Louisiana.—*In re Lake*, 40 La. Ann. 142, 3 So. 479.

Mississippi.—Powers v. Penny, 59 Miss. 5; Dingey v. Paxton, 60 Miss. 1038; Davis v. Vanarsdale, 59 Miss. 367; Stovall v. Connor, 58 Miss. 138; McLeod v. Burkhalter, 57 Miss. 65; Vaughan v. Swayzie, 56 Miss. 704; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Mead v. Day, 54 Miss. 58; McGehee v. Martin, 53 Miss. 519.

Missouri.—Roth v. Gabbert, 123 Mo. 21, 27 S. W. 528; Abbott v. Lindenbower, 46 Mo. 291.

North Dakota.—Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

Ohio.—Magruder v. Esmay, 35 Ohio St. 221.

Oklahoma.—Wilson v. Wood, 10 Okla. 279, 61 Pac. 1045.

Oregon.—Ferguson v. Kaboth, 43 Or. 414, 73 Pac. 200, 74 Pac. 466; Strode v. Washer, 17 Or. 50, 16 Pac.

theless, upon proof of defects which relate to the essential elements of the tax proceedings, the deed may be set aside.¹⁸

Conclusive as Against Purchaser.—It is perfectly competent for the legislature to make a tax deed conclusive evidence as to facts therein stated as against the purchaser at the tax sale.¹⁹

926; *Harris v. Harsch*, 29 Or. 562, 46 Pac. 141.

Texas.—*Eustis v. Henrietta*, 91 Tex. 325, 43 S. W. 259; *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340.

We hold that Rev. §784 (Iowa Code), which provides that a tax deed shall be *prima facie* evidence that the lands conveyed therein are subject to taxation, that the taxes were not paid, and that the land had not been redeemed prior to the execution of the deed, and that it is conclusive evidence of the regularity and sufficiency of all proceedings upon which the sale and deed are based, is in conflict with the constitution in so far as it makes the deed conclusive evidence of matters jurisdictional and essential in their nature to the exercise of the taxing power, such as the assessment, levy, sale, etc. See *McCreedy v. Sexton*, 29 Iowa 356; *Rima v. Cowan*, 31 Iowa 125, and other cases following them. *Martin v. Cole*, 38 Iowa 141.

In *Adams v. Beale*, 19 Iowa 61, the court said: "But whether the legislature may declare in advance that an instrument false in fact shall be conclusive evidence of its truth, has not yet been determined, certainly not by this court. How far, if at all, such legislative action may be in violation of our bill of rights, which declares that 'no person shall be deprived of his life, liberty or property without due process of law,' it is not necessary in this case to decide. Suppose, however, the legislature should declare that an indictment duly found by a grand jury, should be conclusive evidence of the guilt of the accused, would this deprive him of his 'liberty without due process of law'? If so, where is the line at which the legislative power begins and where does it end?"

Cairo & F. R. Co. v. Parks, 32 Ark. 131. In this case the court said: "To make the recitals in the deed conclusive evidence of their

truth, and to deny to the party who desires the truth of them, the privilege of proving them to be false, is, in effect, manufacturing falsehood into truth, or giving to falsehood the validity and effect of truth. If the legislature has the power to do this, then, that provision in the bill of rights, which ordains that 'no one shall be deprived of life, liberty or property, but by the judgment of his peers, or the law of the land,' is a dead letter, because to deprive the citizen of the right to protect his property by showing that it has been taken from him contrary to law, is, in effect, denying to him the protection of the law. The legislature may declare what shall be received as evidence, but it cannot make that conclusively true, which may be shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property."

Notice of Application for Tax Deed.—In *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414, which was an action to cancel a tax deed, it was held that the code of 1881, sec. 2937, making a tax deed conclusive evidence of the regularity of all other proceedings from the assessment by the assessor to the execution of the deed, does not necessarily make such deed conclusive evidence of the fact that the holder had complied with the provisions of the statute which require notice to the owner or occupant of the land by the holder of the tax certificate thereon that application for a tax deed would be made at the expiration of the period allowed for redemption.

18. *Greene v. Williams*, 58 Miss. 752; *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. 900.

19. *Eustis v. Henrietta*, 91 Tex. 325, 43 S. W. 259; *Brady v. Dowden*, 59 Cal. 51; *Grimm v. O'Connell*, 54 Cal. 522; *French v. Edwards*, 13

Limitation Statutes.—In a few instances statutes have been enacted making a tax deed conclusive evidence after the expiration of a certain specified period for redemption. Such statutes have been uniformly upheld by the courts, whether looked upon as in the nature of rules of property or as statutes of limitations.²⁰

Statutes Strictly Construed.—As previously stated, statutes making tax deeds *prima facie* evidence of title or of particular recitals therein contained, are by the courts strictly construed. The same rule applies to statutes making tax deeds conclusive evidence of certain facts.²¹

IV. PAYMENT OF TAXES.

1. Presumptions and Burden of Proof.—A. IN GENERAL. Where payment of taxes is a fact in issue, the burden of proof is upon the party asserting payment.²²

B. PRESUMPTION FROM LAPSE OF TIME.—No presumption of payment of taxes on land returned as delinquent arises merely from the lapse of time.²³

C. NO PRESUMPTION FROM MERE DUTY.—Nor does any presumption of payment of taxes arise simply from the duty to pay.²⁴

2. Mode of Proof.—A. IN GENERAL.—Unless it is expressly provided otherwise by statute,²⁵ the payment of taxes may be estab-

Wall. (U. S.) 506; Pack v. Crawford, 29 Ark. 489; Reckitt v. Knight, 16 S. D. 395, 92 N. W. 1077; Hanenkratt v. Hamil, 10 Okla. 219, 61 Pac. 1050.

^{20.} *United States v. Saranac Land & T. Co. v. New York*, 177 U. S. 318; *Turner v. People*, 168 U. S. 90.

New York.—*People v. Turner*, 145 N. Y. 451, 40 N. E. 400; *Marsh v. Ne-ha-sa-ne Park Assn.*, 25 App. Div. 34, 49 N. Y. Supp. 384; *People v. Francisco*, 76 App. Div. 262, 78 N. Y. Supp. 423.

Virginia.—*Thomas v. Jones*, 94 Va. 756, 27 S. E. 813; *Virginia Coal Co. v. Thomas*, 97 Va. 527, 34 S. E. 486.

^{21.} *Gavin v. Shuman*, 23 Ind. 32; *McCallister v. Cottrille*, 24 W. Va. 173.

^{22.} *Attleborough v. Middleborough*, 10 Pick. (Mass.) 378; *Dana v. Petersham*, 107 Mass. 598; *Haverhill v. Orange*, 47 N. H. 273; *Lisbon v. Lyman*, 49 N. H. 553.

^{23.} *Mills v. Henry Oil Co.*, 57 W. Va. 255, 50 S. E. 157; *State v. Seaboard & R. R. Co.*, 52 Fed. 450. *Compare Colebrook v. Stewartstown*, 28 N. H. 75; *Hopkinton v. Spring-*

field, 12 N. H. 328; *Pittsfield v. Barnstead*, 40 N. H. 477.

In *Andover v. Merrimack County*, 37 N. H. 437, a petition to the county commissioners for the allowance of a claim for the support of a pauper, for the purpose of determining the settlement of the pauper, it became material to ascertain whether or not an ancestor of the pauper in question had paid taxes. It was held that since it appeared that this party was taxed, although nothing was said as to the payment of these taxes, yet as it was the duty of the officers of a town to collect them, in the absence of all proof to the contrary it should be presumed after a lapse of twenty years that they were duly paid.

^{24.} *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465.

^{25.} In *Edmondson v. Ingram*, 68 Miss. 32, 8 So. 257, a bill to cancel a tax deed alleged to be a cloud upon the title of complainant to certain land, the appellant sought to prove the payment of the taxes due by him on the land in controversy, not by the production of the specified receipt declared by § 516, code 1880, to be the only tax receipt which shall be valid as evidence of the payment

lished by any competent evidence.²⁶ Thus parol evidence may be

of taxes, but by other evidence. The court said: "The purpose of the statute appears to be twofold, viz: (1) To prevent frauds upon the revenue on the part of the fiscal agents of the state, in the collection and settlement of taxes; and, (2), to cut up by the root litigation growing out of loose and irregular or pretended payments of taxes by the citizen. The exact, minute and ample details of the requirements of § 516 must be held to shut out any other evidence of payment than the production of the prescribed tax receipt. It is admitted by counsel for appellant that 'it is evident the legislature intended to prevent the tax-collector from giving a private . . . receipt for taxes, thus hedging against the opportunity to commit fraud,' and this candid and manly admission clearly carries this question beyond the domain of dispute; for if any other private receipt, as counter-distinguished from the prescribed official receipt, though such other receipt be written and signed by the tax-collector, admittedly is not valid as evidence; it is impossible to resist the conclusion that any oral evidence of payment must likewise be necessarily held not valid, and inadmissible. Of course, if the taxpayer has settled his taxes, and obtained the prescribed receipt from the collector, and the same shall be lost, or destroyed, or by any other means be incapable of production, the taxpayer may make proof to supply the missing receipt. But the case at bar is not of that character, and if the taxpayer in this instance shall suffer hurt and damage, it will result from his trusting to mails, and to inattentive agents, whom he employed to pay his taxes, and procure the prescribed receipt, and from his disappointment by the failure of these agencies to meet his wishes and instructions. It may be hard, but so the law is written, and it is not for the court to soften its requirements."

²⁶. *Holmead v. Chesapeake & O. Co.*, 1 Hayw. & H. 77, 12 Fed. Cas. No. 6,626; *Keesling v. Winfield*, 149

Ind. 709, 49 N. E. 163; *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12; *McDonough v. Jefferson County*, 79 Tex. 535, 15 S. W. 490; *Hammond v. Hannin*, 21 Mich. 374; *Ilston v. Kennicott*, 52 Ill. 272; *Richards v. Hatfield*, 40 Neb. 879, 59 N. W. 777.

Compare Hall v. Hall, 1 Mass. 101, where it was held that the tax-collector's receipt should be produced as being the better evidence.

Ordinarily when the fact of payment or non-payment of taxes is the question directly at issue in a suit, the official's receipts, required by law to be issued by the tax-collector as evidence of such payment, would probably be the most persuasive evidence of the fact of payment. But where the payment of taxes is only collaterally in issue, there is no impropriety in permitting a witness to state as an abstract fact within his knowledge, that certain taxes were paid, without exhibiting the official receipts evidencing such payment. "While an official tax receipt is strong evidence of the fact of payment of taxes, yet it is not the exclusive mode of proving such payment; such payment may exist in fact and may be established orally whether an official receipt be in existence to evidence it or not." *Boyd v. State*, 40 Fla. 484, 24 So. 141.

In *Hinchman v. Whetstone*, 23 Ill. 108, it was held that the payment of taxes may be proved otherwise than by production of tax receipts; the court saying: "No reason is perceived why the payment of taxes may not be proved . . . by the verbal evidence of a witness, as well as the payment of money in any other case."

The payment of taxes may be proved by parol evidence as well as by the receipts or books of the tax-collector. *Adams v. Beale*, 19 Iowa 61. In this case the objections to the parol evidence were founded upon § 86, ch. 152 of Laws of Seventh General Assembly, p. 337, which required taxpayers to take duplicate receipts, leave one with the county judge, and take his signature and endorsement of "duplicate surren-

received as to the facts concerning the payment, even though it contradict the tax receipt.²⁷

B. RECEIPTS, ETC. — Receipts²⁸ given to the taxpayer by the re-

dered" on the other, and then provided that "no receipt for taxes shall be held as evidence of the payment thereof without such signature of the county judge." This statute may well be held to accomplish all its language imports, or which may be reasonably construed as its purpose, and yet fall far short of sustaining the rulings sought to be founded upon it. The receipt, either with or without the statute, is no more primary evidence of the fact of payment than a living competent witness to the same fact. If a party was compelled to rely upon the receipt as his evidence of the payment, then the statute might defeat that reliance unless its provisions had been complied with; this, of course, upon the theory that the statute was still in force or properly applicable to the case. But a statute which prohibits the introduction of one class of evidence cannot be properly construed to exclude another class not mentioned, simply because such other class is not co-equal with it.

Where land has been wrongfully sold for taxes on an erroneous assessment twice under different names, the collector is a competent witness to prove that the taxes had been paid. *Davis v. Hare*, 32 Ark. 386. As the court said in this case, it frequently happens that lands are through error or inadvertence returned delinquent upon which taxes have been paid, and it may be that the collector is the only person by whom the payment can be proved.

In *Nickum v. Gaston*, 28 Or. 322, 42 Pac. 130, it was held that parol or any other competent evidence was admissible for the purpose of showing payment of a tax to defeat a tax title which was based upon a subsequent sale for the alleged non-payment of such tax.

27. In *Coleman v. Billings*, 89 Ill. 183, where the receipts showed payment by Billings and Parsons, it was held that it was competent to prove, if such was the fact, that the taxes

were in fact paid by Billings, and that the name of Parsons was by some inadvertence included in the receipt.

It is competent to prove by parol evidence on what land taxes are in fact paid and thus to supplement or contradict the evidence of the written receipt for taxes. *Stumpf v. Osterhage*, 111 Ill. 82.

In *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12, the receipts in question showed on their face payment by one party, and the court permitted the introduction of evidence to show that in fact the payment was made by another.

28. Where, in the foreclosure of a mortgage, plaintiff prays judgment for taxes by him paid for the protection of his security, and offers in evidence tax receipts for the sums so paid, such receipts are *prima facie* evidence of the payment of such taxes. *Mutual Ben. Life Ins. Co. v. Daniels*, 67 Neb. 91, 93 N. W. 134.

Upon the simple issue as to whether a party has paid taxes upon land, the receipts of the proper county treasurer are competent *prima facie* evidence of such payment. *Seigneuret v. Fahey*, 27 Minn. 60, 6 N. W. 403; *Board of Trustees v. Brown*, 66 Minn. 179, 68 N. W. 837. Compare *Knight v. Valentine*, 34 Minn. 26, 24 N. W. 295.

Tax receipts issued for the payment of taxes are not inadmissible in evidence because the receipts cover other lands than the lands in controversy and are for a gross sum, where it does not appear that from the face of the receipts the amount of taxes paid upon the property in controversy cannot be determined. *Vaughn v. Stone*, 54 Iowa 376, 2 N. W. 973.

Where an action or defense is founded upon an alleged breach of warranty in that a grantee has been obliged to pay taxes assessed against the grantor upon the property conveyed, the exclusion of the tax receipts, if error at all, is harmless

ceiving officer are competent to prove the payment of taxes. So also are the tax books kept by such officers.²⁹

where the grantor declines to introduce other evidence showing that the taxes had been properly assessed by officers having due authority. *Hanna v. Fisher*, 95 Ind. 383. The court said: "Ordinarily, tax receipts may be given in evidence to prove payment of taxes, but the receipts themselves are simply evidence that money was paid to the treasurer; they are not evidence that the taxes were duly assessed. The statute of 1881 does not make the receipt evidence that the tax had been duly assessed, its whole office is to evidence the payment of money to the treasurer. As the receipt has no other force than that stated, no material error is committed in excluding it where it does not appear that the taxes had been assessed."

The receipt of a deputy collector of delinquent taxes has the same force and effect as that of the treasurer. *Jones v. Welsing*, 52 Iowa 220, 2 N. W. 1106.

In *Buck v. Holt*, 74 Iowa 294, 37 N. W. 377, it was held that an imperfect stub of a tax receipt was, under the circumstances shown in that case, competent and sufficient evidence to show the payment of the taxes.

The South Dakota Statute (Laws of 1890, p. 318, ch. 150, § 3, re-enacted in 1891 and 1897 and carried into the Rev. Pol. Code, § 2149) providing that possession of a tax receipt shall be conclusive evidence that the prior taxes on the property have been paid, applies only to tax receipts issued by the county treasurer in the usual discharge of his official duties, and not to a tax receipt, the possession of which was obtained by larceny, forgery or fraud. *Harris v. Stearns* (S. D.), 108 N. W. 247.

In an action of ejectment based on tax title, the plaintiff cannot on the trial of the ejectment action, for the purpose of asserting a lien on the land for the taxes paid, introduce in evidence his tax receipts; that fact can only be proved by the assessment rolls, the receipts not being evidence

to charge the defendants in such an action. *Weimer v. Porter*, 42 Mich. 569, 4 N. W. 306.

In *Milligan v. Mayne*, 2 Cranch C. C. 210, which was an action of trespass *quare clausum fregit*, the defendant claiming under a tax deed, it became material to show that the taxes on the property in question had been paid, and for that purpose receipts of the tax-collector were sought to be introduced in evidence. *Held*, that the collector's receipts were not admissible in evidence even though proof was made of his handwriting, since he was within the jurisdiction of the court.

29. On an issue as to whether or not a purchaser under a tax sale paid the taxes, the taxes paid by him may be shown by the certificate and stub books as against the objection that they are not the best evidence. *Cornoy v. Wetmore*, 92 Iowa 100, 60 N. W. 245.

Tax Receipts Not Sufficient Evidence To Show Payment in Favor of Party Upon Whom the Burden Rests.—*Clark v. Blair*, 14 Fed. 812. This was a suit in equity to set aside and cancel certain tax deeds executed by the county through its treasurer to the respondent. At the hearing upon the final proofs the court held that the tax sale deeds complained of were void, and that the plaintiff was entitled to the relief sought, but that he should first pay or tender to the respondent such legal taxes as the latter had paid upon the land in controversy. The case was accordingly referred to a master for the purpose of ascertaining and reporting upon the amount of the legal taxes so paid by the respondent. Exceptions were taken to the master's report filed by plaintiff's counsel as to the sufficiency of certain tax receipts as evidence to show that the taxes were legal. It appeared that the only evidence presented to the master to establish the fact that respondent had paid legal taxes were certain tax receipts. It was objected that these did not show that the taxes were legal, and it was insisted that

V. REDEMPTION.

1. **Presumptions and Burden of Proof.** — A. IN GENERAL. — The right to redeem property sold for taxes is purely a statutory right, and a person who claims such right and seeks to enforce it must show himself entitled thereto.³⁰

their legality must be established by other and better evidence showing a substantial compliance with the law. *Held*, that the burden is upon respondent in order to establish his lien to show that he has paid taxes for which the land in question was liable and which the complainant would have been obliged to pay if respondent had not paid them.

In *Bright v. Slocum*, 77 Iowa 27, 41 N. W. 477, an action in chancery to set aside a tax sale, the plaintiff in order to show that prior to the sale of his lot for taxes, he had paid the very tax for which it was sold, proved that he had applied to the treasurer for a statement of the taxes due on all of his property, consisting of more than one hundred lots, and that upon receiving his report, he sent by express the amount of money indicated to pay all the taxes. He also produced a tax receipt, showing the payment of the tax on the lot in question, together with five other lots. But the stub of the receipt, which remained in the treasurer's office, showed payment on five of the lots only, omitting the one in question. *Held*, that the stub, being a mere memorandum, could not overcome the receipt; also, that it was more rational to presume that the treasurer made a mistake in omitting the lot from the stub, than that he neglected to apply the money sent by plaintiff to the purpose for which it was intended.

The tax-list and certified copy of a tax receipt stub kept in the treasurer's office are competent facts to prove the payment of taxes; and where these concur in indicating that the taxes were paid prior to a sale of the land therefor they are sufficient to overcome the presumption of non-payment, which, under the statute, is raised by the tax deed. *Harison v. Sauerwein*, 70 Iowa 291, 30 N. W. 571.

In *Vaughn v. Stone*, 54 Iowa 376, 2 N. W. 973, a suit to foreclose the equity of redemption under a tax deed, the county treasurer, as a witness for the plaintiff, was permitted to testify from the tax receipts shown to him the amount of taxes receipted for in each, and it was held that since the receipts were in evidence the testimony of the witness was doubtless in the nature of an explanation of those documents, which, in view of his familiarity with the business of the office from which they were issued, he was competent to make.

Where a tax title is relied upon for the purpose of establishing a title by prescription, payment of taxes by the claimant in possession of the land cannot be established by the introduction of a certified statement from an abstractor's office. *Brinker v. Union Pac., D. & C. R. Co.*, 11 Colo. App. 166, 55 Pac. 207.

Under § 1095, Wis. Stat. 1898, it is the duty of the town treasurer to make a duplicate stub receipt whenever he receives payment of any taxes, and by § 1096 he is required to compare the stub receipt book with the tax-roll and return it with the tax-roll to the county treasurer. § 1096 further provides that such stub receipt book shall have the same effect as evidence as the original receipt. In this case it was held that a stub receipt book properly produced and identified which showed payment of taxes for which a tax deed had been issued is competent and sufficient evidence of the payment of the tax and the invalidity of such tax deed. *McIntosh v. Marathon Land Co.*, 110 Wis. 296, 85 N. W. 976, *distinguishing* *Pier v. Prouty*, 67 Wis. 218, 30 N. W. 232.

30. *United States*. — *Keely v. Sanders*, 99 U. S. 441.

Alabama. — *Boyd v. Holt*, 62 Ala. 296.

Agreement. — Independent of the statutory right, however, redemption may be made a matter of agreement between the owner of the property and the purchaser or holder of the certificate, and of course where such an agreement is sought to be enforced it must be established.³¹

B. TITLE TO PROPERTY. — a. *In General.* — In order to entitle a person to redeem land from a sale for taxes, it is not incumbent upon him to show absolute title; proof of any right or interest in the land is enough.³²

Arkansas. — *Smith v. Macon*, 20 Ark. 17; *Thompson v. Sherrill*, 51 Ark. 453.

Colorado. — *Hartman v. Reid*, 17 Colo. App. 407, 68 Pac. 787.

Illinois. — *Gage v. Scales*, 100 Ill. 218.

Iowa. — *Medland v. Walker*, 96 Iowa 175, 64 N. W. 797; *McGee v. Bailey*, 86 Iowa 513, 53 N. W. 309.

Michigan. — *Dumphy v. Hilton*, 121 Mich. 315, 80 N. W. 1; *Peavy v. Wood*, 71 Miss. 981, 15 So. 929.

New York. — *Levy v. Newman*, 130 N. Y. 11, 28 N. E. 660.

Pennsylvania. — *Metz v. Hipps*, 96 Pa. St. 15.

31. See *Swan v. Whaley*, 75 Iowa 623, 35 N. W. 440; *Gillespie v. Stone*, 70 Mo. 505.

32. *Cummings v. Wilson*, 59 Iowa 14, 12 N. W. 747; *Masterson v. Beasley*, 3 Ohio 301.

In *Harding v. Vaughn*, 36 Fed. 742, a bill in equity to redeem land from a tax sale, complainant averred in his bill that he became the owner of the realty in question before the tax sale by deed executed by his father and mother. The original deed was lost and a copy from the record was produced. It appeared that the acknowledgment on the deed was not dated, and further, that the deed was not recorded until long after the tax deed was given. It was held that the burden was upon complainant of showing the time of the execution and delivery of this deed, for until the delivery the title did not vest in him, and that therefore the deed in question was not sufficient proof of title in complainant at the time of the tax sale, no proof having been made as to the time when the deed was signed, or that it was ever delivered.

Under the provisions of §893 of the Iowa code, any right or interest in property will entitle a party to maintain an action to redeem the same from a tax sale. Proof of absolute title is not necessary. *Paxton v. Ross*, 89 Iowa 661, 57 N. W. 428. This was an action to redeem, the plaintiff having introduced in proof of his chain of title, a deed made to one M. Thompson, of Washington City, District of Columbia, offering a deed purporting to be that of "Michael Thompson, of Honolulu, Sandwich Islands," but signed "M. Thompson," and the certificate of the notary recited that "Michael Thompson" signed and acknowledged said deed. Held, that the latter deed was properly admitted in evidence without proof that the grantee in the first deed and the grantor in the second were the same person.

In *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465, it is held that one asking to make redemption of forfeited land under the West Virginia statute must prove that at the time title became vested in the state he held a good and valid title, legal or equitable, superior to that of any other claimant, whether that claimant be the state holding a superior title by forfeiture or otherwise, or an individual.

Evidence of Ownership in Actions To Redeem. — In *Hillis v. O'Keefe*, 189 Mass. 139, 75 N. E. 147, a bill in equity to redeem land from a tax title, the statute provided that "the owner of land taken or sold for a payment of taxes . . . may within two years after the taking or sale redeem the same by paying or tendering," etc. The principal question in the case was whether the plaintiff was an "owner" within the meaning

b. *Person Under Disability*. — A person under disability, such as an infant, married woman, etc., must, in order to bring himself within the terms of the statute, show that he owned the land at the time of the sale.³³

C. *PAYMENT*. — Where it appears that no proper notice was given of the expiration of the period of redemption as required by the statute, the redemptioner need not show payment of the taxes in order to entitle him to redeem.³⁴

2. *Mode of Proof*. — A. *IN GENERAL*. — Proof of the facts on which the right to redeem is claimed to rest may be made by evidence other than the affidavit of such facts.³⁵

B. *BOOKS OF REDEMPTION*. — The books of redemption are competent evidence to show the fact of redemption.³⁶

of the statute. The land consisted of woodland formerly belonging to one James Rielley, deceased. It was held that since the evidence showed that the plaintiff had been on the land and had paid a tax assessed in the name of the heirs of James Rielley, this gave him possession sufficient to maintain a bill to redeem, meaning that he was so in possession as to constitute him the owner within the statute.

33. *Harding v. Vaughn*, 36 Fed. 742; *Stevens v. Cassaday*, 59 Iowa 113, 12 N. W. 803; *Hall v. Cardell*, 111 Iowa 206, 82 N. W. 503; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118; *McMillan v. Hogan*, 129 N. C. 314, 40 S. E. 63; *McCormack v. Russell*, 25 Pa. St. 185.

In Iowa it is provided by statute that if real property of any minor or lunatic is sold for taxes the same may be redeemed at any time within one year after such disability is removed, and it is held that under this provision a minor suing to redeem certain property from a sale for taxes must show that he was the owner of the property at the time of the sale in order to be entitled to an extension of the time of redemption beyond the three years provided for in other cases of sale for taxes. *Pearsons v. American Inv. Co.*, 83 Iowa 358, 49 N. W. 853.

34. *Iowa Loan & Tr. Co. v. Pond*, 128 Iowa 600, 105 N. W. 119, *following* *Swan v. Harvey*, 117 Iowa 58, 90 N. W. 489.

35. *Chapin v. Curtenius*, 15 Ill. 427.

36. *Gage v. Parker*, 103 Ill. 528; *Huzzard v. Trego*, 35 Pa. St. 9.

The stub of a redemption certificate kept in the county auditor's office is a record belonging to that office, and is, by § 905 of the Iowa code, made evidence of the matters which appear therein. But an entry thereon purporting to cancel the redemption because inadvertently allowed by the auditor after the time therefor had expired cannot bind the redemptioner without his acquiescence. *Ellsworth v. Low*, 62 Iowa 178, 17 N. W. 450.

The *Kansas Statute* requires the county treasurer to keep a record of tax sales and redemptions, and a certified copy of such record is competent evidence. But it is error to permit the county treasurer, without producing his books in court, to testify orally that he finds from an examination of his books that a certain tax certificate has been redeemed. The record speaks for itself and should be produced, and an officer in charge of the record cannot, in the absence thereof, testify as to what the record contains and shows. *Downing v. Haxton*, 21 Kan. 178.

In *Illinois* it is provided by § 197, ch. 120 of the Revised Statutes of 1874, that "when any tract or lot shall be redeemed from tax sale, the clerk shall enter the name of the person redeeming, the date, and the amount of the redemption, in the proper column. And § 120 of the same statute provides that the books and records belonging to the office of the county clerk, or copies thereof

C. CERTIFICATE OF REDEMPTION. — Where a statute provides for the issuance by the proper officer of a certificate of redemption the certificate issued under such a statute is held to be evidence of the fact of payment of the taxes.³⁷ Such a certificate

certified by said clerk, shall be deemed *prima facie* evidence to prove the sale of any land or lot or taxes or special assessments, the redemption of the same, or payment of taxes or special assessments thereon." We think these certificates are, within the meaning of this section, "certified copies of the record of redemption." *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249.

37. *Henricksen v. Hodgen*, 67 Ill. 179; *Shelton v. Dunn*, 6 Kan. 128; *Hardy v. Brown* (Tex. Civ. App.), 46 S. W. 385.

Payment of taxes by a redemptioner for redemption purposes may be established by the requisite treasurer's certificate of redemption. *Byington v. Rider*, 9 Iowa 566.

In *Rice v. Nelson*, 27 Iowa 148, a certificate of tax sale described certain lots sold as in "Hoxie's Add." (meaning "Hoxie's addition to Des Moines"). The certificate of redemption from the tax sale described the lots by numbers, but omitted the name of any town or addition. It referred, however, with accuracy to the sale, its date, the amount for which sold, the years for which sold, and that the purchaser had since paid a certain amount of taxes thereon. *Held*, under the circumstances of the case, that the identity was sufficiently established to admit in evidence the certificate of redemption in an action to redeem, for the purpose of showing that a redemption had been made.

A receipt or certificate given by the county treasurer to a redemptioner of land sold for taxes must be countersigned by the county clerk before it can be of any validity, and it is error to allow such certificate to be read as evidence of redemption until it has been so countersigned. *Shelton v. Dunn*, 6 Kan. 128, basing decision on Kans. Laws of 1866, ch. 118, § 87, and 1868, ch. 107, § 102.

In *Battin v. Woods*, 27 W. Va. 58, certain lands were sold for the non-payment of taxes. Plaintiff claimed that he had redeemed the land in

question prior to the tax sale and brought this action against the purchaser for the purpose of having the deed declared void. A copy of the list of redemptions attested by the clerk of the county court and required by law to be copied by him was sought to be introduced in evidence on the part of plaintiff to show that the redemption under which he claimed title had been made. The statute provides (§ 16, ch. 31 of the code) that the "recorder (now the clerk of the county court,) of every county shall in the month of June in each year in which real estate is required to be sold for the non-payment of taxes thereon, make a list of all real estate redeemed as aforesaid not before included in a similar list." While it is not in express terms required that this list shall be preserved by the clerk in his office, yet this duty is clearly implied, for he is to include in such list, such redemptions as have not before been included in a similar list, which would have been a meaningless injunction if he had not been required to preserve in his office such former similar lists. The conclusion is, therefore, that this "list" of lands so redeemed, required to be made by such clerk, although it may have been compiled from the duplicate receipts of such redemptions, filed in his office, is a document or memorial required by law to be made by such clerk and preserved in his office, and that the list itself is primary evidence of the facts appearing on the face thereof, which the law requires to be stated therein, and that a copy thereof, attested by the clerk of the county court in whose office the same is, may be admitted as evidence in lieu of the original, without in any manner accounting for the absence of the original duplicate receipts, of any of them, from which such list may have been compiled; and such original list as an instrument of evidence of the facts appearing on the face

is however held not to be evidence of the right to redeem.⁸⁸

D. TAX DEED. — Under some statutes a tax deed is *prima facie* evidence not only of the fact that notice of the expiration of the period of redemption was given, but also that the notice was in the form required by the statute.⁸⁹

VI. ACTIONS BASED UPON ILLEGAL TAXATION.

1. Burden of Proof. — Burden on Taxpayer. — In an action for the recovery of money or property based upon alleged illegal taxation the burden is upon the plaintiff to prove that the tax was illegal and that he paid it under compulsion.⁴⁰ But it has been held in

thereof which the law requires to be stated therein is wholly independent of the duplicate receipts from which it may have been prepared and does not upon the face thereof in any manner indicate that better evidence of the facts stated therein remains behind. *Johnson, President, dissenting.*

38. *Henricksen v. Hodgen*, 67 Ill. 179; *Jewell v. Truhn*, 38 Minn. 433, 38 N. W. 106; *Danforth v. McCook County*, 11 S. D. 238, 76 N. W. 940. In a proceeding to redeem under a tax sale, the certificate of the treasurer is not conclusive upon the amount required for redemption, and it is error for the court to disregard the testimony of a clerk that the costs were not all paid. Such a certificate is simply an acknowledgment that so much has been paid to redeem the land, and the officer properly leaves it to the party concerned whether this is all that is required. *Byington v. Buckwalter*, 7 Iowa 512.

39. *McQuitty v. Doudna*, 101 Iowa 144, 70 N. W. 99; *Baker v. Crabb*, 73 Iowa 412, 35 N. W. 484; *Chard v. Holt*, 136 N. Y. 30, 32 N. E. 740. And see *supra*, "Tax Sale," "Tax Titles."

40. *Alabama*. — *Raisler v. Mayor & Council*, 66 Ala. 194.

California. — *Savings & Loan Society v. San Francisco*, 146 Cal. 673, 80 Pac. 1086.

Indiana. — *Baltimore & O. S. W. R. Co. v. Oregon Twp.* (Ind. App.), 81 N. E. 105; *Ziegler v. Board Comrs.*, 33 Ind. App. 375, 71 N. E. 527.

Maine. — *Portsmouth, S. & P. R. Co. v. Saco*, 60 Me. 196; *Smith v. Readfield*, 27 Me. 145.

Massachusetts. — *Oliver v. Lynn*, 130 Mass. 143.

Michigan. — *Godkin v. Doyle Twp.*, 143 Mich. 236, 106 N. W. 882.

Minnesota. — *Oakland Cemetery Assn. v. Board of Comrs.*, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237.

North Carolina. — *Pickens v. Commissioners*, 112 N. C. 698, 17 S. E. 438.

Texas. — *County of Galveston v. Galveston Gas Co.*, 72 Tex. 509, 10 S. W. 583.

Virginia. — *Town of Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839.

To recover from a municipality taxes illegally collected and paid over, it is incumbent upon the plaintiff to show that the taxes were illegal and void, and that they were paid under compulsion, or what would be equivalent thereto, and that they were received to the use of the municipality from the collecting officer. *Otis v. People ex rel. Raymond*, 196 Ill. 542, 63 N. E. 1053.

In *Michigan* the right to recover taxes paid under protest depends upon the following facts: (1) That the treasurer was armed with a tax-roll, with proper warrant attached, and demanded the payment of a tax appearing on the roll as assessed against him, and had levied or threatened to levy the same upon his property unless the same was paid. (2) That he paid the same under protest, to relieve his property from the levy or threatened levy. (3) That the tax was void, and the township had no legal right to demand or have it; and, in an action, it is incumbent upon the plaintiff to establish all these facts, and failure

Vermont, that when a town causes the name of a person to be placed in the tax list, and proceeds to tax him, it assumes the burden of proving that he is a resident of the town and liable to taxation there.⁴¹

2. Presumptions. — A. AS TO VALIDITY OF TAX. — The law presumes that public taxes are regularly and lawfully levied, assessed and collected for lawful purposes.⁴²

B. AS TO QUALIFICATIONS OF TAXING OFFICERS. — The law presumes that officers acting in the assessment and collection of taxes are duly qualified.⁴³

of proof as to any one of them will defeat his right of action. *Turnbull v. Alpena Twp.*, 74 Mich. 621, 42 N. W. 114.

Place of Business of Corporation. *Portsmouth, S. & P. R. Co. v. Saco*, 60 Me. 196, was an action in assumpsit to recover an amount of taxes alleged to have been illegally assessed upon a certain quantity of wood and paid to the defendant city. Under the statute, (R. S. 1857, ch. 6, § 10), if personal property belongs to a corporation, and does not compose a part of its capital stock, it is liable to be taxed where the corporation has its principal place of business. Plaintiff contended that its place of business was not in the defendant town but offered no evidence as to where its place of business was. *Held*, that the plaintiff corporation assumes the burden of proving that the taxes complained of were illegal, and therefore the burden of proof is upon plaintiff of proving that its place of business was not in defendant town.

41. Burden on Town. — In an action against a tax-collector to recover the value of property distrained by the collector for taxes, it was held that a town, having set a party in the grand list and proceeded to tax him, takes upon itself the burden and responsibility of showing that he was a resident of the town and liable to be set in the list, if the right is questioned. There is no intendment in favor of the town where a man is listed in a case where it does not appear that he was listed elsewhere, and the proof as to his residence is equally balanced between different towns. *Hurlburt v. Green*, 41 Vt. 490.

42. Fuller v. Elizabeth, 42 N. J. L. 427.

Presumption as to Validity of Tax. *Briggs v. Whipple*, 7 Vt. 15.

Presumption of Legality of Tax. In *Clemons v. Lewis*, 36 Vt. 673, which was an action of trespass, with a count in trover joined under the statute, it appeared that defendant, a tax-collector, had seized plaintiff's property. Defendant's plea of justification alleged that the tax was voted "for the purpose of paying bounty money which had been promised to volunteers who had enlisted from said town of Wells and gone into the military service of the United States under the calls and requisition of the President thereof." Plaintiff objected to the sufficiency of defendant's plea in that it did not appear that the purpose for which the tax was voted was one for which the town had a right to raise money by a tax. The court said: "If the collector in his plea sets forth the purposes for which the tax was voted, and that purpose proves to be an illegal one or one beyond the corporate power of the town to raise a tax for, it would without doubt destroy his justification. But if the plea sets forth the purpose in general terms merely, and that be one for which the town may raise the money, it does not make it necessary that he should allege all the circumstances and particulars to show that in the particular case the exercise of the power was rightful. That will be presumed unless the contrary appears."

43. Hathaway v. Addison, 48 Me. 440.

Proof of Collector Having Given Bonds. — In *Downer v. Woodbury*,

C. AS TO ACTS OF TAXING OFFICERS. — The proceedings of public officers in the levy, assessment and collection of taxes, are presumed to be regular and legal.⁴⁴

D. FROM ASSESSMENT BOOKS AND TAX-ROLLS. — The law presumes from the assessment books and tax-rolls that the levy and

19 Vt. 329, which was an action of trespass brought by a taxpayer against a collector of taxes, it was held that where a collector of taxes justifies the taking of property under his rate-bill and warrant, and alleges in his plea that he gave the bond required by statute for the faithful performance of his duty, but does not attempt to set forth the bond or make proffer of it, the fact that he acted as collector is sufficient proof of his having given a bond to sustain his allegation.

44. *Blodgett v. Holbrook*, 39 Vt. 336.

Presumption as to Regularity of Acts of Public Officers. — *Adams v. Sleeper*, 64 Vt. 544, 24 Atl. 990. This was an action of replevin. It was conceded upon the trial that the plaintiff was the owner of the property replevied at the time it was taken by the defendant. The defendant justified under a tax warrant as a collector of taxes. The plaintiff claims that the tax was illegal because her property was set in the grand list to herself and husband. *Held*, that it cannot be said that the property was not set to the plaintiff as the owner; the error was in joining her husband's name with hers as if they were joint owners. § 322, Rev. Stat., makes it the duty of the taxpayer to procure a blank inventory and fill out and complete the same in all respects as required by law and to return it to the listers on or before April 20th. It is to be presumed that the listers placed it in the list as it was returned to them, for the legal presumption is in favor of the regularity of the proceedings of public officers.

In *Fletcher v. Drew*, 48 N. H. 180, an action of trespass for assault and imprisonment, defendant, who acted as tax-collector, arrested the plaintiff upon her refusal to pay a tax assessed against her by the other defendants, who were acting selectmen. The plaintiff denied the validity of

the assessment of the tax on the ground that it was excessive and in contravention of law. The court said: "The record shows a legal assessment. 'In assessing such taxes the selectmen may assess a sum not exceeding five per cent. more than the amount of such tax, to answer any abatements that may be made, which shall be paid into the town treasury for the use of the town.' Rev. Stats. ch. 43, § 4. The addition of three per cent. did not exhaust the power of the selectmen to add two per cent. more at any time before the completion of the assessment. If the selectmen, in determining the amount, were not acting under the foregoing statute, they must either have been grossly transcending their powers and acting in flagrant violation of law or, in the case of the state, county, town and road taxes, have committed an unaccountable clerical error, and, in the case of the school tax, have made a very singular arithmetical blunder. But we think that instead of presuming that the selectmen were proceeding illegally, the natural inference in the mind of any one familiar with the statute must be that the selectmen were acting under the authority expressly given them by law to do the very thing which they have done."

In *Beers v. Botsford*, 3 Day (Conn.) 159, by a statute entitled: "An act providing for the collection and payment of rates and taxes," it was enacted that on neglect of a collector, the treasurer shall issue a distress or warrant against him for the amount due. On return of that unsatisfied, he shall issue a distress against the goods, etc., of the selectmen; and on return of that unsatisfied, he shall issue a distress for the sum due, and all charges, against the goods and chattels of the inhabitants of the town. Upon execution issued against the town the plaintiff paid the taxes due and brought this action

assessment of taxes therein shown were properly and lawfully made and the forms of law complied with.⁴⁵

E. FROM PAYMENT. — A payment of taxes is presumed to be voluntary.⁴⁶

3. Facts Necessary To Maintain Action. — A. ILLEGALITY OF THE TAX. — In an action by a taxpayer based upon the payment of a tax alleged to be illegal, he must establish by evidence such facts as will show the tax to be illegal and void; proof of mere irregularity in the levy, assessment, or collection, is not sufficient.⁴⁷ Evidence

to recover the amount paid. As tending to show that the above statute has been complied with, it was held that proof to the effect that an execution had issued against the town was, at least, *prima facie* evidence that an execution had previously issued against the collector, and against the selectmen.

45. *San Gabriel Val. Land & Water Co. v. Witmer Bros. Co.*, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465.

In *Douglass v. Byers*, 69 Kan. 59, 76 Pac. 432, an action to recover taxes paid, it was contended that the proof of the levy of the taxes was insufficient, and complaint was made of the character of the proof that was offered. The court said: "It is true that there was no proof of the various levies made by the officers of the school district of said township and county to provide the several funds which made up the total taxes against the property. It was shown however, that the taxes were paid and the tax receipts evidencing the payments were produced. The assessment and tax-rolls were also introduced which showed that taxes were levied against the land and the purposes for which they were levied. The tax-rolls are the original extensions of the levies made by the proper authorities and include all kinds of taxes. Having been officially made on the public records it is presumed that they have been correctly made, and these, with the other proofs offered are sufficient evidence of a levy in an action of this character."

46. *Town of Phoebe v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839.

47. *Raisler v. Mayor & Council*,

6 Ala. 194; *Otis v. People ex rel. Raymond*, 196 Ill. 542, 63 N. E. 1053; *Portsmouth, S. & P. R. Co. v. Saco*, 60 Me. 196; *Oliver v. Lynn*, 130 Mass. 143; *County of Galveston v. Galveston Gas Co.*, 72 Tex. 509, 10 S. W. 583; *Ziegler v. Board of Comrs.*, 33 Ind. App. 375, 71 N. E. 527.

Illegality of Tax Must Be Shown. *Greenbanks v. Boutwell*, 43 Vt. 207. This was an action of replevin to recover certain property taken by a collector of taxes upon failure to pay a tax thereon. The warning was "to raise money to defray expenses and pay our indebtedness" and the vote was "to raise \$1.00 on \$1.00 on the grand list to defray the expenses of the current year, and the balance toward our indebtedness." The plaintiff contended that the indebtedness was for the building of a certain hall, which it was not within the legitimate province of the district to build. The court said: "If it should be assumed that the *indebtedness* intended by that vote was in part or the whole for the unlawful building of that hall, still in order that that fact should affect the validity of that vote, it ought at least to be shown that the tax voted would raise more money than was needed to pay the expenses of the current year, so that there might be a balance to be applied on the unlawful debt. This is not shown in the case."

In an action to recover taxes paid under protest the plaintiff cannot show mere irregularities that might have been corrected by a timely application to the board of review, nor can he show matters invalidating an assessment not specified in his protest. *Hinds v. Belvidere Twp.*, 107 Mich. 664, 65 N. W. 544.

that the tax was diverted from the purpose for which it was levied, is not admissible.⁴⁸

B. ACTUAL PAYMENT. — It is incumbent upon a taxpayer plaintiff to prove that he paid the tax in question to the proper public official.⁴⁹ Oral admissions alleged to have been made by a deceased collector cannot be given in evidence to show payment.⁵⁰ Proof

Excessive Taxation. — In an action by a taxpayer against the county commissioners to recover the amount of an alleged excessive tax paid by him, he is not entitled to recover unless he can show that the value of the property upon the tax books is greater than that fixed by the proper authorities under §§ 7, 24 and 25 of the act of 1891, ch. 326, or that the tax which he has been forced to pay is greater than it would have been if correctly computed at the legal rate of the adjudged valuation. *Pickens v. Commissioners*, 112 N. C. 698, 17 S. E. 438.

Irregularity in Collection. — Where it appears that the taxpayer has paid a valid tax which he was in duty bound to pay he cannot recover back the taxes so paid merely on proof of an irregularity in the method of collection, such as an invalid process. *Godkin v. Doyle Twp.*, 143 Mich. 236, 106 N. W. 882.

Illegal Assessment. — Where a suit was brought by a taxpayer to recover taxes paid under protest, plaintiff alleging that the assessment was not legally made, it was held that the presumption was in favor of the assessment and that the burden of proof was upon the party questioning its legality to show that the acts relating to the assessment were unauthorized. *Savings & Loan Society v. San Francisco*, 146 Cal. 673, 80 Pac. 1086.

Evidence of Taxation in Another Place, Inadmissible. — In an action brought to recover the amount of a tax assessed upon plaintiff and paid under protest, evidence introduced by plaintiff that he was taxed in another town is inadmissible to prove that he was not taxable in the town in which he was assessed, since the evidence has no legal tendency to prove the fact in issue. *Mead v. Inhabitants of Boxborough*, 11 Cush. (Mass.) 362.

⁴⁸. *Cresswell Ranch & Cattle Co. v. Roberts County* (Tex. Civ. App.), 27 S. W. 737.

⁴⁹. *Raisler v. Mayor & Council*, 66 Ala. 194; *Smith v. Readfield*, 27 Me. 145.

Where an action was brought against a county to recover an amount of taxes alleged to have been illegally assessed, it was held that as this action was for money had and received there can be no doubt that in order to maintain it it must appear from the evidence that the tax was illegal and void, and not merely irregular, that it was not voluntarily paid, and that it went into the hands of such person as was the representative of the county to receive it for its use. *County of Galveston v. Galveston Gas Co.*, 72 Tex. 509, 10 S. W. 583.

⁵⁰. **Admission of Collector as to Payment.** — *Lawrence v. Kimball*, 1 Met. (Mass.) 524. It appeared that a former tax collector had died and left the tax of the plaintiff uncanceled on the tax-list. Conforming to the statute (Rev. Stats. ch. 8, § 39), which provides that if any collector shall die before completing his collection, the assessors may appoint some suitable person to complete the collection, the assessors committed said list to another person for collection, who took and sold the plaintiff's property to pay said tax. This action was brought against one of the assessors to recover damages for such taking and sale, the plaintiff basing his action on the ground that the tax referred to above had been in fact paid to the deceased collector. On the trial, evidence of the deceased collector's admissions, in conversation with third persons, to the effect that this tax had been paid, were sought to be introduced. It was argued that their admissions were within an exception to the hearsay rule on the ground that there

that a promissory note was given for the tax is not sufficient⁵¹

C. APPLICATION OF MONEY.—Where a recovery of taxes is sought on the ground that they were levied for an illegal object, it is not necessary to show that the money paid was applied to such object.⁵²

D. PAYMENT UNDER COMPULSION.—In order for a plaintiff to obtain relief on account of the payment of illegal taxes he must prove that the payment was made to procure the release of person or property from the power of the collecting officer, for though it may appear that the taxes are illegal, if the evidence shows that they were voluntarily paid, no recovery can be had.⁵³

was a privity of interest between the deceased collector and the assessors, of whom the defendant is one, because their authority to act depended upon the act or omission of such collector; and that he stood toward them in the relation of an agent. The court said: "It is not easy to perceive this relation of agent between the deceased collector and the assessors, both acting as public officers, in their respective spheres; but if it were more obvious, it would not be applicable, unless it were shown that the declarations, relied upon as admissions, were made in the exercise, as well as within the scope, of his authority. Declarations made by an agent, after his agency has ceased, or not made in connection with the actual exercise of his authority, are not evidence against his principal." It was further argued that these admissions were within another exception to the hearsay rule, viz., that the admissions were made by the collector in a matter against his interest at the time, inasmuch as it rendered him liable to the town as for so much money collected. The court held that this exception is confined wholly to the case of entries made in books.

51. *Turnbull v. Alpena Twp.*, 74 Mich. 621, 42 N. W. 114.

52. *Gillette v. Hartford*, 31 Conn. 351.

53. *England*.—*Oates v. Hudson*, 5 Eng. L. & Eq. 469, and note.

United States.—*Elliott v. Swartwout*, 10 Pet. 137.

Alabama.—*Raisler v. Mayor & Council*, 66 Ala. 194.

Illinois.—*Otis v. People ex rel. Raymond*, 196 Ill. 542, 63 N. E. 1053.

Indiana.—*Jenks v. Lima Twp.*, 17 Ind. 326; *Baltimore & O. S. W. R. Co. v. Oregon Twp.* (Ind. App.), 81 N. E. 105.

Maine.—*Smith v. Readfield*, 27 Me. 145.

Massachusetts.—*Boston & S. Glass Co. v. Boston*, 4 Met. 181.

New York.—*Silliman v. Wing*, 7 Hill 159; *Fleetwood v. New York*, 2 Sandf. 475.

Ohio.—*Mays v. Cincinnati*, 1 Ohio St. 268.

Pennsylvania.—*Allentown v. Saeger*, 20 Pa. St. 421.

Proof that taxes were paid under a written protest prior to the time when they became delinquent, and before threats had been made to sell the property for their collection, is not sufficient to establish payment under duress. *Bank of Woodland v. Webber*, 52 Cal. 73.

Where the evidence showed that an agreement was made between a city and a bank whereby the latter was permitted to pay taxes under protest, the agreement reciting that a distress warrant was about to issue and the taxes were paid in view of that fact, the city agreeing that it would not insist that such payment was voluntary, it was held in an action brought by the bank to recover taxes thus paid to the city that the payment was not voluntary so that the bank was precluded from recovery. *Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606.

Proof of a payment made to prevent sale of real estate for an illegal tax is not sufficient to establish payment under compulsion. *Otis v. People ex rel. Raymond*, 196 Ill. 542, 63 N. E. 1053.

4. Domicil of Taxpayer. — A. ACTS AND DECLARATIONS — Where the domicil of a taxpayer is in issue in an action based upon alleged illegal taxation, his acts and declarations tending to show his place of residence are generally admissible in evidence.⁵⁴

Res Gestae. — But it has been held that mere declarations of a taxpayer as to his change of domicil, which appear to be in his own favor, and not part of the *res gestae*, are not admissible.⁵⁵

Before there can be a recovery for taxes paid under protest it must appear that the payment of taxes was involuntary and made under such circumstances as to constitute duress. The element of coercion must be established. In the absence of present and potential compulsion mere protest is not enough. *Oakland Cemetery Assn. v. Board of Comrs.*, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237.

Where an action of assumpsit was brought against a town to recover back a license tax, it was held that it must be shown by the plaintiff that the payment in question was not voluntarily made. The mere declaration of the defendant when he made payment that it was made under protest does not show that it was not voluntarily made. There was no evidence in this case that the recorder of the town, who issued the license and noted the plaintiff's protest, was authorized to receive the payment made or that he did receive it, or that he in any way brought any pressure to bear upon the plaintiff to compel payment of a license tax, or had any power to do so, or that any other official of the defendant town demanded payment thereof, or was making any effort to collect it. The tax was not recoverable. *Town of Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839.

Sufficient Evidence of Duress. In *Oakland Cemetery Assn. v. Board of Comrs.*, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237, an action to recover certain taxes alleged to have been paid under duress, it appeared that the plaintiff by force of the statute was unable to place on record the deed of conveyance by which it had acquired title to the property, because of taxes charged upon the land, legal in their inception, but illegally demanded. He

paid the taxes under protest in order to enable him to record his deed, and it was held that the plaintiff in order to recover need not show that he nor his grantor had pursued the ordinary remedies provided by the statute to be relieved from the payment of the so-called illegal tax, but that such payment was involuntary and under duress.

54. Registering and Voting in Another State. — *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652.

Declaration of Place of Domicil. *Lyman v. Fiske*, 17 Pick. (Mass.) 231.

Declarations of Intentions To Change Domicil. — *Thorndike v. Boston*, 1 Met. (Mass.) 242.

Acts and Declarations Showing Intention. — *Cole v. Cheshire*, 1 Gray (Mass.) 441.

Notice of Change to Assessors. *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311.

55. In Pickering v. Cambridge, 144 Mass. 244, 10 N. E. 827, which was an action to recover the amount of a tax assessed upon personal property belonging to the plaintiff and paid under protest, plaintiff contended that he had changed his domicil from Cambridge, where the tax was levied, to Greenland, New Hampshire. The court said: "The second exception is to the exclusion of the statement made by the plaintiff upon the farm in Greenland, in November, 1881, to the superintendent, when giving him instructions in regard to work to be done upon the farm. The statement was 'that he had now made Greenland his residence and domicil, and that he wished to be taxed there, and to vote there, and to become a citizen of the town, and that he had left Cambridge as a resident.' The third exception is to the exclusion of what the plaintiff said at Cambridge, in

B. IRRELEVANT DECLARATIONS. — Declarations of a taxpayer as to his intention to engage in business at a certain place, are not admissible to show domicile.⁵⁶

C. OPINION OF ASSESSORS. — The determination of assessors as to the domicile of a taxpayer is not conclusive.⁵⁷

5. Qualifications of Tax Officers. — In an action for money had and received based upon the payment of alleged illegal taxes, it has been held unnecessary for the plaintiff to prove that the tax officers were duly qualified to act.⁵⁸

6. Defensive Evidence. — **A. QUALIFICATION OF TAX OFFICERS.**

the autumn of 1881, to one Packer, a witness, at the time the plaintiff requested Packer to go to Greenland and 'make and report to him an estimate of the expense of making certain repairs and improvements in the house in Greenland.' The plaintiff then 'stated to the witness that he, the plaintiff, had changed his residence from Cambridge to Greenland, and that he was no longer an inhabitant or citizen of Cambridge.' The ground on which the declarations of a person in his own favor have been admitted as evidence of domicile, or a change of domicile, is that they accompany acts done, and tend to explain and qualify the meaning of the acts, or in other words, that the declarations are a part of the *res gestae*. The declarations in the present case are in the plaintiff's favor, and were made to persons who in no respect represented either the city of Cambridge or the town of Greenland, and they are inadmissible as evidence, unless they are to be admitted as a part of the *res gestae*.⁵⁶ *Held*, that it could not be said that the declarations were not rightly excluded.

56. *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652.

Disclaimer of Interest in City. *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827. This was an action to recover the amount of a tax assessed upon personalty and paid under protest. Plaintiff contended that he had changed his domicile about the month of October, 1881, from Cambridge, the place where the tax was levied, to Greenland, New Hampshire. The court said:

"The (lower) court rightly excluded the evidence that the plain-

tiff, in the autumn of 1880, declined to accept a nomination for the common council of the city of Cambridge, or to serve if elected, 'on the ground that he had no connection with, or interest in, the affairs of Cambridge.' Such evidence, if admissible under any circumstances, could only be admissible upon the question whether at any time he was domiciled at Cambridge; and this was not in dispute. As evidence that the plaintiff's interest in Cambridge was slight, and therefore that it was probable that he would some time break the connection, it is too indefinite and remote to be admitted as evidence to show that he afterward actually abandoned his domicile in Cambridge and acquired another in Greenland."

Attempt to Place Name in City Directory. — In action of replevin against a tax-collector to recover goods taken because of failure to pay taxes thereon, plaintiff contended that his residence was in New York on April 1st. As tending to show this, plaintiff offered evidence to the effect that he took measures sufficient, as he supposed, to have his name put on the New York city directory, and what means he employed to that end. It seems he did not succeed, and all that he did was long after April 1st. Nor was it claimed that his right to have his name inserted in a subsequent directory depended on his legal domicile in April previous. *Held*, that this evidence was inadmissible. *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652.

57. *Paddock v. Guyder*, 55 Hun 612, 8 N. Y. Supp. 905.

58. *Hathaway v. Addison*, 48 Me. 440.

In an action based upon the payment of alleged illegal taxes, it is incumbent upon the defendant to prove that acting tax officers were duly qualified as such officers, where that fact is in issue.⁵⁹

B. PAROL EVIDENCE.—a. *Admissible*.—In actions based upon payment of alleged illegal taxes, parol evidence is generally admissible on behalf of defendants to prove the following matters: Due qualification of tax officers;⁶⁰ seizure and sale of property for the non-payment of taxes;⁶¹ the existence and contents of lost tax

59. *Whiting v. Ellsworth*, 85 Me. 307, 27 Atl. 177; *Hathaway v. Addison*, 48 Me. 440; *Caldwell v. Hawkins*, 40 Me. 526; *Pease v. Smith*, 24 Pick (Mass.) 122; *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919.

Evidence Necessary To Justify Sale for Taxes.—Where an action for trespass was brought against the selectmen of a town for taking the plaintiff's property and causing it to be sold for payment of taxes, which the plaintiff alleged was illegally assessed against him, it was held that the selectmen to justify must not only show jurisdiction and a due assessment of the tax on their part, but that they were duly elected and qualified to act; in other words, that they were officers *de jure*. *Blake v. Sturtevant*, 12 N. H. 567.

60. **Official Oath.**—In *Hathaway v. Addison*, 48 Me. 440, which was an action by a taxpayer to recover back a tax alleged to have been illegally assessed, it was held that parol evidence was admissible to prove that the assessors and collector were duly sworn. Such testimony, in the absence of any record evidence, is clearly admissible. See also *Whiting v. Ellsworth*, 85 Me. 307, 27 Atl. 177; *Pease v. Smith*, 24 Pick. (Mass.) 122.

Official Bond.—In *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919, which was an action of trespass for the taking of certain personal property, the defendant justified under a tax warrant. In the court below, for the purpose of showing that he had duly qualified as constable, the defendant was permitted to testify that he had furnished a bond which had been accepted by the selectmen. The plaintiff excepted to the admission of this evidence for the reason that the bond itself was the best evidence. The court said: "There was no error in

receiving parol evidence that the defendant gave a bond as constable and collector, which was accepted by the selectmen. The identity and existence of a written instrument, together with the time when it was given and accepted, may be shown by parol evidence. The instrument, if produced, might not furnish evidence in these respects. If the contents of the bond had been involved in the inquiry, a different question would have been presented, which might have merited different consideration."

61. *Davis v. Clements*, 2 N. H. 390; *Hathaway v. Goodrich*, 5 Vt. 65.

Proceedings of Tax Collector. *Hoitt v. Burnham*, 61 N. H. 620. This was an action of trespass for taking and selling certain personal property belonging to plaintiff. The defendant justified as collector of taxes, claiming that he had taken and sold the property in question as a distress for taxes. It appeared that defendant had made no return of his proceedings upon the warrant accompanying the tax-list. The plaintiff contended that such a return was necessary, and that the proceedings could not be proved in any other way. *Held*, that the collector's warrant was not a returnable process, and that his proceedings may be shown by other evidence. See also *Spear v. Tilson*, 24 Vt. 420, citing *Hathaway v. Goodrich*, 5 Vt. 65.

Sale of Property.—*Cushing v. Longfellow*, 26 Me. 306.

Seizure and Sale.—In *Hathaway v. Goodrich*, 5 Vt. 65, which was an action of trespass against a tax-collector for taking and carrying away certain personalty, it was held that a collector of taxes, who is sued as a trespasser for making distress, may plead specially and give in evidence his rate bill and warrant and adver-

warrants;⁶² date of rate bill and certificate, and when received;⁶³ contents of sale notices appearing to have been lost;⁶⁴ domicile of taxpayer;⁶⁵ destruction of deed, and contents.⁶⁶

tisement of the distress for sale; and what these do not prove he may show by parol evidence. But the collector's certificates showing the seizure and sale of the distress for taxes are not legal evidence for the collector, because the law had not made the collector a certifying officer of these facts; and the collector cannot make evidence for himself by certificates which are not official.

62. *Scammon v. Scammon*, 33 N. H. 52.

In *Gerry v. Herrick*, 87 Me. 219, 32 Atl. 882, which was an action of replevin to recover certain personalty distrained and sold for taxes, plaintiff maintained that the sale was void, and that his right to the property had not been divested. This claim was based upon the allegation that the evidence failed to show that the predecessor of the collector who distrained and sold the property was acting under a sufficient warrant of commitment. The court said: "It appears that at the annual town meeting in March, 1890, John Brown was elected collector of taxes, and to him the taxes for that year were committed, October 10, 1890. No objection is made to his qualification as a collector, but it is objected that the evidence fails to show a sufficient warrant of commitment. The tax book shown contains a portion of a warrant, the remaining portion having been torn off and lost. Elmer E. Brown, to whom the tax bills were committed after the death of John Brown, testified that when the book was delivered to him, it contained a complete warrant, signed by the assessors; that a portion of that warrant was afterward lost. The contents of the lost portion were sufficiently shown by the evidence; and it appears that the commitment to John Brown was in due form, under a legal warrant."

63. *Goodwin v. Perkins*, 39 Vt. 598.

64. *Sale Notices*.—In *Eddy v. Wilson*, 43 Vt. 362, an action of replevin, the defendant filed an avowry

that the property in question was legally taken by defendant as tax-collector. It was held that the defendant was properly allowed to show by parol the contents of the notices of sale of the property distrained, without first proving the loss of the notices. More than a year having elapsed after the notices were posted up, the court would have been warranted in presuming the loss. And see article "BEST AND SECONDARY EVIDENCE," Vol. II.

65. *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926.

66. *Pitkin v. Parks*, 54 Vt. 301. This was an action of trover to recover an amount of taxes alleged to have been illegally assessed and collected. The law requires real estate for the purposes of taxation to be set in the grand list, to "the owner or possessor" on the first day of April of each year. The plaintiff sold and deeded his farm March 10, 1879, and the deed was properly placed on file for record, but the town clerk neglected to record it. On April 4, 1879, plaintiff repurchased of his grantee the same premises and having called upon the town clerk to make the proper papers, he was thereupon notified that the deed had not been recorded, and that if they should destroy it, title would stand as originally, and so save the expense of making another deed. By agreement the deed was destroyed. The town clerk had entered the conveyance upon the list of transfers for the use of the listers; but after the destruction of the deed he erased it without the knowledge of the plaintiff, and the listers, in ignorance of the transaction, placed the farm in the grand list of the plaintiff. All the parties acted in good faith. *Held*, that parol evidence was admissible to prove the destruction of the deed and its contents; and also held that the farm should not have been set in the plaintiff's grand list, as he was not the owner on the first day of April. If the transaction had been fraudulent

b. *Not Admissible*. — A matter or proceeding relating to the levy, assessment or collection of taxes which is required by law to be of record, cannot be proved by parol evidence.⁶⁷

C. DOCUMENTARY EVIDENCE. — a. *Return of Officer*. — When the law requires a tax officer to make a return of his doings, such return is admissible to prove the facts therein stated;⁶⁸ otherwise it is not admissible.⁶⁹

and for the purpose of avoiding taxation, parol evidence would not have been admissible. If the parties had intended that the destruction of the deed should leave them as though no deed had been made instead of re-vesting the title in the plaintiff from the 4th day of April, then the farm should have been set in the plaintiff's list.

67. *Time of School Meeting*. *Sherwin v. Bugbee*, 17 Vt. 337. This was an action of trespass for taking certain personal property. Defendant pleaded the general issue, with notice that he would justify the taking as a collector of taxes of a school district. On the trial, the plaintiff read from the records of the district the warning of the district meeting, at which the tax, for the payment of which the personal property in question was taken, was voted. It did not appear from the record of the warning that the hour of the day at which the meeting was to be held was specified in the warning, and the defendant offered parol evidence to prove that, in the original warning for the meeting, which was posted up in the district, the hour of meeting was set at six o'clock in the afternoon. To the admission of this evidence the plaintiff objected. *Held*, that the defect in the record could not be proved by parol evidence. It is impliedly required by the statute that the hour of meeting should be specified in the warning. Any fact which should be matter of record, should be proved by the record. See also *Henry v. Tilson*, 19 Vt. 447.

Arrest and Imprisonment. — *Boardman v. Goldsmith*, 48 Vt. 403. This was an action of trespass for false imprisonment brought by a taxpayer who had been committed to jail upon failure to pay a poll-tax. The defendant, who was collector of taxes, justified under a tax warrant. The

defendant offered to show by parol his proceedings under his tax warrant. Plaintiff objected and claimed that the proceeding of defendant about collecting the tax should be shown by the return made by defendant upon the copy of his warrant left with the jailer. The statute requires such return to be made (Gen. Stat. ch. 84, § 14). It was held that a rate bill and warrant, with a full return thereon being in evidence, parol testimony of the collector's proceedings was not admissible; that the return was *prima facie* evidence in behalf of the collector, but not conclusive against the plaintiff, but that plaintiff might controvert it by his proof, and that defendant might meet such proof by rebutting testimony.

68. *Davis v. Clements*, 2 N. H. 390.

In *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919, which was an action of trespass for the taking of certain personal property, defendant justified under a tax warrant issued by the town treasurer. This warrant was offered in evidence. *Held*, that the warrant was a returnable process, upon which the defendant was required to set forth his doings in collecting the taxes from the plaintiff, and this return was conclusive evidence against the defendant, and *prima facie* evidence in his favor. If false in fact, the plaintiff was not precluded from showing it, and the defendant was liable for making a false return. Under the circumstances it was held that the return was properly admitted. See also *Barnard v. Graves*, 13 Met. (Mass.) 85; *Caldwell v. Hawkins*, 40 Me. 526.

69. *Davis v. Clements*, 2 N. H. 390. This was an action of trespass for taking plaintiff's property. Defendant pleaded in bar, that being surveyor of highways he took the property as a distress for the non-

Copies of Town Records are competent to show that a tax officer was sworn and qualified.⁷⁰

b. *Tax-Lists*.—The taxpayers' list made up by the tax listers, and unappealed from, constitutes conclusive evidence of the amount and value of the property therein listed, and of the ownership thereof.⁷¹

payment of highway taxes by the plaintiff. Upon the question as to whether the surveyor's return of his doings upon his warrant was competent evidence to be offered by him to the jury to prove the facts stated in the return, the court said: "We are clearly of opinion that it was not competent evidence. His warrant was not returnable process; the statute has made it the duty of surveyors of highways to settle accounts and pay over any balance in their hands to the selectmen or town treasurer, but has not made it the duty of the surveyor to make any return of his doings upon his warrant. Where the law has made it the duty of a public officer to make a return of his doings, and has made him responsible for the truth of his return, a return may be evidence; but this is not that case. The return of the surveyor in this case is no better evidence for him than his own confessions and declarations would be, and was clearly incompetent evidence to be offered by him to the jury."

70. In *Caldwell v. Hawkins*, 40 Me. 526, which was an action of trespass for taking plaintiff's property, defendant justifying as collector of taxes, it was held that copies from the records of the town for which the collector acted, were admissible in evidence for defendant to show that he was duly chosen and qualified as collector, and that he had given bond as required.

71. **Conclusiveness of Taxpayer's List as Made Up by Listers**.—In a suit to recover taxes paid under protest, the taxpayer cannot show that he did not in fact own the property listed to him, where there was evidence tending to show such ownership, and that question was considered by the listers and again on appeal by the board of civil authority. *Weatherhead v. Guilford*, 62 Vt. 327, 19 Atl. 717.

Conclusiveness of Taxpayer's List as Made Up by Listers.—*Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919. This was an action of trespass for the taking of certain personal property, the defendant justifying under a tax warrant. In making up plaintiff's list, the listers assessed him for \$7,300 due on mortgages. The only information which the listers had as to these mortgages was furnished them by a letter from the town clerk of another town in the state, stating that certain mortgages appear of record in the plaintiff's name. Upon the trial in the lower court, the plaintiff proposed to show that there was due him a very much less sum than \$7,300 upon those mortgages. Upon the question whether or not evidence was admissible as to this matter, the court said: "When the listers have such information or evidence of the existence of taxable property belonging to a delinquent taxpayer they have jurisdiction to proceed under this provision of the statute, and their action, if taken in compliance with the provisions of the statutes, is judicial, and their judgment unappealed from binds the taxpayer and cannot be inquired into collaterally."

Conclusiveness of Listers' Lists. *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652. This was an action of replevin to recover goods seized in payment of taxes. Defendant justified under a tax bill and warrant directed to him as collector of taxes. The court said: "The listers of the town assessed the plaintiff \$15,000 under the authority of act No. 2, § 17, of 1882, which contains this clause: 'And if the sum obtained by doubling is in the opinion of the listers less than the amount of the taxable property of such person or corporation, they shall further assess such person or corporation for a sum which will in their judgment make up such amount.' The testimony of Mayo

c. Irrelevant Documents. — In justification of an alleged excessive taxation for state and county purposes, the tax-rolls of a city are not admissible to show a reasonable valuation by comparison.⁷²

D. FORMER PAYMENT WITHOUT PROTEST. — In justification of alleged illegal taxation, it may be shown that the plaintiff formerly paid taxes on the same property without protest.⁷³

E. IDENTITY OF RECORD. — It is not necessary to identify a public record relating to taxation, by the evidence of an officer. The testimony of any witness who has knowledge of the fact is sufficient.⁷⁴

VII. ACTIONS AGAINST TAX COLLECTORS AND THEIR SURETIES.

1. Matters Pertaining to Right of Recovery. — *A. PRESUMPTIONS AND BURDEN OF PROOF.* — *a. In General.* — The presumption is that officers charged with the performance of a public trust do their duty. This presumption obtains in favor of taxing officers. And so when

was offered for the purpose of attacking the judgment of the listers in making that assessment, the claim now being that the listers had no evidence upon which to base a judgment. The plaintiff admits, and even claims, that the listers acted judicially, and does not deny that they were acting within the scope of their authority, but insists upon the right to upset their judicial act in this collateral suit. . . . But the aggrieved party in a case like this is not without remedy. He has notice of the assessments, and may appear before the listers to have his list corrected — § 21; and may appeal from their decision to the board of civil authority; and there be heard and have further corrections made — § 22. But there is no further statutory provision for relief. Resort to the common law courts can be had only according to the rules of law that pertain to the practice of those courts. We hold that the ruling of the court excluding the testimony of Mayo was correct." See also *Bullock v. Guilford*, 59 Vt. 516, 9 Atl. 360.

72. *County of Galveston v. Galveston Gas Co.*, 72 Tex. 509, 10 S. W. 583. Appellant proposed to offer in evidence the tax-rolls of the city of Galveston with the valuation of appellee's property thereon, for the purpose of showing that it was of greater value than was placed upon it by the assessments made for state

and county purposes. *Held*, that a statement as to the value found on the rolls of the city not made or shown to have been agreed to by appellee, cannot be received against it any more than could the declarations of third persons as to matters generally be received.

73. In *Hood v. Judkins*, 61 Mich. 575, 28 N. W. 689, where plaintiffs were assessed in a township, other than where they resided, for lumber piled in said township at time of such assessment, and it appeared on the trial of a suit involving the validity of such tax, from the direct examination of one of the plaintiffs, that for the two years prior to such assessment plaintiffs had had lumber piled in the same place, it was held that it was proper on his cross-examination to show the payment by plaintiffs, without protest, of the taxes assessed against them in the two prior years on account of said lumber, as tending to show in what light they regarded their occupancy and use of the premises upon which said lumber was piled and stored.

74. In *Hathaway v. Addison*, 48 Me. 440, which was an action by a taxpayer against a town to recover an amount of taxes alleged to have been illegally collected, plaintiff sought to introduce in evidence the town records, and, to identify the same offered the testimony of a party who was not a town officer. This testimony was objected to. The

an action is brought upon a tax collector's official bond it will be presumed that the levy was made according to law,⁷⁵ that the assessment, the tax list and the warrant for collection were duly signed by the assessors and regularly issued,⁷⁶ that the collector collected the taxes pursuant thereto,⁷⁷ and paid the same over to

court held that the identity of the book as the record book of the town is properly shown by such testimony. No rule of law is known which requires the identification of such a record by any officer of the town. It is sufficient if it be proved by any competent witness who knows the fact.

75. *Clifton v. Wynne*, 80 N. C. 145.

In *State v. Atkinson*, 107 N. C. 317, 12 S. E. 202, an action against a constable and the sureties to his official bond for an alleged breach of the conditions thereof in that he failed to collect and account for certain taxes due to plaintiff's relators, as he was charged and bound to do, it was held that where it appears that the taxes were levied and no insufficiency is shown, they will be presumed regular and sufficient, although no written order of collection is endorsed upon the levy.

In *Charlotte v. Webb & Newell*, 7 Vt. 38, which was an action against the official bondsmen of a tax-collector, the question arose as to whether an extent issued by the treasurer of the state against the inhabitants of a town, which had been paid by them, was admissible in evidence, without showing the previous proceedings of the treasurer. The court said: "It appears that the extent which had issued against the inhabitants of the town of Charlotte, and which had been paid by them, was admitted in evidence, though objected to by the defendants. This was certainly admissible for several purposes. It was evidence of the amount paid by the plaintiffs and that the payment was not a voluntary payment. The regularity of the previous proceedings to be taken before issuing the extent could not be questioned by these parties in this suit, but their regularity was to be presumed. An extent is in the nature of a *scire facias* issued by a public

officer. The recital therein was, to these parties at least, *prima facie* evidence that the proceedings were had agreeably thereto.

76. *Clifton v. Wynne*, 80 N. C. 145.

In *Kellar v. Savage*, 20 Me. 199, an action of debt on a tax-collector's official bond, it was denied by defendants that the assessments, preparatory to the issuing of the tax-list, and the warrant accompanying the same, were signed by the assessors, and also that the tax-list was signed by the assessors, although it seemed that, at the trial, no evidence was adduced to prove or disprove those facts. *Held*, that in the absence of proof the court will presume that the assessment, the tax-list and the warrant for collection were duly signed by the assessors. It must be presumed that the assessors had done their duty. This is a presumption which the law makes in favor of all officers charged with the performance of a public trust.

77. *State v. Lake*, 45 La. Ann. 1207, 14 So. 126; *State v. Tax Collector*, 40 La. Ann. 234; *Arbuckle v. State*, 81 Tex. 191, 16 S. W. 876; *Webb County v. Gonzales*, 69 Tex. 455, 6 S. W. 781.

An assessment book, when delivered to the collector, is an authority and warrant for the collection from each individual taxpayer of the tax assessed on property to him, and *prima facie* on delivery of the assessment book to the collector, he becomes chargeable with the tax assessed to each taxpayer; and when the time allowed for collecting has expired, must be deemed to have collected it unless he discharges himself by showing that in the mode prescribed he has obtained credit for it as an error of assessment, or because of the insolvency of the taxpayer. *Timberlake v. Brewer*, 59 Ala. 108.

Exact Amount Collected Need Not Be Shown. — In a proceeding against

the proper authorities,⁷⁸ in money.⁷⁹ It follows that in actions of this character the burden of proof rests upon the plaintiff to show a default of the collector or a breach of the bonds upon which a recovery is sought.⁸⁰ And where a collector in an action against him claims a set-off, consisting of fees of his office, which he claims to be due him, this being controverted, the burden of proof is upon the plaintiff to show that the fees charged were excessive.⁸¹

b. *When Burden Falls Upon Defendant of Proving Discharge or Payment.* — After a *prima facie* case has been made out by plaintiff, *i. e.*, when a default of the collector has been shown, or the omission of a duty imposed by law, or a breach of his bonds has been established, the burden then devolves upon the defendant to show payment on the part of the collector or other discharge from the obligations of the bond sued upon.⁸²

the sureties on the official bond of a tax-collector for the failure of the latter to pay over moneys collected by him in his official capacity, where the evidence shows the amount of taxes levied and that the period for collection had passed, it must be presumed in the absence of all opposing evidence that the collector performed his duty and collected, within the period required by law, all the taxes as levied, and it is therefore not necessary in an action of this character that the evidence should show with mathematical precision the exact amount collected and not paid into the treasury in order that a recovery may be had. *Dudley v. Chilton County*, 66 Ala. 593.

78. In an action against the sureties on a tax-collector's bond, the collector having defaulted, it appearing that the taxes were legally assessed and the warrants duly issued, and that the collector had received and withheld the amount stated by the referee, it will be presumed that the plaintiff paid the state and the state school tax to the proper authorities. *Town of Pawlet v. Kelley*, 69 Vt. 398, 38 Atl. 92.

79. *State v. Ring*, 29 Minn. 78, 11 N. W. 233.

80. *Timberlake v. Brewer*, 59 Ala. 108; *Machiasport v. Small*, 77 Me. 109.

In an action against a tax-collector and his sureties to recover moneys collected and not accounted for, it is essential for the plaintiff to show by proper evidence the defendant's

default and failure to pay the money, but this burden is satisfied by evidence that the principal defendant did not pay over all of the moneys due at the time fixed by law. *County of Mendocino v. Johnson*, 125 Cal. 337, 58 Pac. 5.

In an action by a county against its tax-collector and the sureties on his official bond, where the breaches complained of relate both to the failure of the collector to collect taxes assessed and to the failure to pay over and account for the same when collected, and the cause is tried on issue joined upon the pleas of the general issue and payment, the burden of proof under the general issue is on the plaintiff to establish some one of the breaches of the official bond as alleged in the complaint. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433.

81. In *Bruce v. Brown* (Tex. Civ. App.), 25 S. W. 444, which was a suit against a state tax-collector and the sureties on his official bond to recover taxes collected by him and not paid over, defendant entering a plea and set-off, which set-off was based upon fees of his office, it was held that the burden of proof was upon the plaintiff to show that the fees charged were excessive.

82. *Alabama.* — *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433.

California. — *County of Mendocino v. Johnson*, 125 Cal. 337, 58 Pac. 5.

Maine. — *Readfield v. Shaver*, 50 Me. 36; *Inhabitants of Gorham v. Hall*, 57 Me. 58.

c. *No Presumption of Default From Mere Failure To Pay Over Funds.* — It has been held that in actions against tax-collectors and the sureties on their official bonds, there is no intendment that a tax-collector has misappropriated taxes collected, from the fact of failure to pay over to the proper authorities revenues collected at the time required by law.⁸³

B. SUBSTANCE AND MODE OF PROOF. — a. *In General.* — Where an action is brought against a tax-collector and the sureties on his official bond, it is not necessary that plaintiff should offer evidence to show the legality of the tax, its validity, levy or assessment, nor that the tax-roll was placed in the hands of the collector.⁸⁴ Nor is it necessary that the evidence should show a demand before suit is brought on a collector's bond, where the collector is required by law to settle before a certain day.⁸⁵ It is sufficient to show that the defendant had failed or neglected to account to the proper authorities for taxes collected by him,⁸⁶ or had failed to make a proper

New Hampshire. — *Northumberland v. Cobleigh*, 59 N. H. 250.

Tennessee. — *Mayor v. Edwards*, 16 Lea 203.

Texas. — *Polk v. State*, 77 Tex. 289, 13 S. W. 1041; *Arbuckle v. State*, 81 Tex. 191, 16 S. W. 876.

See also *Coons v. People*, 76 Ill. 383.

In an action upon the official bond of an assessor to collect from his sureties poll-taxes which it is alleged he failed and neglected to collect, where the evidence shows that a large number of persons who were assessed for poll-taxes were also assessed for personal property, the assessors' lists make a *prima facie* case for the plaintiff, shifting the burden to the defendant. *People v. Smith*, 123 Cal. 70, 55 Pac. 765.

In *Machiasport v. Small*, 77 Me. 109, an action of debt upon a tax-collector's bond, the defendant's plea was that of performance. It was held that before the defendant was required to advance proof of this plea the plaintiff must show either that the collector had been legally authorized to collect taxes, or that he had actually collected them. When such proof has been made by the plaintiff the burden of proof then rests upon defendants under their plea of performance to show that the tax-collector had performed the condition of his bond, either by having performed the duties of his office, or by having disposed, in a legal man-

ner, of the taxes which were shown to have been collected by him.

83. In *Fidelity & Deposit Co. v. Mobile Co.*, 124 Ala. 144, 27 So. 386, which was an action against the sureties on a tax-collector's official bond, it was held that as against the county or state there was no presumption that a tax-collector has misappropriated, converted to his own use or embezzled taxes collected by him, from the mere fact that he has failed to pay over such taxes at the time he was required by law to pay them over. To the contrary, if he carries such sums past one day of settlement, the presumption is that he still has the money and will pay it over on the next day of settlement.

84. *Mast v. Nacogdoches County*, 71 Tex. 380, 9 S. W. 267.

85. *McGuire v. Williams*, 123 N. C. 349, 31 S. E. 627. Compare *Com. v. Williams*, 14 Bush (Ky.) 297.

86. In *Arbuckle v. State*, 81 Tex. 191, 16 S. W. 876, which was a suit brought against a tax-collector and the sureties on his official bond to recover on account of taxes collected for the state and not accounted for, the state made a *prima facie* case when it introduced the bond and the certified account from the comptroller's office showing the deficiency sued for.

Where an officer who has collected revenue refuses to pay over the same on a proper demand, or neglects to make settlement with the county

return of his warrant, as required by law, to the prejudice of the taxing district.⁸⁷ Parol evidence is admissible to show that bills of assessment of all taxes required by law to be assessed, together with a warrant in due form of law for collecting the same, were committed to the collector.⁸⁸ No action can be maintained upon a collector's bond by merely showing his failure to account and the commitment of the tax-lists and warrant to him; where the latter directs an exemption from distress of property not exempt by statute. Such warrant is defective, the collector being circumscribed within less than the statutory limit of the articles to be distrained in case of the non-payment of taxes. Therefore, the commitments confer upon the collector no authority, and impose upon him no official duty. In a case of this nature the plaintiffs must go further

board when required by law, he must, when sued for the same, show what he has done with it, and in such a case no other proof of a conversion is necessary to authorize a recovery upon his bond. *Coons v. People*, 76 Ill. 383.

In *Wheeling v. Black*, 25 W. Va. 266, an action of debt on the official bond of a city tax-collector, it was held that an instruction was erroneous which told the jury that in order to recover for items omitted in a settlement the plaintiff must not only prove that there was such omission, but that it was fraudulently procured or made unintentionally and through mistake; and that in the absence of any evidence of the circumstances attending the settlement the jury cannot infer the existence of such fraud or mistake, and especially is this so where there is evidence in the case tending to show that such omission was caused by the suppression of facts on the part of the defendant which it was his duty to disclose.

⁸⁷. In *Village of Olean v. King*, 116 N. Y. 355, 22 N. E. 559, an action against the defendant King, collector of the village of Olean, and the sureties on his official bond, the plaintiff claimed to recover the sum of \$4,879.84 on said bond as the amount of taxes for which the collector was in default, and for which his sureties were liable, this being the difference between the total amount of taxes called for by the warrant and the amount paid in by the collector to the treasurer of the

village. From a judgment rendered in favor of plaintiff defendant appealed. The appellants assigned as one ground for the reversal of the judgment that the proof did not show that the collector failed to pay over to the village any taxes collected by him, and that the failure to return the warrant to the trustees with the account as required by statute inflicted no loss upon the village, or at most entitled it to but nominal damages. *Held*, that the duty which the charter of the village imposed upon the collector was to collect all taxes which should be specified in the roll delivered to him by the board of trustees with their warrant attached within the time named in the warrant, and to pay over to the treasurer as often as should be prescribed in the warrant the moneys collected by him, and at the expiration of such warrant to return the same to the board of trustees with an account, certified by his oath that the same was correct, of the moneys collected by him, the amount paid to the treasurer, and an itemized account of the unpaid taxes. The collector never returned the warrant to the trustees and neglected and refused to make any account of the moneys collected by him, and failed to render an itemized account of the unpaid taxes. From the failure to make such an account the village clearly sustained a loss equal to the amount of uncollected taxes.

⁸⁸. *Brighton v. Walker*, 35 Me. 132.

and prove an actual reception of money by the collector for taxes and not accounted for by him.⁸⁹

b. *Official Documents Relating to Assessments.* — Assessor's returns and other official documents relating to assessments, including books of assessments, are admissible in evidence in an action on a tax-collector's official bond, to show the amount of taxes levied and assessed, and where other evidence is introduced showing that the tax assessed was not paid a *prima facie* case is thereby established for the plaintiff.⁹⁰

c. *Admissions of Collector, Tax Receipts, Tax Books, County Ledgers, Etc.* — In an action upon a bond given by a tax-collector for the faithful performance of his duty, an admission of the collector concerning his account is admissible against him,⁹¹ but his

89. *Boothbay v. Giles*, 64 Me. 403.

90. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433. This was a suit brought against a county tax-collector for failure to collect and account for taxes levied and assessed. To show the amount of taxes levied and assessed, the book of assessments was introduced in evidence. It was held that where the statute provides (Ala. Code, 1886, § 520) that the book of assessments shall contain and show a footing up of the amounts of the taxes at the bottom of each page, and which must be carried from page to page, and in conclusion show the total or aggregate amount of the taxes so assessed and levied, this having been done, the presumption of the correctness of such total or aggregate as shown on the book of assessments obtains until the contrary is made to appear by the evidence, and in the absence of any evidence tending to impeach the correctness of such total or aggregate, it is conclusive against the defendant.

Where the statute requires a tax assessor to make and deposit in the office of the probate judge a book containing a condensed statement of the tax assessment, and where the statute also requires the probate judge to make another book, after the assessment has been corrected by the commissioners' court, for the use of the tax-collector, showing in concise form the amount of taxes due from each taxpayer, each of these books is an official public document and may be competent evidence in

an action or summary proceeding against the collector. If the second has not been completed by the probate judge, the first may be received in its stead; and, if it is uncertain from the statements of the bill of exceptions, which book was admitted as evidence, it will be presumed to have been the corrected book prepared by the probate judge. *Dudley v. Chilton County*, 66 Ala. 593.

In an action against an assessor and his sureties to collect personal property taxes which it is alleged the assessor failed and neglected to collect, the assessors' returns, showing that no real estate was assessed to the persons named in the schedules or lists, and evidence that the personal property tax was not paid, establishes a *prima facie* case for the plaintiff, since, inasmuch as it must be assumed that if a person whose personal property was assessed owned real estate upon which the taxes might be a lien that it also would be assessed and appear upon the assessment book, and since the tax was levied by the assessor upon personal property he must have known of property which he could seize to collect the tax. *People v. Smith*, 123 Cal. 70, 55 Pac. 765.

91. *Brighton v. Walker*, 35 Me. 132.

In an action by a county against its tax-collector and the sureties on his official bond for failure to collect taxes and to account for the same when collected, a statement made by the tax-collector to the probate judge of the county, in a con-

statements as to such account are not admissible in his own behalf.⁹²

Receipts Given by a Collector for taxes and tax books containing entries made by him showing receipts of money, as well as reports made to the proper authorities concerning his accounts, are admissible in evidence as showing what sums were collected by him.⁹³ Where tax books are so multifarious and voluminous and are of such a character as to render difficult for a jury to comprehend material facts involved therein, it is within the discretion of the court to admit in evidence schedules containing abstracts thereof, verified by the testimony of the person by whom they were prepared, the adverse party being allowed an opportunity to examine them before

versation relating to the settlement of his account with the county treasurer, that he expected he and the treasurer would have a lawsuit over the matter, is admissible in evidence as being in the nature of an admission that he, the collector, was behind in his account with the county. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433.

92. In *Boring v. Williams*, 17 Ala. 510, which was an action brought by the county treasurer against a tax-collector and the sureties on his official bond for moneys alleged to have been collected and not paid over to the county, the question arose as to the admissibility in evidence on the part of the defendants of an answer made by the collector to a bill for a discovery filed by the sureties, in a suit brought some time previously against him. The court said: "Another exception is, that the answer of Boring, the collector, made to a bill filed by the securities for a discovery, should have been allowed as evidence. It is certainly true that in a controversy between his two sets of securities, — those for the year 1846, and the present plaintiffs in error who were bound on his bond for the year 1847, — Boring would be a competent witness; being equally bound to indemnify each of them against his own default, his interest would be balanced. But such is not the posture of the present case. The controversy here is not between the sureties on the different bonds, but between the obligors on one of the bonds and the treasurer; and to allow the answer as evidence would be to permit a party to make his own admissions or declarations

evidence in his own favor in a controversy to which he is a party, and bound for the recovery, should one be had. It is very clear that the exclusion of the answer of Boring was entirely correct."

93. *United States v. Hunt*, 105 U. S. 183; *King v. Ireland*, 68 Tex. 682, 5 S. W. 499; *Webb County v. Gonzales*, 69 Tex. 455, 6 S. W. 781.

Entries made by the collector in the tax books showing receipts of money by him, were *prima facie* evidence that those sums were collected by him, and his mere statement, or that of any one else, that there were errors in the entries, was not sufficient to overcome the probative force of these entries as admissions. The reports made by the tax-collector to the mayor and city council, showing the amounts collected by him, were *prima facie* correct as against him and his sureties, and it was incumbent on the defendants to point out any errors therein, if such existed. *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001.

In an action on a tax-collector's bond, it is competent to introduce evidence of the contents of tax receipts in the possession of the taxpayers in another county, whose attendance cannot be compelled, and it appearing that due efforts have been made to obtain all receipts. *Combs v. Breathitt County*, 20 Ky. L. Rep. 529, 46 S. W. 505.

In *Hardy v. Logan County Court*, 15 Ky. L. Rep. 405, 23 S. W. 661, an action on a tax-collector's bond, the judgment against the sheriff was partly on account of county levy thus collected and not paid over or accounted for by him, and in part for

the case is committed to the jury.⁹⁴ But memoranda made in a tax book relating to the collector's account, made by him for his personal convenience are not, it seems, admissible against him.⁹⁵ Receipts given by a collector for assessment lists, tax bills and war-

taxes collected from delinquents, after he had been allowed credit therefor. The mode by which the plaintiff undertook to prove such payments to the sheriff was by procuring and filing tax receipts given by him to persons whom he had previously reported and satisfied the county court were delinquents. We do not think such evidence is, as argued, incompetent, or by any means inconclusive, especially as the sheriff may, as was the case here, have an opportunity to show by his books or other evidence that such receipts were not in fact given by him to persons he had previously reported as delinquents.

In *Whaley v. Com.*, 110 Ky. 154, 61 S. W. 35, an action against a tax-collector and his sureties to recover taxes collected and received under an illegal levy, it was held that the tax books in the possession of the collector (sheriff), being public records, were properly resorted to as the most accessible and best evidence of the amounts assessed to and paid by the various taxpayers interested in the suit.

In *Mast v. Nacogdoches County*, 71 Tex. 380, 9 S. W. 267, an action against Mast and the sureties on his bond as tax-collector, to recover occupation taxes alleged to have been collected and not paid over, the proof as to the collection of occupation taxes consisted of reports of taxes so collected filed by the collector with the clerk of the county court, one of these reports being signed and certified by the collector and the other not. This evidence was supplemented by the deputy of the collector who attended to the tax business and stated that the report stated correctly the taxes collected. The collector of taxes is required by law to make quarterly report of occupation taxes collected for the state and county, which is required by law to be filed with the county clerk, as were the reports of Mast (*Rev.*

Stats. arts. 4763, 4764). *Held*, that such reports filed by the collector of taxes as required by law are admissible in evidence against him, though they may not be subscribed by him. When shown to have been filed by him as reports of taxes collected they were admissible against him and his sureties as admissions made in the course of his official business, as well as reports required by law to be made. These, with the testimony of the deputy, were sufficient to show that he collected in his official capacity the occupation taxes sought to be recovered against him.

94. *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001.

95. In *Board of Comrs. v. Smith*, 22 Minn. 97, to charge the defendant with moneys received, the plaintiffs offered a great number of what were called "grand duplicates," but which appear to have been the assessment or tax books of towns, opposite many of the items of tax in which was written, in the margin, the word "paid" and the name of defendant. These marginal entries were objected to because there was no evidence that the name of defendant, written in connection with the word "paid" opposite the various items, was his signature. The entries were received in evidence. The court said: "There is no law requiring such entries to be made, and, therefore, they do not stand as official records. There is no proof that the entries were in the books when in custody of defendant, and so there could be no presumption of their genuineness from the fact that they came from his possession. Such memoranda are not 'written instruments' within the meaning of Laws 1867, ch. 64. The written instruments meant by the statute are formal instruments or agreements, and do not include mere entries made only for the use or convenience of the party making them. It was error to admit these entries without proof of their authenticity."

rants are competent evidence for the plaintiff in actions against a collector and his sureties.⁹⁶

County Ledgers showing the state of accounts between a tax-collector and the county are not admissible in an action against the collector to show the extent of his defalcation, in the absence of a statute making them so.⁹⁷

d. *Treasurer's Books, Transcripts and Receipts as Evidence.* — A receipt given to a collector by a treasurer or other officer authorized by law to receive taxes is *prima facie* evidence of payment by the collector, and such receipt is admissible in evidence in an action against the collector on behalf of both plaintiff and defendant.⁹⁸ Books containing the accounts of a collector, required by law to be

96. In *United States v. Hunt*, 105 U. S. 183, an action by the United States against a tax-collector and the sureties on his official bond, upon the collector's failure to turn over money due the government, it was held that receipts signed by the collector for the aggregate amount of the alphabetical lists, the latter showing in detail the names of persons assessed for taxes and the amounts severally due from each, were competent evidence for the government, these receipts being signed by the collector constituted on their face a part of his official transactions.

A receipt signed by a collector for a tax bill and warrant, is evidence in a suit against such collector and his sureties, on their bond, to indemnify the town; and *prima facie* evidence that the rate bill was regularly made out. *Charlotte v. Webb & Newell*, 7 Vt. 38.

97. *Webb County v. Gonzales*, 69 Tex. 455, 6 S. W. 781.

King v. Ireland, 68 Tex. 682, 5 S. W. 499, was a suit against the sureties upon the bond of a county tax-collector to secure the faithful performance of his duties. On the trial of the case the appellee introduced in evidence the "county ledger" to show the state of the account between the collector and the county, and the extent of the collector's defalcation. This was objected to, but the objection was overruled. The appellate court said: "We find in our revised statutes a requirement that such a book shall be kept by the county clerk, but we find no statute making it admissible in evidence against the collector to

show the amount of his indebtedness to the county on tax account. The entries in the ledger to a date of the collector are taken from receipts given by him for the tax-rolls when they are delivered to him. These receipts are of course good evidence against him, but the account made from them is a mere statement of the clerk that he did give such receipt, and is, of course, no more than hearsay evidence, and inadmissible. It falls within none of the rules of common law, which admit this species of testimony in exceptional cases, and no statute being provided for its being received, it should have been ruled out in this case.

98. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433; *Welch v. Coulborn*, 3 Houst. (Del.) 647.

In *Williams v. Fitzpatrick*, 20 Ala. 791, which was an action against a tax-collector and the sureties on his official bond, on the trial of the suit for the taxes of 1845, the tax-collector (defendant) produced the receipt of the county treasurer for an amount greater than the sum due for the taxes of that year, but purporting to be given for the taxes of 1845. He also examined the county treasurer as a witness, who testified that, though he would not deny his signature to the receipt, yet he was sure that defendant had never at any one time paid him so large an amount as that specified in the receipt; that if the receipt was his, it must have been given for some smaller receipts which defendant had never surrendered; that he was county treasurer for 1845, 1846 and 1847, and had

kept by a treasurer or other officer of a like capacity, are *prima facie* correct and are competent evidence as against the collector of the facts therein set out.⁹⁹ Certified treasury transcripts of a tax-collector's account are also admissible to show his default in an action upon his bond.¹

e. *Auditors' and Comptrollers' Certificates, Reports, Etc.* — As a rule auditors' and comptrollers' certificates and reports are made by statute *prima facie* evidence of the facts therein set forth; and so in a proceeding against a defaulting tax-collector and the sureties on his official bond, where such certificates and reports show a deficiency in the collector's account, they will thereby afford *prima facie* proof in plaintiff's behalf.²

never had a final settlement with defendant. *Held*, that upon this state of proof, defendant might introduce as evidence the said county treasurer's receipts for the year 1846, for the purpose of showing that all the receipts amounted in the aggregate to the taxes of two years. A receipt given by the county treasurer while in office, to the tax-collector, for the county taxes, is admissible evidence in itself at all times for the latter, upon proof of the signature and that the maker was county treasurer at the time of its execution.

99. *Mayor, etc. of New York v. Goldman*, 125 N. Y. 395, 26 N. E. 456. This action was brought upon an official bond given by one Gale upon his appointment as attorney for the collector of arrears of taxes on personal property in the city of New York, under the act, ch. 334, laws of 1867. The alleged breach upon which this action was based consisted of Gale's failure to turn over to the receiver of taxes certain taxes received by him in the capacity of such attorney. This appeal was taken from a judgment in the court below entered upon an order which formed a judgment in favor of plaintiff, entered upon a report of a referee. Objection was made by appellant to the proof of Gale's default, and especially in so far as it rested on the books of the department. *Held*, that the books were public records required by law to be kept (Consol. Act, §§ 849, 850), and were admissible upon proof that they came from the proper custody. See also *Dudley v. Chilton County*, 66 Ala. 593.

1. *United States v. Hunt*, 105 U. S. 183.

2. *Cheshire v. Howland*, 13 Gray (Mass.) 321.

In *Timberlake v. Brewer*, 59 Ala. 108, a proceeding against a defaulting tax-collector and the sureties on his official bond, the action was based upon facts set out in the auditor's certificate to the effect that the collector has committed the default. The defendant objected to the admission of this certificate in evidence on the ground that it was founded upon information which was not of the highest character. The court said: "The objections made to the certificate of the auditor in the circuit court were properly overruled. It conforms to the statute—it states the omission of the tax-collector to pay the taxes collected by him into the state treasury, and the amount due the state. Of these facts it was admissible and presumptive evidence, compelling the defendants to repel the presumption by evidence, not merely in disparagement of the information on which the auditor acted in making it, but of its untruth."

In *Chandler v. State*, 1 Lea (Tenn.) 296, a motion against Chandler and his sureties for balances of state revenues for the year 1875, upon a bond executed by him and said sureties upon his induction into the office of revenue collector for the term of two years from the 1st of September, 1874, a part of the revenue said to be due was collected on the dog tax. The comptroller's statement of the balance claimed was produced. The defendant offered no countervailing testimony except the

f. *Admissibility of Collector's Bond.* — Where no particular form of bond is required by law to be given by a tax-collector for the faithful performance of his duties, such bond is admissible in evidence in an action thereon to show the collector's liability, although imperfectly executed and although no proof has been made that it had been approved by the parties to whom given.³

g. *Records of Settlement With Collector.* — Records kept by a taxing district relating to a settlement with a tax-collector are *prima facie* correct, and when made in the collector's presence and with his assent are considered by the courts as in the nature of admissions and are admissible against the collector and his sureties in a suit against them upon the collector's default.⁴

original tax aggregate, which showed that the dog tax was included. *Held*, that assuming that this was charged against him by the comptroller and formed a part of the account upon which the balance was found, still the statute makes the statement of the comptroller *prima facie* evidence of the amount due. If, in fact, the dog tax was not collected it was a matter of proof resting peculiarly with the defendant. In the absence of such proof the statement of the balance due must be taken as correct according to the positive terms of the statute. The defendant might have been relieved of this part of the charge against him by proving that the collections were not made. The state is not required to prove that the money was collected. This would be impracticable.

Certified Extracts of Auditor's Accounts. — In a suit against a defaulting tax-collector and his sureties, certified extracts from the books of the auditor of public accounts showing the condition of his account with the state are competent evidence and afford *prima facie* proof. It is well settled that these are official records kept under the requirements of law. *State v. Tax-Collector*, 40 La. Ann. 234.

3. Although a tax-collector's bond is so vague, indefinite and uncertain that no legal rights or liabilities can be predicated upon it taken by itself, yet it may become effectual if, when taken in connection with the tax bills and other evidence in the case, it contains sufficient to give it force and validity. *Inhabitants of Trescott v. Moan*, 50 Me. 347.

In *Northumberland v. Cobleigh*, 59 N. H. 250, an action of debt on bonds given by one party as principal and another as surety, and conditioned for the faithful performance by the former of his duties as tax-collector of the plaintiff town, the plaintiff introduced in evidence the bonds. The defendant excepted to their admission in evidence without proof of their execution. The court said: "The bonds being specially declared upon, and there having been no denial of the defendant's signature within the first four days of the first term, the signatures are regarded as admitted. No formal proof of their execution was therefore required."

In *Inhabitants of Wendell v. Fleming*, 8 Gray (Mass.) 613, an action to recover of a tax-collector and his sureties taxes collected, but not paid over to the town, it was held that where the provisions of the statute (Rev. Stats. ch. 15, § 80) are merely directory as to the manner of giving bonds by one appointed collector, and the evidence shows that the collector voluntarily gave a bond to the town to secure his faithful discharge of the duties of the office of collector, and the same was accepted, the bond is a good and valid one without any further proof as to the approval by the selectmen, of the sum mentioned or of the sureties, pursuant to the statutes referred to above.

4. *Northumberland v. Cobleigh*, 59 N. H. 250; *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545.

In *Kilpatrick v. Pickens County*, 66 Ala. 422, an action to recover of a tax-collector and his sureties

2. Defenses. — A. DEFENSES WHICH MIGHT HAVE BEEN RAISED BY TAXPAYER. — In actions against tax-collectors and their sureties to recover funds collected, the defendants are estopped from offering evidence as to technical objections which might have been raised by the taxpayer as against the public's right to the use of the money.⁵

a. *Illegality of Levy and Assessment.* — The fact that it appears from the evidence that a levy or an assessment under which taxes were collected was illegal, will not constitute a defense in behalf of the collector or his sureties in an action to recover revenue which has been collected. While a tax-collector may decline to proceed in the collection of a tax illegally assessed or levied, as any person may refuse to recognize any illegal authority or to obey an unconstitutional law, he may do so only for his own protection. Having collected a tax, he cannot introduce evidence in a suit brought against him to recover the same, questioning the right of the proper authorities to receive it.⁶

moneys which it is alleged he had been allowed by a former court of county commissioners to retain, in excess of the commissions allowed him by law, for collecting the taxes, the plaintiff claimed that an error had been made in the tax-collector's accounts with the court and offered evidence showing this, and also offered in evidence a record of the corrected account, but the defendant objected to the introduction of the latter on the ground that the former record on the commissions had been audited, allowed and passed by the former court, and was conclusive evidence of the facts therein set out. *Held*, that the record of the settlement made by the former court with the collector was *prima facie* correct, and cast on the county the *onus* of proving its incorrectness; but that it was not conclusive, and did not preclude testimony showing its incorrectness.

5. *Georgia.* — *Walden v. County of Lee*, 60 Ga. 296; *Wilkinson v. Bennett*, 56 Ga. 290.

Maine. — *Inhabitants of Bethel v. Mason*, 55 Me. 501; *Johnson v. Goodridge*, 15 Me. 29; *Inhabitants of Orono v. Wedgewood*, 44 Me. 49; *Brunswick v. Snow*, 73 Me. 177.

Maryland. — *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001.

Missouri. — *State ex rel. Seibert v. Seibert*, 148 Mo. 408, 50 S. W. 109.

New York. — *Village of Olean v. King*, 116 N. Y. 355, 22 N. E. 559.

Pennsylvania. — *Com. v. Black*, 15 Pa. Co. Ct. 664.

Tennessee. — *Wilson v. State*, 1 Lea 316.

When a collector of the city taxes collects from the taxpayers, by virtue of his office, interest on the taxes, he is in no position to assert that such interest was illegally collected because not authorized by law; and in an action brought against him for such interest by said city he will not be permitted to defeat the same by offering evidence of such illegal collection. *Wheeling v. Black*, 25 W. Va. 266.

In *McGuire v. Williams*, 123 N. C. 349, 31 S. E. 627, the court said: "The validity of the special railroad tax cannot be called in question by the defendants in this action. Admitting for the sake of the argument that the tax may be unconstitutional, the defendant sheriff and his bondsmen are estopped from denying the validity of a tax which he had already collected."

6. *Feigert v. State*, 31 Ohio St. 432.

In *Webb County v. Gonzales*, 69 Tex. 455, 6 S. W. 781, an action against a tax-collector to recover taxes alleged to have been collected by him and not paid over, it was held that neither the sheriff as tax-collector nor his sureties can introduce evidence showing the fact that no legal levy of taxes was made in an action against them for not pay-

b. *Defective Warrants, Tax-Lists, Tax-Bills, Orders, Etc.* While defects in a warrant or tax-list may constitute a good reason for not executing the warrant, nevertheless where a tax-collector has collected money without objection on the part of the taxpayers he must account therefor; and he and his sureties cannot, in an action to recover for such alleged defalcation, by showing such defense, exonerate themselves from liability for the money collected.⁷

c. *That Defendant Not a De Jure Officer.* — In a suit on a tax-collector's official bond, the fact that it appears from the evidence that the collector or any other taxing official was not a *de jure* officer will not constitute a good defense in behalf of the collector's sureties, where it further appears that the latter have not been

ing over, when it is shown that the taxes were collected by the officer and were not in fact paid over. See also *Village of Olean v. King*, 116 N. Y. 355, 22 N. E. 559.

In *State ex rel. Seibert v. Seibert*, 148 Mo. 408, 50 S. W. 109, which was an action by the state at the relation of state auditor upon the official bond of a county revenue collector, plaintiff alleging that the defendant had collected a certain sum of the state revenues from certain railroad companies which he had failed and refused to pay into the state treasury, it was held that the collector having admitted the levy of the taxes, their extension upon the tax books, the delivery of the tax books to him, and the collection of the taxes by him, and that he had failed to pay them into the state treasury, he is in no position to offer evidence to the effect that the railroad companies were not the owners of the property with which they were assessed and from which the taxes were derived. Having received the taxes as the representative of the state it was his duty to pay them into the state treasury as provided by statute (Rev. Stats. §7637), and it does not lie in his mouth to say that the state is not entitled to them.

7. *Walden v. County of Lee*, 60 Ga. 296; *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001; *Inhabitants of Orono v. Wedgewood*, 44 Me. 49; *Brunswick v. Snow*, 73 Me. 177; *State v. Atkinson*, 107 N. C. 317, 12 S. E. 202; *Coons v. People*, 76 Ill. 383.

A collector of taxes, who has given a bond to the town "to pay over the money collected to the treasurer," is bound to pay over money voluntarily paid to him by the inhabitants, although the evidence shows that the tax bills committed to him are imperfect and illegal. *Johnson v. Goodridge*, 15 Me. 29.

In *Wilkinson v. Bennett*, 56 Ga. 290, the court said: "The collector used 'the orders' to collect the money; he now seeks to attack them to retain it. He armed himself as a public agent with what was supposed to be good authority. The authority was not resisted by the taxpayers. They did not complain that the taxes were not legally assessed, but paid over the money for the public use. After this has been done, can the collector be heard to say that he must keep the money, because, perchance, the taxpayers may reclaim it? They have not reclaimed it, and possibly may never do so. If they should, and the collector should be forced to refund it, the proper legislation can doubtless be had for his relief. It is not to be presumed that the state will leave a faithful but unfortunate public officer to suffer by restoring the money illegally taken from the citizen, and paid over to the county for public use. On the score of strict law, however, we think the collector cannot protect himself by alleging a title to this money outstanding in the taxpayers from whom it was received." See also *Com. v. Black*, 15 Pa. Co. Ct. 664.

prejudiced in any way.⁸ But where an action of contract is brought against a collector, if the evidence shows that the amount of taxes sought to be recovered was never paid to the collector by the taxpayers on the ground that the collector was merely a *de facto* officer, such evidence will constitute a good defense to the action.⁹

d. *Illegality of Taxing District*. — A tax-collector cannot introduce in defense of his refusal to pay over the taxes he has collected evidence showing that the legislative act under which the political district in which the taxes were levied was constituted is unconstitutional, nor that the political district was not regularly constituted according to the requirements of the act.¹⁰

B. OTHER DEFENSES. — a. *Illegality of Bond*. — Where proof is made of the execution of a tax-collector's bond, in a suit thereon, the collector and his sureties are estopped from showing the illegality of the bond or any defects therein.¹¹

8. *Inhabitants of Trescott v. Moan*, 50 Me. 347.

It is no defense to a suit on a tax-collector's bond, the collector having collected taxes, that the evidence shows that the collector was not legally chosen and qualified by an oath as required by the statute, faithfully to perform the duties of that office, where it does appear that he was armed with the tax-bills accompanied with a warrant prescribed by the statute, signed by the assessors having jurisdiction over the subject-matter. *Inhabitants of Bethel v. Mason*, 55 Me. 501.

In *Horn v. Whittier*, 6 N. H. 88, an action of debt by the selectmen of a town upon a bond given by a collector of taxes for the faithful performance of his duty, it was contended by defendants that one of these plaintiffs was never qualified to act as selectman, and that the collector was never qualified as such, because he had not taken the oath of office. It was held that neither of these objections could prevail. The evidence showed that the plaintiffs were recognized in the condition of the bond as the selectmen, and the collector was recognized as such. This was sufficient to show that they were officers *de facto*. And as neither the persons nor property of these defendants have been affected, directly, by their official acts, it is enough that they were shown to be officers *de facto*. These defendants are not in a situation to question

the qualifications of these officers.

In *Great Barrington v. Austin*, 8 Gray (Mass.) 444, an action upon a bond to recover of a tax-collector and his sureties an amount of taxes collected but not paid over to the town, it was held that proof being made of the execution of this bond by plaintiffs, the recitals therein contained were sufficient to estop the defendants from offering evidence denying that the party mentioned therein as collector was such, notwithstanding the fact that it appeared that another person bid off the collectorship when it was put up at auction.

9. In an action of contract to recover of a defendant, as collector of taxes of the plaintiff town, the amount of a town tax, under a statute providing to that end (Gen. Stat. ch. 12, § 51), the evidence must show that the defendant was legally authorized to collect the taxes in question, and where it appears that the defendant was merely a *de facto* collector, such fact will be good defense to the action. He cannot be held responsible under the statute for taxes refused to be paid to him on the ground that he had no legal authority to collect. *Lincoln v. Chapin*, 132 Mass. 470.

10. *Street Light Dist. No. 1 v. Drummond*, 63 N. J. L. 493, 43 Atl. 1061.

11. *Seabrook v. Brown*, 71 N. H. 618, 51 Atl. 175.

Where a tax-collector executes an

b. *Payment Under Protest.* — A tax-collector cannot be heard to say, as a ground for refusing to pay over money collected in his official capacity, that the taxes collected were paid by the taxpayers under written protest.¹²

c. *Payment by Collector.* — Suit being brought on a collector's bond, payment by the collector to the treasurer is a good defense; but it must appear from the evidence that such payment was made in the manner required by law or that the treasurer actually received the money and that the taxing district obtained the benefit thereof.¹³

official bond in compliance with a requirement of the probate judge, professing to be predicated on an address of the grand jury of the county under statutory provisions, and the bond recites in substance that it was executed on the address of the grand jury for the execution of an additional bond by the tax-collector, the surety on such bond is cut off by the recitals therein from showing, when sued on the bond, that it is lacking in consideration in that the address of the grand jury had spent its force before its execution — the record showing that the probate judge based his action on the address of the grand jury, requiring an additional bond, and that the bond sued on was given upon that requirement, and under it the tax-collector continued in office as without it he would have been immediately ousted. *Fidelity & Deposit Co. v. Mobile Co.*, 124 Ala. 144, 27 So. 386.

Taxpayer's Inability To Pay.

Where it is provided by statute that an abatement of taxes shall be made, assessed upon persons unable to pay them, if such persons have been committed to prison by the collector within one year from the receipt of the tax bill by him, it is held, in an action brought on the collector's bond, that evidence is admissible as a defense thereto, to the effect that the taxes sought to be recovered were assessed against persons unable to pay, providing it further appears that such persons were committed to prison in accordance with the provisions of the statute; but if it does not so appear, the rule is otherwise. *Colerain v. Bell*, 9 Met. (Mass.) 499.

12. *San Francisco v. Ford*, 52 Cal. 198.

13. *In County of Mendocino v.*

Johnson, 125 Cal. 337, 58 Pac. 5, which was an action against a tax-collector and his sureties to recover moneys claimed to have been paid over to him and not accounted for, it appeared that the particular item in controversy was one of \$3,000, which was by the collector claimed to have been paid by his deputy, into the treasury, but which the plaintiff denied having been paid, he claiming that the treasurer's receipt was secured by fraud and misrepresentation. The defendants called the deputy to prove by him the payment, and that the receipt was not secured by fraud or misrepresentation, but was in fact a valid recognition of the payment thus actually made. It was objected, however, by the plaintiff, that the forms of payment prescribed by law were not followed, and that hence the evidence was not admissible, which objection was by the trial judge sustained. The court, in holding this to be error, said: "A payment to the treasurer in a mode other than that expressly provided by law would not exonerate the tax-collector or his bondsmen from an action at the instance of the county, unless proof were made that the county actually received the money. In other words, the tax-collector, or any other debtor of the county, is entitled to his acquittance from the county only when he has complied with the forms of law governing his payments into the treasury. If he sees fit to adopt an unauthorized mode of payment, he will be exonerated when he can make it appear, not only that he has paid the money, but that the county received it. The mere deposit with the treasurer would not be proof sufficient thus to exonerate him. It would be in the

d. *Offsets in Defense.* — Where a tax-collector has given a bond for the faithful performance of his duty, in a suit against the sureties thereon it is held that they are liable in strict accordance with the provisions of the bond, and evidence is inadmissible, as a defense, that moneys have been paid but applied to funds other than those on account of which the bond was executed.¹⁴ However, if through the mistake or neglect of the parties to whom the collector is authorized to pay taxes, they have not been properly placed to the credit of the collector, evidence is admissible to show this fact, and thereupon the sureties on the collector's bond will not be held liable.¹⁵

nature of an individual deposit made at the party's private risk. But, nevertheless, if the tax-collector could show that he had in fact paid the money to the treasurer, and that the county had obtained the benefit of it, then, notwithstanding the irregularity, no loss of funds would have resulted, and neither the tax-collector nor his bondsmen could be properly charged in an action such as this for peculation or misappropriation. Therefore, although the offered evidence of the irregular payment would not have been sufficient of itself to exonerate the defendants, it was a step in that direction, and it was error on the part of the court to refuse to accept the evidence without proof first made of a compliance with the terms of the county government act, since that proof, from the loose methods seemingly employed by the treasurer and auditor, as well as the tax-collector, could never be made at all, not only as to the \$3,000 here in question, but perhaps also as to the whole \$132,000 charged upon."

14. *Montpelier v. Clarke*, 67 Vt. 479, 32 Atl. 252; *Carpenter v. Town of Corinth*, 62 Vt. 111, 22 Atl. 417; *State v. Tax Collector*, 40 La. Ann. 234, 4 So. 46.

If a suit be brought on the special bond of a sheriff as a collector of school taxes, and the only breach of the bond alleged by the plaintiff is the failure of the sheriff to pay over the amount which he was indebted to the teachers' fund, the defendants cannot set off any balance which they claim is due from the building fund to the sheriff, nor can any evidence be introduced on the trial of such suit by either plaintiff or defendants with

reference to any receipts or payments made by the sheriff on account of the building fund. The endeavor to introduce such matters into the suit should be rejected. *Board v. Cain*, 28 W. Va. 758.

15. In *Inhabitants of Orono v. Wedgewood*, 44 Me. 49, an action upon a bond given by a collector of taxes for the faithful discharge of the duties of his office, where the evidence showed that the sum of one hundred twenty-five dollars passed to the credit of the collector in the wrong year, and that the sum of twenty-three dollars seven cents was collected on the warrant of the treasurer, against the collector, by the sale of his property, it was held that a deduction should be made from the amount found due by the auditor in his account against the sureties. The sureties should not suffer from a mistake of the treasurer in passing the credit to the wrong account.

In *Town of Ferrisburg v. Martin*, 60 Vt. 330, 14 Atl. 88, where the statute provides (R. S. § 441) that it shall be the duty of the collector, when he makes any payment on account of taxes collected, to state the tax on which it shall be applied, and if he fails to do so it is made the duty of the treasurer to immediately notify his bondsmen that no application has been made, and that unless the collector shall direct an application within ten days the application made by the treasurer shall be conclusive, in an action brought against a tax-collector and his bondsmen for the misappropriation of taxes collected, where the evidence showed that the collector made a payment of taxes collected, but failed to show

e. *Release of Sureties*. — If sureties would defend on the ground that the creditor concealed from them the condition of the principal's account, they must show that the creditor had knowledge of the facts and fraudulently concealed them from the sureties.¹⁶

f. *Reasons for Delay in Collecting*. — A tax-collector, being required by law to turn over to the taxing district taxes collected, in an action on his official bond evidence is inadmissible in defense showing that he was instructed to delay the matter of collecting where such instruction was beyond the authority of the party giving it,¹⁷ or that he delayed to avoid ill-will of taxpayers.¹⁸

how they should be applied, and that the treasurer also failed to notify the bondsmen that no application had been made, it was held that an arbitrary application of the funds made by the treasurer to the payment of taxes for years during which these defendants were not sureties, was not conclusive on them.

Hudson v. Miles, 185 Mass. 582, 71 N. E. 63. This was an action brought on a tax-collector's official bond. The defendant offered evidence that the town had been informed of facts showing that the principal upon whose bond they were charged was unreliable. This evidence went to show that this was true prior to the execution of the bond sued on. It was held that the defendants, in order that this evidence might be rendered admissible, must show that the information was given to parties whose knowledge would constitute knowledge on the part of the town and in such manner as to make the town chargeable.

16. Where a judgment entered by a city against a collector of delinquent taxes and his sureties, by virtue of a warrant of attorney contained in his bond, is attacked by the sureties on the ground alone that the city did not communicate to the sureties the collector's negligence, the sureties are not relieved from liability for moneys for which the collector failed to collect where it does not appear from the evidence that the moneys were embezzled or that the city officials wilfully and fraudulently concealed from the sureties the irregularities and negligence of the collector in the performance of his duties of an official character. *Har-*

risburg v. Guiles, 192 Pa. St. 191, 44 Atl. 48.

17. *Northumberland v. Cobleigh*, 59 N. H. 250. This was an action of debt on a tax collector's official bond. Defendant introduced evidence to the effect that the town had voted that "the selectmen instruct the several collectors of the town to collect all back taxes not collected, to pay town expenses for the ensuing year, as soon as possible so as not to press the people too much." Held, that this was not evidence to show a waiver of any breach of the condition of the bonds or of a waiver of the requirements of the warrants to pay over the money at the times specified therein; also that it was not evidence sufficient to excuse the collector for his default in not collecting the taxes as required by the warrant. The statute affords no warrant for such a vote as the above, and the vote is inoperative.

18. *People v. Smith*, 123 Cal. 70, 55 Pac. 765. In an action against an assessor and his sureties to recover taxes which it is alleged he failed and neglected to collect, and which the law makes it his duty to collect, the defendant cannot prove that the assessor instructed his deputies not to press the collection of the taxes in question because he did not want to anger the taxpayers, since in such case his motives are immaterial. The court said: "Under the allegations of the complaint, it was immaterial as to whether his failure to collect taxes which it was his duty as a ministerial officer to collect, was from mere neglect or from motives of personal popularity. If the complaint had charged malfeasance in of-

fice, of unlawful and corrupt failure and neglect to collect taxes, as where his discretion was exercised, not as a matter of judgment where there was room for a difference of opinion,

but for a corrupt or unlawful purpose where there was no reasonable ground for the exercise of discretion, the evidence would have been material and competent."

TECHNICAL TERMS.—See Abbreviations; Expert and Opinion Evidence; Parol Evidence.

Vol. XII

TELEGRAPHS AND TELEPHONES.

BY C. R. MAHAN.

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I. INJURIES TO PROPERTY OR PERSON.

1. *Presumptions and Burden of Proof.* — A. *IN GENERAL.* — As in other actions to recover damages for injuries suffered through the default or negligence of another,¹ so in an action against a telephone or telegraph company to recover damages for injuries, either

1. See generally the articles *PERSON*," Vol. VII; "NEGLIGENCE," "CARRIERS," Vol. III; "INJURIES TO Vol. VIII.

to property,² or to the person,³ suffered through the alleged default or negligence of the company's agents or servants, the burden of proof is on the plaintiff to establish the default or negligence complained of.

B. FREEDOM FROM CONTRIBUTORY NEGLIGENCE.—So, too, the usual rules as to the burden of proving freedom from contributory negligence, or its existence, apply in such an action.⁴

2. See *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572; *Erie Tel. & Tel. Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704; *Lee v. Maryland Tel. & Tel. Co.*, 97 Md. 692, 55 Atl. 680.

Cutting Trees.—In an action to recover the statutory penalty for cutting trees, the plaintiff must show that the trees were cut before the commencement of the action. *Postal Tel. Cable Co. v. Brantley*, 107 Ala. 683, 18 So. 321.

3. *Cumberland Tel. Co. v. Coats*, 100 Ill. App. 519; *Allen v. Atlantic & P. Tel. Co.*, 21 Hun (N. Y.) 22; *Barrett v. Independent Tel. Co.* (Tex. Civ. App.), 65 S. W. 1128; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; *Arkansas Tel. Co. v. Rat-teree*, 57 Ark. 429, 21 S. W. 1059; *Western Union Tel. Co. v. Guernsey*, 46 Mo. App. 120; *Dickey v. Maine Tel. Co.*, 43 Me. 492.

In *White v. Keystone Tel. Co.*, 211 Pa. St. 455, 60 Atl. 998, an action against a telephone company to recover damages for personal injuries sustained by falling after dark over a pile of stones on the sidewalk of a dimly lighted street, the evidence for the plaintiff showed that a few days before the accident the defendant company had secured a permit to lay conduits on the street, had begun work, and was occupying the street for that purpose; that on the day of the accident the paving stones had been removed from the roadway and piled on the pavement, the conduits laid and the trench filled with earth, and that on the morning after the accident the same workman who had removed the stones from the street and piled them on the pavement placed them back on the street. And it was held that there was sufficient evidence to make out a *prima facie* case.

In Massachusetts a statute provides that whenever injury shall be done to any person or to property by the poles, wires or other apparatus of any telegraph line, the proprietor thereof shall be held responsible in damages therefor; and that towns which may otherwise be liable in damages for injuries to person or property occasioned by telegraph poles or other fixtures erected on highways or townways shall not be discharged from liability by reason of anything contained in the statute authorizing the erection of the poles, and makes companies erecting the poles or fixtures liable to reimburse the towns for the full amount of damages recovered by any person injured. In *Riley v. New England Tel. & Tel. Co.*, 184 Mass. 150, 68 N. E. 17, where the plaintiff had been injured by being thrown from a wagon which had struck a telephone pole located in a street, it was held that the plaintiff was entitled to recover against the telephone company without reference to whether or not there was any proof of negligence on the part of the company.

4. *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623.

In an action against a telegraph company for personal injuries resulting from the alleged negligence in permitting its wires to sag across a highway, it is incumbent upon the plaintiff to show not only that the injury was occasioned by the fault of the defendant company, but also that there was no neglect or want of ordinary care contributing to the injury on his part. *Dickey v. Maine Tel. Co.*, 43 Me. 492.

In *Pennsylvania Tel. Co. v. Varnau* (Pa.), 15 Atl. 624, an action for the death of the plaintiff's intestate resulting from the alleged negligence of the defendant company in permitting its telephone wire to hang too

C. PRESUMPTION FROM FACT OF INJURY. — And in such an action, the usual rules pertaining to the presumption of negligence from the fact of the injury are applicable.⁵

D. EXEMPLARY DAMAGES. — So, too, in order to warrant awarding punitive or exemplary damages, there must, as in other damage cases, be the usual proof of malice or wantonness.⁶

2. **Mode and Substance of Proof.** — The rules of evidence governing the proof of issues of fact in damage cases generally are equally

low over a public highway, it was held that the burden of proof was upon the plaintiff to prove that the negligence of the defendant caused the death of the plaintiff's intestate without any contributory negligence on his part; and that if contributory negligence was set up by the defendant by way of defense, it had the burden of proof on that question.

In Wisconsin it is the settled rule that contributory negligence is purely matter of *defense*, and the burden of proof in relation thereto upon the defendant; and where evidence introduced by the plaintiff tends to show contributory negligence, while defendant may avail himself of such evidence, the burden of proof is not shifted thereby. *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17. And see article "NEGLECT," Vol. VIII.

5. See *Southwestern Tel. & Tel. Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545.

Evidence That a Telephone Company's Servants Let a Wire Fall in the streets which caused the plaintiff's horse, standing near, to leap forward, thereby throwing the plaintiff out of the wagon to which the horse was harnessed, makes a *prima facie* case of negligence which casts upon the company the burden of showing that the occurrence was unavoidable. *Arkansas Tel. Co. v. Rat-teree*, 57 Ark. 429, 21 S. W. 1059.

In *Thomas v. Western Union Tel. Co.*, 100 Mass. 156, an action against a telegraph company for injuries sustained by the plaintiff's horses by reason of the hind wheels of the wagon becoming entangled with the defendant's wires which were hanging across a highway in such manner as to interfere with traffic, it was held that the fact of the wire so

swinging was, in itself unexplained and unaccounted for, some evidence of neglect on the part of the defendant company whose duty it was to keep it in a proper and safe condition.

In *Ahern v. Oregon Tel. & Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, where the plaintiff was injured by coming in contact with a sagging telephone wire charged with electricity, it was held that proof that the defendant company permitted the wire, which from its environment was liable to become so charged with electricity, to hang so near a sidewalk as to obstruct and endanger ordinary travel, established negligence on the part of the company.

6. Where a property owner sues a telegraph and telephone company for damages for injuries to his property resulting from the alleged wrongful acts of the defendant company's agent and employes, in order to warrant punitive damages the evidence on the part of the plaintiff must show some bad motive or such reckless conduct, either intentional or grossly negligent, as evinces a conscious disregard of the rights of the plaintiff. *Erie Tel. & Tel. Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704. In this case the injury complained of resulted from tearing up the plaintiff's sidewalk and cutting a hole in his awning in front of the building for the purpose of setting a telephone pole. There was no evidence tending to show that the company's agent intended to act in any other than a lawful manner. The court said: "Such being the evidence we fail to find in the facts of the case anything to authorize a recovery of exemplary damages. It is neither a case of malice, oppression, nor gross negligence. The intentional doing of a wrongful act with-

applicable to actions against telegraph companies for injuries either to the property or person.⁷

II. TRANSMISSION AND DELIVERY OF TELEGRAMS.

1. The Contract of Sending and Delivery. — A. IN GENERAL. Inasmuch as the duty of a telegraph company to effect a prompt and correct transmission and a prompt delivery of a telegraphic message arises, in part at least, out of a contract of sending and delivery, it is accordingly held that where a party seeks to recover damages from the company for a breach of that duty it is incumbent upon him to

out justification or excuse is ordinarily malicious; but although an act may be intentional and may result in a wrong, yet exemplary damages should not be awarded when it appears that there was no actual intention to invade any right. The fact that the telephone pole was placed according to the direction of the mayor of the city and of the city engineer, and that it was removed in a short time, show that the plaintiff was entitled to full compensation for his damages but for no other recovery."

7. In an action for personal injuries received by reason of the negligence of a telephone company in permitting its wire to be stretched so low down over the public highway as to be caught by a horse's feet in passing, it is not competent to prove the condition of the wire at that point months subsequent to the time of the injury complained of. *Hannum v. Hill*, 52 W. Va. 166, 43 S. E. 223.

An Admission by the Defendant Company's General Agent, after the injury was received, that the defendant was liable therefor, was not admissible in evidence; and a judgment for plaintiff was reversed for its admission against a sufficient objection to its competency, the court not being able to say that defendant was not injured thereby. *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

In an action for injuries from defendant's negligence in permitting its telegraph wires to be down and lying across a highway at a certain spot, proof that defendant's poles and wire were down at other places, within a

few miles of the place of the injury, *would seem* to be admissible to show defendant's negligence. *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

In an action against a telegraph company for carelessly and negligently permitting its poles to fall and suspend the wires across a public highway, where the issue is as to the soundness of the poles, evidence of the condition of other poles several rods away should not be received when unaccompanied by any evidence showing that they were of the same kind, put up at the same time and equally exposed to the elements. *Western Union Tel. Co. v. Levi*, 47 Ind. 552. The court said that if in connection with the evidence offered there had been an offer to show that the poles in question and those which fell were all of one kind, put up at the same time and equally exposed to the elements, the evidence might have been competent inasmuch as it might have been inferred that like causes would equally affect like matters.

In an action by a landowner against a telegraph company for damages because of the erection of poles on the right of way previously granted by the landowner to a railroad company, evidence that the telegraph line was necessary to the operation of the railroad was immaterial and inadmissible. *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572.

In *Fitter v. Iowa Tel.*, 129 Iowa 610, 106 N. W. 7, it was held that evidence of a method of performing certain work adopted subsequent to the injury of an employe was not

establish the contract whose breach is complained of.⁸ And not only must the addressee of a message in such case establish the contract,⁹

competent to show that the first method adopted was negligent. Nor is such evidence admissible as part of the *res gestae*.

8. *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 So. 607, where the court held that where a duty springs out of the relation of the parties growing out of a contract, of necessity, the contract and its terms must be established in order to show the duty; and that if recovery is sought for breach of duty growing out of a contract, a breach of the contract must also be shown. See also *Western Union Tel. Co. v. Dozier*, 67 Miss. 288, 7 So. 325.

In an action against a telegraph company to recover damages for failure to deliver a telegram, it is incumbent upon the plaintiff to show that the message was in fact delivered for transmission. *Planters' Cotton Oil Co. v. Western Union Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180. In this case it was held that the fact of delivery for transmission was not made out by proof that the plaintiff's agent in an attempt to deliver the message for transmission used the telephone, calling upon the telephone company for connection with the telegraph office, and upon being answered by one supposed to be in the latter office asked, "Is that the Western Union Telegraph office?" and upon being assured in the affirmative repeated to the person so answering the message intended to be sent; it not appearing that the agent of the plaintiff recognized the voice of the person who answered him as being the voice of one of the agents of the telegraph company, and it not being otherwise known to him or shown that the person to whom he was talking was in fact the agent of the telegraph company.

In *Hellams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12, it was held that the receipt of a message with notice of the addressee's residence, the receipt of charges over the usual charge for delivery beyond the free delivery limits, the actual de-

livery of the message, was some evidence of contract to deliver the message with reasonable promptness.

Authority of Agent To Bind Company in Disregard of Regulation. In an action against a telegraph company to recover damages for breach of a contract in failing promptly to transmit and deliver a message where the evidence shows that the transaction between the plaintiff (sender) and the defendant's agent involved an agreement for the prompt transmission of a message, it will be presumed, in the absence of anything to the contrary, that the agent had authority to bind the company promptly to transmit and deliver the message, even though such transmission and delivery could have been accomplished only by disregarding a regulation as to the hours of opening and closing the company's offices at the terminal point of the message. *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517.

A recovery cannot be had against a telegraph company for damages resulting from delay in sending or delivering a message relative to an advance in a certain commodity which reached plaintiffs a short time after they had sold a lot of that commodity on hand, where the evidence makes it appear that the message was the voluntary act of a third person who was under no legal obligation to send it, and that it had no connection with the commodity sold. *Frazer v. Western Union Tel. Co.*, 84 Ala. 487, 4 So. 831.

That a Telegram Was Delivered to the Company and by it transmitted to the office of destination is some evidence of a contract to transmit and deliver. *Harrison v. Western Union Tel. Co.*, 71 S. C. 386, 51 S. E. 119.

9. *Western Union Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 9, 931, 30 S. W. 549. See also *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Butner v. Western Union Tel. Co.*, 2 Okla. 234, 37 Pac. 1087.

A person to whom a telegram is

but he must establish the contract as alleged in the complaint.¹⁰

B. PREPAYMENT OF CHARGES. — Ordinarily, it is not incumbent on the plaintiff in such an action to show the fact of prepayment of the charges made by the company for sending the message. It is enough to show that the company's services were engaged and that it undertook to perform the services.¹¹

C. TRANSMISSION AND DELIVERY ON SUNDAY. — In some of the states the Sunday laws forbid the work of transmitting and delivering telegrams except as matter of necessity or charity; and where a party is injured by the negligence or default in the transmission or delivery of a telegram on Sunday, it devolves upon him to show that the work involved was not covered by the general rule, but was embraced in the exception.¹²

2. The Fact of the Breach, Negligence, Etc. — **A. PRESUMPTIONS AND BURDEN OF PROOF.** — *a. In General.* — In an action to recover damages from a telegraph company alleged to have been caused by negligent failure, or other default to effect a prompt and correct transmission or prompt delivery of a telegraphic message, the burden

addressed cannot maintain an action against a telegraph company for negligence in transmitting it, unless he alleges and proves that he was either directly or by his agent a party to the contract for the sending and delivering of such message; and in an action against a telegraph company by the sendee of a telegram to recover damages for negligence of the company in transmitting the telegram, where the plaintiff alleges in his complaint that the sender contracted as his agent with the defendant, he cannot recover unless he introduces evidence to establish such allegation. *Western Union Tel. Co. v. Adair*, 115 Ala. 441, 22 So. 73.

A person to whom a telegram is addressed may maintain an action for failure to forward and deliver it promptly on averment and proof that the sender acted as his agent in sending it, and that the telegraph company knew that fact. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

10. *Western Union Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549. In this case the plaintiff alleged a contract made with the defendant by which the defendant undertook to transmit the message in question and deliver it to the plaintiff. The proof showed that the contract was made with another com-

pany, and that by an agreement made between the two companies the defendant received the message from the other company and undertook to deliver it. It was held that the variance was fatal.

11. *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

In *Western Union Tel. Co. v. Liddell*, 68 Miss. 1, 8 So. 510, it was held that proof merely that a message not written on the usual blanks was delivered to a telegraph operator for transmission to another town, unaccompanied by any evidence of prepayment of charges or anything stated with reference thereto or to the sending of the message, was sufficient to establish liability on the part of the defendant company for failure to send the message.

12. *Willingham v. Western Union Tel. Co.*, 91 Ga. 449, 18 S. E. 298. See also *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599. Compare *Western Union Tel. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36.

The Message Itself May Show That Fact, or it may be shown by evidence *aliunde* that the operator had knowledge, or was informed, thereof. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222; *Willingham v. Western Union Tel. Co.*, 91 Ga. 449, 18 S. E. 298.

is, of course, upon the complaining party to establish the default or negligence complained of.¹³

A Prima Facie Case of Negligence sufficient to satisfy this rule is ordinarily made out by proof of facts which raise a presumption of negligence.¹⁴

The Failure of a Telegraph Company To Notify the Sender of a tele-

13. *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *Wolff v. Western Union Tel. Co.* (Tex. Civ. App.), 94 S. W. 1062; *Western Union Tel. Co. v. Baker*, 140 Fed. 315, 72 C. C. A. 87; *Western Union Tel. Co. v. Gault*, 28 Ky. L. Rep. 881, 90 S. W. 610; *Western Union Tel. Co. v. Cox*, 29 Ky. L. Rep. 941, 96 S. W. 594.

Negligence Is the Gist of Such an Action, and unless it is established there can be no recovery. *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

14. *Indiana*.—*Western Union Tel. Co. v. Meek*, 49 Ind. 53.

Maine.—*Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

Michigan.—*Western Union Tel. Co. v. Carew*, 15 Mich. 525.

Missouri.—*Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

New York.—*Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673.

North Carolina.—*Sherrill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429.

South Carolina.—*Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765.

Texas.—*Western Union Tel. Co. v. Bouchell*, 28 Tex. Civ. App. 23, 67 S. W. 159.

In *Western Union Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610, it was held that proof of the delivery of the message to the operator and his receipt of the same and of the price charged for transmitting and repeating it, and of the utter non-delivery of the message to the addressee, was sufficient proof of negligence to subject the company to such actual damages as the sender sustained from the non-delivery.

In *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781, an action for personal injuries against the owner of a telegraph line, the court charged the jury "that the plaintiff, in order to entitle her to recover damages under this action, is required to prove that the accident occurred through the negligence of" the defendant. The court said: "Abstractly this is, of course, correct. No liability rested upon him except through negligence; but the instruction was misleading in this case in not being qualified or coupled with another one explaining that the evidence of the accident, and injury flowing therefrom, when the occurrence was out of the usual course, was *prima facie* evidence of negligence, and shifted the burden on to the defendant to prove that it was not caused by any want of care on his part. The facts disclosed in evidence brought this case squarely within this rule."

In *Mott v. Western Union Tel. Co.*, 142 N. C. 532, 55 S. E. 363, it was admitted that the message, charges prepaid, was received at the receiving office at 8:55 a. m. and was not delivered until 11:30, and that the operator knew that the plaintiff lived a mile away, and it was held that a *prima facie* case of negligence was made out, nothing else appearing.

In *Alexander v. Western Union Tel. Co.*, 141 N. C. 75, 53 S. E. 657, an action to recover damages for mental anguish for failure to deliver promptly a telegram, it appeared that the telegram was received at the defendant's office in Burlington, North Carolina, for transmission at one o'clock p. m., and was not delivered at Spray, North Carolina, its destination, until after eight o'clock the next morning, and it was held that this made out a *prima facie* case of negligence.

gram of the non-delivery thereof is some evidence of negligence.¹⁶

Joint Addressees. — In an action by two joint addressees for failure of a telegraph company to deliver a message, the burden is on the plaintiff to show that neither of them received the message.¹⁶

b. *Error in Transmission.* — *Proof of a material error in the transmission of the message raises a presumption of negligence against the company, imposing upon it the burden of showing exculpatory facts.*¹⁷

15. *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274, holding, further, that if for any reason it cannot deliver the message, it becomes the duty of the company to so inform the sender, stating the reason therefor, in order that he may have the opportunity to supply the lacking information.

16. *Western Union Tel. Co. v. Barnes*, 95 Tenn. 271, 32 S. W. 207.

17. *Arkansas.* — *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649.

Georgia. — *Western Union Tel. Co. v. Fontaine*, 58 Ga. 299, 433; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 308.

Illinois. — *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279.

Indiana. — *Telephone Co. v. Meek*, 49 Ind. 53.

Iowa. — *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605; *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268.

Kansas. — *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

Louisiana. — *Olympe de la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

Maine. — *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

Michigan. — *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

Mississippi. — *Western Union Tel. Co. v. Goodbar*, 7 So. 214.

Missouri. — *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

New York. — *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673.

Ohio. — *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

Pennsylvania. — *New York Prtg. Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

South Carolina. — *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765.

Texas. — *Western Union Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599; *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. 627.

Wisconsin. — *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

Compare *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226.

The Failure of a Telegraph Company To Transmit a Message Correctly is *prima facie* evidence of negligence. *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649. The court said: "If the failure was not the result of negligence, the means of showing that fact is almost invariably in all cases within the exclusive possession of the company. To require the sender to prove negligence after showing the mistake 'would be to require in many cases an impossibility not infrequently resulting in enabling the company to evade a just liability.'"

When a message is delivered to a telegraph company for transmission, very plainly written, and could not be mistaken by any person possessing ordinary eyesight who would examine it with ordinary care, and there is a mistake in the transmission, and

An Error in the Name of the Sender or Addressee, occurring during transmission, raises a presumption of negligence against the company.¹⁸

Cipher Messages. — And this rule permitting a presumption of negligence from the fact of erroneous transmission has been applied in the case of cipher messages, provided the cipher is written in words of the English language of letters of the English alphabet.¹⁹

If the Error or Mistake Is Attributable to Atmospheric Causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show that fact.²⁰

Unrepeated Messages. — Some of the courts, however, have held that while a telegraph company is liable for want of ordinary care

a mistake is feared by the person who received it, and at his request the agent at the place where it is received inquires at two relay stations if the message is correctly sent, and is assured from both stations that it is, and there is no explanatory or exculpatory evidence offered on behalf of the telegraph company, a finding of the trial court that the company is guilty of gross negligence is supported by sufficient evidence. *Western Union Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. 313.

Proof of an Error in an Important Word in a message is *prima facie* evidence of negligence. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437.

In *Womack v. Western Union Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 619, the message as delivered was different from that sent by the addition of one letter to one word, and it was held that this fact was not of itself sufficient evidence of negligence on the part of the company so as to entitle the sender to recover damages. The court said, however, that they did not intend to lay it down as an arbitrary rule, that in no case would the mere fact, of itself, that the message, as delivered to the addressee, was different from that delivered to the company to be transmitted, was not sufficient evidence of negligence as claimed; that there might be such apparent omissions or perversions in the message as thus delivered, from the one ordered, as would indicate such fraud or gross carelessness as would require that the question, as one of fact, should

be submitted to the jury; but that this strictness should not be applied in a case like the one at bar, where there was simply a mistake in one letter, and which might be consistent with a very high degree of skill and care. The court in holding as it did and in referring to other cases holding to the same effect, said: "These decisions are based upon the liability of such companies to mistakes by reason of the comparative infancy and novelty of the business in which they are engaged, and of the hidden and uncontrollable causes which may prevent a correct transmission of the message. Except, therefore, in cases where it is shown by direct testimony, or by the facts and circumstances of the case, that the mistake or omission happened, not from such cause, but by reason of the misconduct, fraud, or want of due care on the part of the company, its servants or agents, it will be presumed that it occurred from some casualty sought thus to be provided against, and the stipulated compensation becomes the measure of damages."

18. *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *Western Union Tel. Co. v. Ragland* (Tex. Civ. App.), 61 S. W. 421.

19. *Hughes v. Western Union Tel. Co.*, 79 Mo. App. 133. See also *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

20. *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

and skill, as well as for gross negligence, notwithstanding the condition restricting its liability in cases where the message is not repeated, the burden of proof is on the plaintiff to show this want of ordinary care or fault on the part of the company; and where this condition as to repeating messages exists and is known to the party sending the message, or where he is bound to take notice of it, and a mistake occurs in an unrepeatable message, the mere proof of such mistake, without some other evidence of carelessness or negligence on the part of the company, does not render it liable.²¹

It Is Not Necessary for the Company in Rebutting the Prima Facie Case so made by the plaintiff in such an action to disprove the presumption by showing that some uncontrollable cause produced the mistake, or that some one or more uncontrollable cause or causes were in existence to which the error might be attributable. It is only necessary to show the exercise of due care and diligence and thus negative the presumption of negligence.²²

c. Delay or Failure To Deliver.—Again, proof that the delivery of the message was unreasonably delayed, or was not made at all, is regarded by many of the courts as sufficient to raise a presump-

21. *Sweatland v. Illinois & M. Tel. Co.*, 27 Iowa 433, holding that in that case the plaintiff, in order to recover, must prove something more than the mistake in the message, and the damage resulting therefrom. He must show that this mistake was caused by the fault of the company, and that it might have been avoided if the company's instruments had been good ones and if its agents had possessed the requisite skill and exercised proper care and diligence in respect to the transmission and receipt of the message in question. See also *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164, where the court said: "The proof shows that it is impracticable to transmit telegraphic communications with absolute accuracy at all times, and that such communications, from the very nature of the medium through which they are made, are subject not only to occasional interruptions and delays, but also to inaccuracies in words and expressions. It may be, therefore, reasonably presumed that the failure to deliver this message correctly, was the result of a mistake to which such communications are liable, and which will sometimes occur, even where the utmost care and

skill are exercised." This case is followed in *Aiken v. Western Union Tel. Co.*, 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210.

Where a message is sent subject to a stipulation in the contract exonerating the company from liability for errors in transmission beyond the amount received therefor unless repeated, the mere fact of an error in the message as delivered is not of itself and without further proof of carelessness on the part of the company sufficient to authorize the plaintiff, in an action based on such default, to recover anything beyond the amount paid for transmission, and interest thereon. *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356.

In *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672, where the telegram in question was not delivered until three days after its receipt, it was held that the court trying the action was justified in finding that the company was negligent in the absence of any evidence excusing the delay.

22. *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765.

tion of negligence, and cast upon the company the burden of showing facts excusing such default.²³

23. United States.—*Dorgan v. Telephone Co.*, 7 Fed. Cas. No. 4,004.
Arkansas.—*Little Rock & F. S. Tel. Co. v. Davis*, 41 Ark. 79.

Indiana.—*Western Union Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 2 N. E. 604.

Iowa.—*Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268.

Kansas.—*Western Union Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

Kentucky.—*Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428.

Maine.—*Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437.

Missouri.—*Smith v. Western Union Tel. Co.*, 57 Mo. App. 259.

North Carolina.—*Rosser v. Western Union Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *Harrison v. Western Union Tel. Co.*, 136 N. C. 381, 48 S. E. 772; *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Sherrill v. Western Union Tel. Co.*, 117 N. C. 352, 23 S. E. 277.

Pennsylvania.—*United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751.

South Carolina.—*Eaker v. Western Union Tel. Co.*, 75 S. C. 97, 55 S. E. 129; *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *Arial v. Western Union Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *Hellams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12.

Texas.—*Western Union Tel. Co. v. Bouchell*, 28 Tex. Civ. App. 23, 67 S. W. 159; *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825.

Rule Stated.—"The plaintiff in such an action makes out a *prima facie* case when he shows that the message which the company undertook to send was not delivered and

that loss has resulted. It is not necessary that he should show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the company. The failure to deliver being shown, the legal presumption is that it was caused by some one or the other of these causes or of all combined. It then becomes incumbent upon the defendant if it would relieve itself from the consequences of such presumption, to overcome that presumption by showing that in the attempted transmission and delivery of the message it exercised all proper care and diligence commensurate with the undertaking, and that the failure is not attributable to any fault or negligence on its part or that of any of its employees." *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

Proof That the Message Was Delivered to the Defendant or received at its office in time to have been delivered, by reasonable diligence, in such a length of time that the addressee could have reached his father before his death, the message having notified the addressee of the dangerous illness of his father and asking him to come at once, and that the message was not so delivered, is sufficient *prima facie* evidence to establish negligence on the part of the company. And if there are any facts or circumstances which would excuse the company for failure so to deliver, it is incumbent upon the company to show them. *Western Union Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549.

Proof That a Telegram Was Never Received at the Office to which it was addressed is *prima facie* evidence that it was never started. *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542.

In *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192, it was shown that the usual time required to transmit a message between the sending

The Reason assigned is that proof of such exculpatory facts is not within the power of either the sendee or addressee, but is within the power of the telegraph company, and should therefore be produced by it.²⁴

The Receipt of a Message Without Objection on account of its being after office hours amounts to an implied agreement to deliver it with reasonable dispatch, and a failure to deliver within a reasonable time raises a presumption of negligence, the burden of rebutting which is upon the telegraph company.²⁵

Where the printed blanks of the telegraph company, on which messages are required to be written, expressly declare that messages will be delivered free within the free delivery limits, but that a special charge will be made for delivery at a greater distance, it will be presumed that the sender of a message knows whether the person to whom it is sent resides within or beyond those limits and that he will make provision for delivery by informing the operator of the facts; and when it appears that he knew the limits of the free delivery but made no offer to pay a special charge for delivery, the burden is on him to prove residence within the limits.²⁶

d. *Delivery by Telephone.* — The provisions on the back of the telegraph blank as to the company being the agent of the sender in transmission over other lines do not apply to telephone lines, and the failure of a telegraph company to send a message by telephone, in absence of proof of a special contract for that purpose, does not show negligence in transmission.²⁷

and receiving offices in question was from fifteen to forty-five minutes, and that the delay in that case was fifteen hours; it was accordingly held that the length of time intervening between the delivery of the message for transmission and its delivery to the addressee was such as to raise a presumption of negligence imposing upon the defendant company the burden of explaining the same.

In *Jones v. Western Union Tel. Co.*, 75 S. C. 208, 55 S. E. 318, it was held that the mere failure to get a telegram from one point to another in the interval between its receipt in the sending office and the closing of the receiving office, which, according to the plaintiff's witness was thirty minutes, and according to the receiving clerk and the memorandum on the message was one minute, was not sufficient on which to found a presumption of negligence.

§ 2164 of the Iowa Code declares that in an action against a telegraph company for damages caused by the

erroneous transmission of a message, or by the unreasonable delay in its delivery, negligence on the part of the defendant shall be presumed upon proof of erroneous transmission or delivery. *Bank of Havelock v. Western Union Tel. Co.*, 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181.

24. *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 2 N. E. 604.

25. *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274.

26. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Whitson*, 145 Ala. 426, 41 So. 405.

27. *Hellams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12. The court said that had the sender or addressee of the message authorized its transmission by telephone to any one who would receive it and undertake to deliver it, that might

e. *Presumption Not Conclusive*. — The presumption discussed in the previous sections is, however, not conclusive, but it may be rebutted.²⁸

f. *Connecting Lines*. — In the case of connecting lines of telegraph, it will be presumed that a message was correctly delivered to the terminal company at the point where its own line commenced; and where it appears that the telegram as delivered contained an error, the presumption is that the error occurred through the terminal company's negligence,²⁹ upon whom the burden is then cast to show the contrary.³⁰

g. *Gross Negligence*. — Where the contract of sending between the telegraph company and the sender who seeks compensation from the company for its negligence in the transmission of the message includes a stipulation to the effect that unless repeated the company was not liable for any mistake or delay in the transmission or delivery of the message, or for its non-delivery, beyond the sum paid for sending it unless the mistake, delay or failure arose from the wilful misconduct or gross negligence of the company, it is not enough for the plaintiff merely to show the mistake in the message

have been a proper consideration for the jury in determining whether the company had used due diligence in delivering the message.

28. *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

Failure to deliver a message shown or admitted to have been received by the telegraph company is *prima facie* evidence of negligence; but the presumption arising therefrom is not conclusive. It merely shifts to the defendant the subsequent burden of proof upon that issue, that is, the defendant must then show by the preponderance of the evidence that it has not been guilty of negligence. *Hunter v. Western Union Tel. Co.*, 130 N. C. 602, 41 S. E. 796, where it was held that if there is more than a scintilla of evidence tending to prove that the defendant company exercised due care and diligence, the trial judge should not direct a verdict against the defendant.

In *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259, the defendant company proved that the operators at both the sending and the receiving office were competent, were at their place of duty and performed their duties at the time the message was received for transmission, that the instruments in both offices were in

good working order and repair, and that the sending operator signalled the receiving operator repeatedly but could secure no answer; and it was held that it might in such case be reasonably inferred that the intervening wire was out of working order in consequence of the operation of some one of various intervening causes of which the operators had no knowledge and could not discover; and hence that the *prima facie* case made by the plaintiff in proving the delay was rebutted.

29. *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605.

30. *Olympe de la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, where the court said: "It seems clear to us that whether first carrier or not, it was peculiarly within their power, and was the duty of the defendants to make the proof here suggested, if necessary. They were engaged in the business of transmitting messages to and from various points in the country, and found it to their interest, if not a necessity, to effect such mutual arrangements with other companies as would enable them to successfully conduct such business, and this without any consultation with the parties who might use the telegraph. It was in their power to show that the mes-

as delivered; he must, in order to recover more than the amount paid for sending the message, also prove wilful misconduct or gross negligence on the part of the company.³¹

And this same rule applies to an action by the addressee of the message where the message was sent in response to one by the addressee to the sender, thus making the sender the agent for the addressee in sending it.³²

h. *Wilfulness, Wantonness, Etc.* — As in other cases where exemplary damages are sought, so in an action against a telegraph company for its default or negligence in the transmission and delivery of a telegram wherein exemplary damages are asked, there must be proof of malice, or such gross negligence on the part of the company as amounts to wantonness or malicious purpose.³³

sage delivered by them to plaintiff was precisely the one received by them at Meridian, and thus throw the responsibility upon the other company, if it be a correct legal principle, that one of two or more connecting companies may then be relieved from liability, a question which it is unnecessary now to decide."

31. *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119. See also *Redington v. Pacific Postal Tel. C. Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132, where the court said: "The onus, then, of proving wilful misconduct or gross negligence on the part of the defendant devolved upon the plaintiff, and is not, in the face of the stipulation, to be presumed from the mere fact of a mistake, but must be proven by independent facts, or by circumstances connected with the principal fact, and warranting the conclusion or inference of wilful misconduct or gross negligence. There is no claim of wilful misconduct."

In *Western Union Tel. Co. v. Goodbar* (Miss.), 7 So. 214, it appeared that the transmitting agent called the receiving operator and informed him of the number of words contained in the message in controversy, and having sent the message as written received from the receiving operator the signal indicating that it had been properly received and contained the number of words indicated. On the trial the receiving operator testified to these facts

but was unable to explain why he failed to get the number of words sent and admitted that certain words had been omitted. It was held that the evidence showed gross negligence on the part of the company.

32. *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

33. *Alabama*. — *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Western Union Tel. Co. v. Westmoreland*, 44 So. 382.

Kansas. — *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

Kentucky. — *Robinson v. Western Union Tel. Co.*, 24 Ky. L. Rep. 452, 68 S. W. 656.

South Carolina. — *Murray v. Western Union Tel. Co.*, 74 S. C. 64, 54 S. E. 209; *Jones v. Western Union Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *Smith v. Western Union Tel. Co.*, 72 S. C. 116, 51 S. E. 537; *Lewis v. Western Union Tel. Co.*, 57 S. C. 325, 35 S. E. 556.

West Virginia. — *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

Where a telegraph company receives from the agent of the sendee and transmits to the place of destination three separate and distinct messages announcing the death of the mother of the sendee, one of which is addressed to the care of the hotel where the sendee was registered, and each of the others to the care of different friends, who were

B. SUBSTANCE AND MODE OF PROOF.—*a. In General.*—As in other cases where the fact of negligence is in issue, circumstantial evidence must of necessity be resorted to, in an action against a telegraph company for negligence in the transmission and delivery of a telegram, both for the purpose of establishing the negligence complained of,³⁴ and also to disprove

well known citizens in the city, and whose residences and places of business were within the delivery limits of the telegraph company and were correctly stated in the city directory, and the company, through its employes, places all three messages in one envelope addressed to the care of the hotel, and delivered them there when the sendee was not there, and to which place he did not return until late in the afternoon of the next day, when all three messages in the one envelope were delivered to him, at which time it was impossible, after the use of the utmost diligence, for him to reach the place of burial in time to see the remains of his mother and to be present at her interment, the misconduct of such employes of the telegraph company is so gross as to import an intention on their part to inflict a wrong upon the sendee, or there was such a reckless and wanton disregard of their plain duty as to be equivalent to a wilful wrong, for the commission of which the company is liable for punitive damages. *Western Union Tel. Co. v. Seed*, 115 Ala. 670, 22 So. 474.

The Fact That a Telegram Remained in the Possession of a Telegraph Company for Fourteen Hours without delivery, and the absence of evidence tending to show an effort to deliver, are circumstances proper to go to the jury as to reckless disregard of the plaintiff's rights. *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448. See also *Marsh v. Western Union Tel. Co.*, 65 S. C. 430, 43 S. E. 953.

Proof That a Messenger Boy Intentionally Failed to go to the house of the addressee of a telegram and deliver it to him there, entitles the addressee to punitive damages. *Butler v. Western Union Tel. Co.*, 65 S. C. 510, 44 S. E. 91.

Mere Delay in Delivering a telegram is not sufficient to send the

case to the jury on the issue of wilfulness, there being evidence of an effort to deliver. *Roberts v. Western Union Tel. Co.*, 73 S. C. 520, 53 S. E. 985.

Long Delay and Absence of Effort To Deliver promptly are some evidence to go to the jury on the question of wilfulness. *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448; *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697; *Willis v. Western Union Tel. Co.*, 73 S. C. 379, 53 S. E. 639. Compare *Mitchiner v. Western Union Tel. Co.*, 75 S. C. 182, 55 S. E. 222.

Unexplained Delay in the delivery of a telegram for twenty-two hours is sufficient to warrant a jury in awarding punitive damages. *Willis v. Western Union Tel. Co.*, 73 S. C. 379, 53 S. E. 639.

Wantonness May Be Inferred from the failure of the telegraph company to correct an error in a message upon a request to have it repeated and from uncertainty in determining exactly when, where, how and by whom the message was changed. *Walker v. Western Union Tel. Co.*, 75 S. C. 512, 56 S. E. 38.

Changing the Name of the Addressee to that of his competitor, and delivering the message to the latter, is some evidence of reckless disregard of the addressee's rights. *Lathan v. Western Union Tel. Co.*, 75 S. C. 129, 55 S. E. 134.

34. It is competent to show that a telegraph company had delivered other telegrams beyond the alleged free delivery limits as being some evidence tending to show that there were no free delivery limits, and, if there were, the company had disregarded them. *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841.

In an action against a telegraph company to recover damages for its negligence in the delivery of a tele-

it.³⁶ Thus it is competent for the plaintiff to show that he sent a second message to the company's operator urging prompt delivery of the first message.³⁶

gram, it is competent to show the proximity of the places of business and residence of the addressee, that the location of which was well known to the company's agent, and that if the message had been delivered at either of these places with reasonable diligence it would have reached the addressee in time to have prevented the loss complained of. *Western Union Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989.

In *Thorp v. Western Union Tel. Co.*, 84 Iowa 190, 50 N. W. 675, an action for damages for the non-delivery of a telegram, the plaintiff had testified that upon changing his place of residence to another town he had requested the proper employe of the post-office to forward his mail, and that a postal card shown to have been mailed at his former residence advising him of the receipt of the telegram in question had not been received; it was held that the postal card was admissible in evidence on behalf of the defendant to show the effort made to deliver the telegram.

In *Western Union Tel. Co. v. Church* (Neb.), 90 N. W. 878, 57 L. R. A. 905, where the telegram in controversy was one to the plaintiff's physician summoning him to her bedside, it was held proper to permit the plaintiff to show by the physician that the delivery of other telegrams had been unseasonably delayed and that he had complained to the operator and directed the latter to see that telegrams were more promptly delivered.

On the question of negligence it is proper to show that if the messenger had inquired for the addressee of the person to whom he was directed he would have been informed of the addressee's whereabouts. *Western Union Tel. Co. v. Waller* (Tex. Civ. App.), 84 S. W. 695.

In the case of non-delivery of a telegram, it is proper to permit the addressee to show by various persons that they were in business in the town where the message was re-

ceived and that the messenger boy made no inquiry of them about the addressee. *Arkansas & L. R. Co. v. Stroude* (Ark.), 100 S. W. 760.

35. Upon the question of negligence on the part of a telegraph company in the delivery of a telegram, replies made to the messenger at the office of the addressee touching the whereabouts of the latter are admissible in evidence. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 7 Am. St. Rep. 598, 1 L. R. A. 728.

On the question of the negligence of a telegraph company in the delivery of a message, evidence as to inquiries by the messenger as to the addressee's place of business and also the business in which he was engaged is admissible. *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653.

In *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 7 Am. St. Rep. 598, 1 L. R. A. 728, where the question was as to the negligence of the company in failing to deliver a telegram, it was held that the fact that the addressee was out of town could not be established by evidence that the sending operator received a telegram from the receiving operator of the fact of the addressee's absence.

A telegraph company cannot exonerate itself from its duty to deliver a message by showing that the receiving operator had no messenger, and that by the rules of the company he was not allowed to leave his office. *Western Union Tel. Co. v. Parsons*, 24 Ky. L. Rep. 2008, 72 S. W. 800.

36. *Western Union Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118. The court said that such evidence "was pertinent to show the urgency of the sender of the message, and the negligence of the company in not delivering the original telegram, and this is true whether, as a matter of fact, the second message was or was not sent. The wording of the message carried with it notice of its im-

b. *Declarations of Company's Agent.*—Evidence of statements or declarations by the company's agent who handled the message in question is not admissible on the question of negligence, unless the statements or declarations sought to be shown are part of the *res gestae*.³⁷

Subsequent Acts and Declarations of the defendant's agents in such

portance and the necessity for immediate delivery. This was made still more prominent and important by the effort to trace it and procure its delivery. The sending of the second message bore directly upon the question of the defendant's discharge of duty and accentuated its negligence in that regard."

In *Western Union Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701, an action against the defendant company for delay in delivering a message sent by the plaintiff inquiring as to his mother's condition, in consequence whereof he did not reach his mother before her death, it was held proper to permit the plaintiff to testify that after waiting two days he sent another message to another person, to which he received a reply within twenty-four hours and at once started to his mother; that these facts were relevant as tending to show how long it required to send a message, and also to explain the plaintiff's conduct in delaying to start at once to his mother.

37. *Aiken v. Western Union Tel. Co.*, 5 S. C. 358; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

In *Western Union Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701, the plaintiff after sending the message in question and while he was waiting for an answer thereto was told by the operators that his message had been delivered at the other end all right, thereby influencing him to take no action in the matter; it was held that these facts were competent and relevant as tending to explain the cause of his delay.

A statement by a telegraph operator to the sender of a telegram on calling for an answer thereto, it appearing that the telegram was one calling for an answer, that the message had not been sent, is admissible against the company in an action to recover damages for the failure to

send. *Evans v. Western Union Tel. Co.*, 102 Iowa 219, 71 N. W. 219. The court said: "The telegram advised the company a reply was expected, and when this was called for if the agent knew none would come, it was his duty to so inform (the sender). It was a part of the same transaction and not relating to past occurrences."

In *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427, it was held that as against the objection of its being immaterial and irrelevant, testimony of a witness to whom the defendant's agent had given the message for delivery, that the agent then stated that he had received it the day before but did not have time to find any one to deliver it, was proper.

A statement by a telegraph operator to the sender of a message that it has not been delivered, made as a report of his efforts to trace the telegram, is admissible in evidence against the company to show the fact of non-delivery. *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394.

In an action against a telegraph company for refusing to receive a message for transmission, the language of the agent at the time of refusing the message is relevant and proper for the purpose of showing the motives actuating him in refusing it. *Western Union Tel. Co. v. Simmons* (Tex. Civ. App.), 93 S. W. 686.

Statements of the sending operator as to the transmission of the message to a relay station and its receipt there and failure to reach the receiving station, when not a part of the *res gestae*, cannot be received in evidence on behalf of the company. *Western Union Tel. Co. v. Woodard* (Ark.), 105 S. W. 579.

case, not connected with the transmission of the message, are not competent evidence to charge the telegraph company.³⁸

c. *Admissions*. — The default on the part of the telegraph company as to the transmission and delivery of the telegram in controversy may of course be established by the admissions of the company.³⁹

d. *Evidence of Gross Negligence*. — What is sufficient evidence of gross negligence within the contemplation of the rule requiring proof thereof must of necessity depend upon the circumstances of the particular case itself.⁴⁰

Errors. — Thus, although in one case at least, it was held to the contrary,⁴¹ an error of a single word occurring in the transmission of the message has been held not to be sufficient evidence of gross negligence.⁴² On the other hand, it has been held that evidence of several errors in a brief message is sufficient to establish gross negligence.⁴³

Ignorance on Part of the Sending Operator of the locality of a well-known city or town to which the message is directed is evidence of gross negligence.⁴⁴

Total Failure to Send the Message, unexplained, is of itself sufficient evidence of gross negligence.⁴⁵

38. *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485. See also *MacAndrews v. Electric Tel. Co.*, 17 C. B. (Eng.) 3, 25 L. J. C. P. 26, 1 Jur. (N. S.) 1073; *Darlington v. Western Union Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697; *Hamrick v. Western Union Tel. Co.*, 140 N. C. 151, 52 S. E. 232.

Within this rule it is not competent on the part of the plaintiff in such an action to show that because of the default in question one of the inferior officers of the company deducted from the pay of one of the operators a portion of his salary for the purpose, as claimed, of paying the loss suffered by the plaintiff, it appearing that the superior officers of the company declined to recognize or pay any such claim as against the company. *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

The Declaration of a Telegraph Operator at the Terminal Office, made the day after the message in question was sent and received, as to his reason for not delivering the

message as soon as it was received, is not competent evidence against the company. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

39. *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259.

40. See *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

41. *Western Union Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. 313.

42. *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356; *Mowry v. Western Union Tel. Co.*, 51 Hun 126, 4 N. Y. Supp. 666; *Pegram v. Western Union Tel. Co.*, 97 N. C. 56, 2 S. E. 256; *Womack v. Western Union Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 619.

43. *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

44. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744. See also *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385.

45. *Garrett v. Western Union Tel. Co.*, 83 Iowa 257, 49 N. W. 88,

3. Freedom From Contributory Negligence. — It is not necessary for the plaintiff in an action against a telegraph company for alleged negligence in the transmission or delivery of a telegram, to show freedom from contributory negligence.⁴⁶

4. Default as Proximate Cause of Injury. — The burden is on the plaintiff in an action to recover damages for the alleged default of a telegraph company in the transmission or delivery of a message to show by competent evidence⁴⁷ that in all reasonable probability the loss complained of resulted from the default alleged.⁴⁸

46. *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268.

Compare Mitchiner v. Western Union Tel. Co., 70 S. C. 522, 50 S. E. 190, holding that the defense that the injury complained of was caused by negligence of the plaintiff is not an affirmative one to be supported by the preponderance of the evidence, but the burden is on the plaintiff to establish his cause by a preponderance of the evidence.

47. In *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214, where the alleged negligence of the company consisted of its failure to deliver promptly the message in question which directed the sendee, who was an officer, to come on the first train for the purpose of arresting a fugitive from justice, it was held proper to permit the plaintiff to prove an arrangement made between himself and the sender of the message with reference to the capture of the person in question. The court said: "This was original, and not hearsay, evidence. It related to circumstances and facts essentially to be proved as leading up to the sending of the telegram, and had a direct bearing upon the probability of the plaintiff effecting the arrest, had the telegram been promptly delivered. It was necessary to show the exact situation, and all that had been done to accomplish that purpose."

48. *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214. See also *Hendershot v. Western Union Tel. Co.*, 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313; *Smith v. Western Union Tel. Co.*, 83 Ky. 104,

4 Am. St. Rep. 126; *Western Union Tel. Co. v. Pallotta*, 81 Miss. 216, 32 So. 310; *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223; *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366.

The default on the part of the company complained of must be shown to have been the proximate cause of the injury for which compensation is sought; and if the evidence shows that the injury was in fact occasioned by the act of a third person or through the operation of some other intervening cause, the telegraph company is not liable. *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485.

In *Western Union Tel. Co. v. Liddell*, 68 Miss. 1, 8 So. 510, an action by the plaintiff to recover the value of a lost valise claimed to have resulted from the negligence of the defendant company in failing to send a message to the place where the valise had been left and was last seen, it was held that in the absence of proof that the valise was still at that place when the message was sent the default of the company could not be asserted as the proximate cause of the loss.

In *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, the plaintiff's agent living at a place in Iowa delivered to the defendant company a telegram directed to the plaintiff in Missouri, stating that he had an offer of \$1300 cash for property owned by the plaintiff. The message as delivered stated the price offered to be \$1900, and the plaintiff immediately wired to his agent to sell the property for the amount stated in the message as received.

Mental Anguish. — The rule of proximate cause applies also in respect of the consideration of mental anguish as an element of damages; and it is accordingly held that the plaintiff in such an action must show not only that the mental anguish suffered by him was proximately caused by the defendant's default, but that such default was such as would bring suffering to a reasonable human being in the plaintiff's situation.⁴⁹

5. Compensation or Damages for Default or Negligence. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — The plaintiff in an action against a telegraph company to recover damages for the default or negligence of the company in the transmission and delivery of a telegraphic message must show an actual loss or injury to himself as a result of such default or negligence, before he is entitled to actual compensation.⁵⁰

Upon receipt of the plaintiff's telegram the agent concluded the contract of sale at \$1300. It was held that the negligence of the company was the proximate cause of the loss incurred by the plaintiff.

In *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143, the evidence showed that the local agent of the defendant company, who was also agent of an express company at the same place, sent a forged message to a merchant in another city requesting him to forward money to his correspondent at the former place; that the message was duly received and the money forwarded in good faith by express in response to the telegram, but was intercepted and converted to his own use by the agent. It was held that the evidence showed that the transmission of the forged message was the proximate cause of the loss and that the defendant was liable therefor.

In *Western Union Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601, it was held that the default of the telegraph company, whereby the address of a message was changed in transmitting it to a connecting line, was not the proximate cause of loss occasioned by delay in its delivery, inasmuch as it appeared that the connecting company received the message promptly, and was not misled by the change of address, but negli-

gently delayed delivery solely from other causes.

In *Duncan v. Western Union Tel. Co.*, 87 Wis. 173, 58 N. W. 75, an action against a telegraph company to recover for the death of a horse alleged to have been caused by a mistake in the transmission of a telegram and a consequent delay in procuring a veterinary surgeon, it was a matter of mere guess or conjecture, upon the evidence, whether the horse could have been saved had there been no such delay. It was held that a nonsuit should have been granted.

49. *Roberts v. Western Union Tel. Co.*, 73 S. C. 520, 53 S. E. 985. And see *infra*, "Mental Anguish."

In *Taliferro v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1290, 54 S. W. 825, it was held that the default of the defendant company in failing to deliver a message sent by the plaintiff inquiring as to the condition of his sick sister was not the proximate cause of mental anguish suffered by him in consequence of his absence from her funeral. The court said that even if his telegram had been received an answer might not have been sent, or if sent, might without fault on the part of the defendant never have reached the plaintiff.

50. *Arkansas.* — *Western Union Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 14 Am. St. Rep. 81.

California. — *Pacific Pine Lumb. Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103.

Iowa. — *Mickelwait v. Western*

Union Tel. Co., 113 Iowa 177, 84 N. W. 1038; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

Kentucky.—*Taliferro v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1290, 54 S. W. 825.

Maine.—*True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

Mississippi.—*Western Union Tel. Co. v. Pallotta*, 81 Miss. 216, 32 So. 310.

Missouri.—*Levy v. Western Union Tel. Co.*, 35 Mo. App. 170.

North Carolina.—*Williams v. Western Union Tel. Co.*, 136 N. C. 82, 48 S. E. 559.

Texas.—*Gulf, C. & S. F. R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891.

Virginia.—*Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

See also *Levy v. Western Union Tel. Co.*, 35 Mo. App. 170, where it was held that although there may have been a mistake in the transmission of the message and that this may have resulted from the defendant's default, nevertheless before the plaintiff was entitled to judgment for special damages on account of such negligence it devolved upon him to show that he was in some way actually damaged.

A telegraph company cannot be mulcted in more than nominal damages for a breach of its contract to transmit and deliver a telegram, unless it is established that the breach caused substantial loss or injury. *Strahorn-Hutton-Evans Com. Co. v. Western Union Tel. Co.*, 101 Mo. App. 500, 74 S. W. 876.

In *Western Union Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933, the attorney for plaintiff in *certiorari* proceedings sent a telegram containing a notice necessary to the maintenance of the proceedings which the company failed to deliver within the time agreed upon, in consequence whereof the proceedings were dismissed for want of said notice, and the attorney after having paid his client the amount involved in the proceedings sued the telephone company for the non-delivery

of the message; and it was held that the attorney occupied the position of his client and that it was incumbent upon him to show that he would have succeeded in the proceedings and was damaged by their dismissal.

In *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 So. 418, an action to recover damages for loss caused by delay of certain telegrams between the plaintiff and his broker, giving directions as to the purchase and sale of stocks, the only evidence of loss was testimony of the plaintiff that by reason of the delays he had lost certain sums of money; and it was held that the verdict for the plaintiff was not to be set aside merely because the defendant failed to require a specific explanation by the witness as to how the delayed telegrams caused the loss stated.

In the case of unintentional delay in the delivery of money by a telegraph company, whereby plaintiff's note was protested, there can be no recovery for a mere loss of credit by reason of the protest without showing pecuniary loss as a consequence of the protest. *Smith v. Western Union Tel. Co.*, 150 Pa. St. 561, 24 Atl. 1049.

If a Telegram Is Sent Containing a Proposal To Sell goods, but by mistake of the telegraph company as delivered it does not state the proposal correctly, the addressee cannot recover from the telegraph company compensatory damages on the ground that if the message had been correctly transmitted and contained the proposal as intended by the sender, it would have been accepted in that form and certain benefits and profits would have accrued to the addressee therefrom, where it is not shown what actual loss, if any, resulted to the addressee from the error. *Richmond Hosiery Mills Co. v. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290.

In *Newsome v. Western Union Tel. Co.*, 137 N. C. 513, 50 S. E. 279, the plaintiff had delivered to the company the following telegram: "Send by express four gallons of corn, Mint's Siding. Rush. Raft hands," and his name was changed by the company in transmission, and

Liability to Third Person. — And for the purpose of showing actual loss within this rule it is not enough for the plaintiff to show a loss or injury accruing to a third person in consequence of the default of the company, although the plaintiff may be actually liable for such injury or loss by reason of his contractual relations for or with such third person.⁵¹

b. *Nominal Damages.* — But, although there is no proof of actual or substantial loss or injury, yet it is very generally held that proof of the default or negligence complained of will entitle the plaintiff in such an action to at least nominal damages.⁵² But merely show-

the goods asked for were not sent. It was held that the plaintiff could not recover for expense incurred in payment of his hands and in sending to the telegraph and express offices, inasmuch as there was no evidence that the goods would have been sent if the error had not been made, nor that the defendant at the time of accepting the message had any notice of the purpose for which the goods were wanted, nor of the probable consequences of the failure to receive them.

In *Western Union Tel. Co. v. True* (Tex. Civ. App.), 103 S. W. 1180, an action involving the negligent delay in delivering a telegram, whereby plaintiffs claimed to have been deprived of an opportunity of making a purchase of livestock, it was held sufficient to entitle the plaintiffs to recover for them to show that they were in fact deprived of such opportunity and that they would have made a profit on the transaction, without also showing that they had a binding contract with their vendor for the purchase of the stock.

51. *Pacific Pine Lumb. Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103.

52. *Alabama.* — *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 So. 386.

Arkansas. — *Western Union Tel. Co. v. Aubrey*, 61 Ark. 613, 33 S. W. 1063.

California. — *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589.

Iowa. — *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

Kentucky. — *Taliferro v. Western*

Union Tel. Co., 21 Ky. L. Rep. 1290, 54 S. W. 825.

Minnesota. — *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155.

North Carolina. — *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 S. E. 770; *Green v. Western Union Tel. Co.*, 136 N. C. 506, 49 S. E. 171.

Ohio. — *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485.

Texas. — *Klopf v. Western Union Tel. Co.* (Tex. Civ. App.), 97 S. W. 829.

Where one delivers a telegram to a telegraph company, the undertaking of the company is of course to transmit and deliver promptly and accurately, and the sender would in an action against the telegraph company be entitled to show any damages he has sustained on account of its failure to transmit the telegram promptly and accurately; and if he shows that no actual damages were sustained he would of course be entitled to at least nominal damages for the breach of contract. *Western Union Tel. Co. v. Flint River Lumb. Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36.

In *Logan v. Western Union Tel. Co.*, 84 Ill. 468, an action for negligence in failing to deliver a telegram from the plaintiff summoning his son to the death-bed of his wife, the mother of said son, it was held that the plaintiff was entitled to nominal damages at least, including the charges paid for sending said telegram.

In an action to recover damages for the delay in the transmission of a telegram, unless the special injury claimed is shown to have resulted

ing a breach of the defendant company's duty to a third person is not enough to entitle the plaintiff to nominal damages.⁵³

B. SCOPE AND MODE OF INQUIRY. — a. *In General*. — The rule adopted by all of the courts in respect of the scope of the inquiry as to damages proper to be shown in an action against a telegraph company for its default in the transmission and delivery of a telegram, is that laid down by Baron Alderson⁵⁴ in 1854. And of

from such delay, only the amount paid for the transmission can be recovered. *Cutts v. Western Union Tel. Co.*, 71 Wis. 46, 36 N. W. 627.

In *Hughes v. Western Union Tel. Co.*, 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782, it was held that where the evidence shows that one in consequence of a mistake in the transmission of a telegram was induced to sell property at a price less than he could thereafter have sold it for, but that he did receive its then market value, the cost of the telegram was all he should be permitted to show in the way of damages against the telegraph company for the mistake.

Where the delay has not been so great as to amount to a substantial failure on the part of the telegraph company to perform the duty which it undertook and for which it was paid, nominal damages only can be awarded. But where the delay has been so great as to amount substantially to a failure to perform the duty undertaken, the damages proper in such a case are the sum paid for the transmission of the message with interest. *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554, following *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

53. He must at all events show a breach of the defendant's duty to the plaintiff directly. *Pacific Pine Lumb Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103.

54. *Hadley v. Baxendale*, 9 Exch. (Eng.) 341, 353, 2 C. L. R. 517, 23 L. J. Ex. 179, where the court said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual

course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." It should perhaps be noted that the case in which this rule was laid down was not a telegraph case, but the rule has been uniformly recognized as the true rule for admeasuring damages to be awarded in such cases. See the following cases:

Alabama. — *Doughtery v. Western Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

Arkansas. — *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649.

Illinois. — *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4.

Indiana. — *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

Iowa. — *Hise v. Western Union Tel. Co.*, 113 N. W. 819.

Kentucky. — *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

Minnesota. — *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155.

Mississippi. — *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, 8 So. 746; *Fairley v. Western Union Tel. Co.*, 73 Miss. 6, 18 So. 796; *Hilley v. Western Union Tel. Co.*, 85 Miss. 67, 37 So. 556.

Missouri. — *Hughes v. Western Union Tel. Co.*, 79 Mo. App. 133; *McCarty v. Western Union Tel. Co.*, 116 Mo. App. 441, 91 S. W. 976; *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111.

Nebraska. — *Western Union Tel. Co. v. Church*, 90 N. W. 878.

North Carolina. — *Williams v. Western Union Tel. Co.*, 136 N. C. 82, 48 S. E. 559.

Ohio. — *First Nat. Bank v. West-*

course in admitting evidence for the purpose of showing damages within this rule, the evidence must be confined within proper limits.⁵⁵

Where the Addressee of a Telegraphic Message seeks to recover damages for default on the part of the company in the transmission or delivery of the message, his damages are not to be limited to what might reasonably have been within the contemplation of the parties, but he may show all injurious results which flow therefrom by ordinary natural sequence without the interposition of any other negligent act or overpowering force.⁵⁶

ern Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485.

Texas.—*Western Union Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610.

Wisconsin.—*Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

Traveling Expenses.—In *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375, it appeared that in consequence of the incorrect transmission of the telegram in controversy stating that the sender would be absent from his office at a certain time, the addressee traveled from a long distance to see the sender at that time; and it was held that he might in an action against the company for such default prove the amount of traveling expenses incurred by him.

55. Thus in *Hancock v. Western Union Tel. Co.*, 142 N. C. 163, 55 S. E. 83, an action to recover damages for negligent delay in the delivery of a telegram announcing the death of the plaintiff's brother and that he would arrive with the corpse at a certain station the next day, it was held error to receive evidence showing that the employes of the railway company, with whom the defendant had no connection, left the body of the deceased on the railway platform in the rain.

See also *Western Union Tel. Co. v. Mellon*, 97 Tenn. 66, 33 S. W. 725; *Western Union Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438, where the court speaking of the probable consequences of admitting such testimony, said: "The admission of such testimony would awaken in the jury a sympathy for the distressed sister, and, although it might be unconsciously done, would induce them to increase the amount of dam-

ages. If the evidence is not to influence the verdict, why should it be admitted at all? The jury has the right, and it is their duty, to consider all the evidence admitted by the court. But the telegraph company cannot be held liable for all damages which may arise for the failure to comply with its contract, no matter how great or how real such damage may be. It can only be held for such as it could have anticipated from the knowledge it had and that which the law imputes to it as the result of the failure to deliver the message."

In *Taylor v. Western Union Tel. Co.*, 31 Ky. L. Rep. 240, 101 S. W. 969, it was held that the addressee of a telegram could not recover for bodily pain and suffering produced by sickness, by being forced to travel in that condition, inasmuch as it did not appear in the telegram nor could it reasonably be inferred from it, that he was sick at the time, it not being shown that the plaintiff's feeble condition was known to the defendant.

56. *Illinois.*—*Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4.

Indiana.—*Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

Iowa.—*Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

Kentucky.—*Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

Massachusetts.—*Ellis v. American Tel. Co.*, 13 Allen 226.

Mississippi.—*Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461.

New York.—*Milliken v. Western*

b. *Remote Damages*. — Of course, as in other cases instituted for the recovery of damages, damages not resulting as the proximate cause of the negligence complained of cannot be shown.⁶⁷

Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281.

North Carolina. — *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669.

Texas. — *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844.

The sender of a telegram is entitled to such substantial damages as he may sustain by reason of his message being improperly transmitted, that is, such damages as are the natural and proximate consequence of the default complained of. *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

57. United States. — *Stansell v. Western Union Tel. Co.*, 107 Fed. 668.

California. — *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75.

Georgia. — *Haber B. B. Hat Co. v. Southern Bell Tel. & Tel. Co.*, 118 Ga. 874, 45 S. E. 696; *Western Union Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151.

Kansas. — *Western Union Tel. Co. v. Simpson*, 64 Kan. 309, 67 Pac. 839.

Texas. — *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257, 13 S. W. 986; *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western Union Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169.

The maxim "*Causa proxima, non remota spectatur*" applies to suits for breaches of contract for the delivery of messages by telegraph companies; said companies are liable only for proximate or immediate and not for distant consequences. If the telegraph company is in default but their default is made mischievous or injurious to a party only by some other intervening cause, this rule prevents the liability of the company because their default would be only the remote or removed cause of the injury and not the proximate cause. *Western Union Tel. Co. v. Barlow*

(Fla.), 40 So. 491; citing with approval *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485.

"*The Damages Must, Moreover, Be Certain*, both in their nature, and in respect of the cause from which they proceed. They must not be the remote, but proximate, consequence of the breach of contract, and must not be speculative or contingent." *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155.

In *Johnson v. Western Union Tel. Co.*, 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584, the telegram in controversy merely gave to the plaintiff an opportunity to secure a contract for certain work, and it was held that the company was not liable for loss of profits which the plaintiff might have made if he had secured the contract; that the damages in such case were not the direct result of the breach of duty complained of, that they did not naturally or necessarily or probably arise from the wrong done, and hence come within the rule stated in the text.

In *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549, the evidence showed that the plaintiff's wife had been notified of the dangerous illness of her brother and by a second telegram of his death, which last telegram was not delivered, notifying her that he had died from a contagious disease and advising her not to come; that she went with her young baby to his home and there learned that he had died of smallpox; that greatly fatigued and worried, and with great alarm and anguish at having exposed herself and baby to smallpox, left the house, but was compelled to wait in the cold and rain with her baby exposed for an hour until a carriage could be obtained, and that as soon thereafter as she was able she returned home. It was held that the

c. *Speculative Damages*. — Damages which are uncertain and contingent, depending upon the happening of merely possible events, in short, which are merely speculative, are to be excluded.⁵⁸

damage resulting from her having to wait for a carriage and from the sickness consequent thereupon were too remote.

In *Western Union Tel. Co. v. Ebanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 370, where the message was one directing the plaintiff to ship live stock on a certain day and was not delivered within a reasonable time, by reason of which the stock was not shipped in time to reach a good market, but was shipped on a subsequent day and reached a demoralized market; it was held that the damages resulting to the plaintiff from the defendant's default were not too remote or speculative to authorize recovery.

In *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 7 Am. St. Rep. 598, 1 L. R. A. 728, an action by a husband against the defendant company for failure to deliver a message from the plaintiff to a physician summoning the latter to his wife's bedside, it was held that the death of the child before birth and the grief and sorrow occasioned thereby could not be shown as an element of damages.

In *Western Union Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151, the evidence showed that the plaintiff's alleged damages resulted not from loss dependent upon the state of his contract with his customer as that contract actually existed at the time of the default by the telegraph company, but by reason of failure to obtain a modification of that contract according to a proposition which the plaintiff intended to make and which the customer would have accepted if it had been made, neither of them in fact knowing the state of mind of the other on the subject until it was too late to make the modification or agree upon it; and it was held that the damages were too remote and uncertain to be the basis of a recovery for delay in delivering a telegram and for exposure of its con-

tents to the customer before delivery, thus causing the customer to take action contrary to the plaintiff's probable interest which otherwise he would not have taken.

A telegraph company is not liable to the sendee of a telegram for expenses alleged to have been occasioned by negligent delay in delivering the telegram, where it is obvious that the incurring of such expenses was totally unnecessary. *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638.

In *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880, where the defendant company failed for several days to deliver a message to the plaintiff, announcing the dangerous illness of his father, it was held that the plaintiff could not show that if the message had been delivered to him within a reasonable time he would have reached his father before his death, and have received from him a donation, because such a claim is too remote and uncertain to constitute an element of damage; that considering the nature of the message, the parties to the sending of it could not have contemplated that such a loss would arise from a breach of the contract.

58. *United States*. — *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Cahn v. Western Union Tel. Co.*, 48 Fed. 810, 1 C. C. A. 107; *McBride v. Sunset Tel. Co.*, 96 Fed. 81.

Arkansas. — *Western Union Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81.

California. — *Pacific Pine Lumb. Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103; *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75.

Iowa. — *Bennett v. Western Union Tel. Co.*, 129 Iowa 607, 106 N. W. 13.

Kentucky. — *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880.

New York. — *Baldwin v. United States Tel. Co.*, 45 N. Y. 444, 6 Am. Rep. 165.

d. *Special Circumstances.* — (1.) *Generally.* — The rule in respect of special circumstances as affecting the damages proper to be shown and allowed in an action against a telegraph company, is that if the special circumstances under which the contract was actually made were communicated to or known by the defendant company, and known to both parties, the damages resulting from the breach of such a contract would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.⁵⁹ But, on the other hand, if

South Carolina. — Harmon v. Western Union Tel. Co., 65 S. C. 490, 43 S. E. 959.

Texas. — Western Union Tel. Co. v. Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133.

Washington. — Martin v. Sunset Tel. & Tel. Co., 18 Wash. 260, 51 Pac. 376.

West Virginia. — Beatty Lumb. Co. v. Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

It is not permissible to "indulge in speculation as to what might or might not have happened if the telegram had been correctly transmitted. To do so would be to concern ourselves about speculative damages, which are not recoverable." Hughes v. Western Union Tel. Co., 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782.

Loss of Benefit of Contract liable to be defeated by the will of the other party thereto cannot be shown as the basis of an award of actual damages; the benefits are entirely speculative. Merrill v. Western Union Tel. Co., 78 Me. 97, 2 Atl. 847.

In Western Union Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719, an action against a telegraph company for damages resulting from an inaccurate transmission of a message, in consequence of which a horse belonging to the plaintiff was shipped to a wrong place and the plaintiff deprived of his use at a race, it was held that the plaintiff could not show the loss of anticipated gains based upon the probability of the horse being able to win prize purses at the race in question.

In Kopperl v. Western Union Tel. Co. (Tex. Civ. App.), 85 S. W. 1018, the plaintiff in answer to a message informing him of his wife's illness

wired to her asking her if he should come to her, and her reply message was not delivered, in consequence of which he went to her; and it was held that what he might have earned at his occupation, which was that of an attorney at law, during the time of his absence, was not in contemplation by the parties in their transactions with each other, and that such damages were too uncertain and remote to form a basis for recovery.

^{59.} *Alabama.* — Western Union Tel. Co. v. Way, 83 Ala. 542, 4 So. 844.

Arkansas. — Western Union Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649.

Colorado. — Western Union Tel. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393.

Iowa. — Evans v. Western Union Tel. Co., 102 Iowa 219, 71 N. W. 219.

Mississippi. — Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152.

Missouri. — Melson v. Western Union Tel. Co., 72 Mo. App. 111.

South Carolina. — Capers v. Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537.

Texas. — Reliance Lumb. Co. v. Western Union Tel. Co., 58 Tex. 394, 44 Am. Rep. 620; Western Union Tel. Co. v. J. A. Kemp Shoe Co. (Tex. Civ. App.), 28 S. W. 905.

In Parks v. Alta California Tel. Co., 13 Cal. 422, 73 Am. Dec. 589, where the plaintiff had sent a message to his agent instructing the latter to secure by attachment a debt due the plaintiff from a third person, and by reason of delay in its transmission and delivery other creditors attached and exhausted the assets of the debtor, it was held that plaintiff was entitled to show on the question

these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.⁶⁰

(2.) Message in Cipher or Unintelligible Except to Sender and Sendee.

(A.) **GENERALLY.** — The general rule is that if the message in controversy was in cipher and intelligible only to the sender and addressee, and neither its purport, nor character, nor importance is known to the company, nominal damages only can be awarded for negligence or default in its transmission or delivery.⁶¹

of his damages, not only the cost of sending the message, but also the amount of his claim lost through the company's negligence, as the natural and proximate damages resulting from the breach of contract.

In *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790, where the message read as follows: "You had better come and attend to your claim at once," it was held that the addressee was, in an action to recover for damages resulting from the negligence of the company in transmitting and delivering the message, entitled to show the amount of the claim lost to the plaintiff as the result of the negligence, together with the cost of the message and legal interest to the day of the trial.

60. *Hadley v. Baxendale*, 9 Exch. (Eng.) 341, 354, 2 C. L. R. 517, 23 L. J. Ex. 179. See also *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554.

Other and special damages are not recoverable unless the language of the message or extraneous information bring them within the contemplation of the parties. *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, 8 So. 746. In this case the message in controversy was to the plaintiff, an attorney at law, requesting him to come on the first train to a neighboring town and requesting an answer; and it was held that in the absence of proof that the company was informed by the message itself or otherwise that loss of fees which he would have probably earned would probably result from delay in the de-

livery of the telegram, the company was not liable therefor.

Plaintiff's Losses on Contracts carried over from the previous year, and his purchase of one thousand bales of cotton a few days before he received the offer of his foreign correspondent, are special circumstances, which, not having been communicated to the agent of the telegraph company, cannot be considered in estimating his damages for the failure to forward his message accepting the offer. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

In *McCarty v. Western Union Tel. Co.*, 116 Mo. App. 441, 91 S. W. 976, it was held that the Missouri statute subjecting telegraph companies organized under the laws of Missouri to liability for special damages occasioned by their failure or neglect in receiving, copying, transmitting and delivering messages does not apply to foreign telegraph companies.

61. *United States.* — *Primrose v. Western Union Tel. Co.*, 154 U. S. 1. *California.* — *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119.

Florida. — *Western Union Tel. Co. v. Wilson*, 32 Fla. 527, 14 So. 1, 37 Am. St. Rep. 125.

Illinois. — *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474.

Maryland. — *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

Minnesota. — *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155.

A Contrary Doctrine prevails in several states, however, and the damages proper to be shown and recovered for the negligence of the company are not affected by the fact either that the message was in cipher or that the company had no information of special circumstances making it important, except such as the message itself may convey.⁶²

(B.) COMMUNICATION OF SPECIAL CIRCUMSTANCES. — (a.) *Generally.* It is not material, however, how the information of such special circumstances was communicated to the company; the only thing essential is that the company shall have had knowledge thereof when the contract of sending was entered into.⁶³ And of course in all such cases extrinsic evidence is admissible to show that the company had notice of the importance of the message.⁶⁴

Missouri. — Hughes v. Western Union Tel. Co., 79 Mo. App. 133; Melson v. Western Union Tel. Co., 72 Mo. App. 111.

Nevada. — Mackay v. Western Union Tel. Co., 16 Nev. 222.

New York. — Leonard v. New York Elec. Magn. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

North Carolina. — Cannon v. Western Union Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590.

Ohio. — Western Union Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

Pennsylvania. — Fergusson v. Anglo-American Tel. Co., 178 Pa. St. 377, 55 Atl. 979, 56 Am. St. Rep. 770, 35 L. R. A. 554.

South Carolina. — Pinckney v. Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765.

Texas. — Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; McAllen v. Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715; Daniel v. Western Union Tel. Co., 61 Tex. 452, 48 Am. Rep. 452.

Wisconsin. — Candee v. Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452.

The Reason Assigned for This Rule is that in such case it cannot be inferred that when the contract to transmit the message was entered into the company had in contemplation that any special damages might accrue should the message be erroneously transmitted, or that any special damages would naturally arise from a failure to transmit cor-

rectly. Hughes v. Western Union Tel. Co., 79 Mo. App. 133. See also Abeles v. Western Union Tel. Co., 37 Mo. App. 554.

62. American Union Tel. Co. v. Daugherty, 89 Ala. 191, 7 So. 660; Daugherty v. American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; Dodd Groc. Co. v. Postal Tel. Cable Co., 112 Ga. 685, 37 S. E. 981; Western Union Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; Western Union Tel. Co. v. Reynolds Bros., 77 Va. 173, 46 Am. Rep. 715.

The damages recoverable against a telegraph company, for the failure to send a cipher message, is the same as if the message was expressed in ordinary language, and it is not necessary that its meaning should be explained to the receiving agent of the company. Western Union Tel. Co. v. Way, 83 Ala. 542, 4 So. 844.

63. McColl v. Western Union Tel. Co., 44 N. Y. Super. Ct. 487. See also Western Union Tel. Co. v. Valentine, 18 Ill. App. 57; Western Union Tel. Co. v. Houston Rice Mill Co. (Tex. Civ. App.), 93 S. W. 1084.

Where the Agent Knew of the Importance of prompt transmission and delivery of the message, or could have discovered it from the terms of the telegram or from other telegrams in reference to the same matter, the company is chargeable with knowledge of that fact. Erie Tel. & Tel. Co. v. Grimes, 82 Tex. 89, 17 S. W. 831.

64. McPeck v. Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

The Constant Use in Telegrams of Words which, although peculiar, are well understood in the trade, may be considered in determining whether or not such words were sufficiently intelligible to put the company on notice that the message was important.⁶⁵

(b.) *Message Giving Evidence of Character and Importance.* — When the language of the message is such as of itself to make apparent the fact that the message is important, or to warn the company that negligence in its transmission or delivery will likely result in loss, the rule confining damages to merely nominal damages does not govern.⁶⁶

A Message Advising the Addressee That His Debtor Is in Failing Circumstances, or directing the sender's attorney to attach property, is sufficient to put the company on notice that negligence in the transmission or delivery of the message may cause the loss of the debt so as to take the case out of the rule as to nominal damages.⁶⁷

See also *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 329, 15 Am. St. Rep. 835.

In *Western Union Tel. Co. v. O'Fiel* (Tex. Civ. App.), 104 S. W. 407, the admission of evidence that the sender had advised the transmitting operator that the plaintiff was at work in a certain store at the place addressed, on the ground that it served to vary a message which was a written instrument was objected to. But the court held the point as presented to be without merit. "The admission of the evidence was justified by the principle announced in those cases, holding that oral notice to the sending agent of the relationship of the parties concerned or the importance of the message serves to charge the company with the knowledge thus conveyed. We can see no reason why it is not admissible as any information furnished from any other source would be admissible as to the whereabouts of plaintiff in aid of the accomplishment of the undertaking to find him."

65. *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

66. *Georgia.* — *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

Illinois. — *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Postal Tel. C. Co. v. Lathrop*, 131

Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474.

Indiana. — *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

Iowa. — *Herron v. Western Union Tel. Co.* 90 Iowa 129, 57 N. W. 696; *Hendershot v. Western Union Tel. Co.*, 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313.

Missouri. — *Strahorn-Hutton-Evans Com. Co. v. Western Union Tel. Co.*, 101 Mo. App. 500, 74 S. W. 876.

Ohio. — *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

Pennsylvania. — *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751.

Tennessee. — *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

Texas. — *Western Union Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. 432; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790; *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181; *Western Union Tel. Co. v. Williford*, 2 Tex. Civ. App. 574, 22 S. W. 244.

Utah. — *Brooks v. Western Union Tel. Co.*, 26 Utah 147, 72 Pac. 499.

West Virginia. — *Beatty Lumb. Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

67. *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166; *Martin v. Western Union*

(c.) *Knowledge of Importance of Message Otherwise Than From Message Itself.* — The importance of the message need not necessarily be apparent from the message itself, in order to permit proof of substantial damages; that fact may become known to the company from other sources.⁶⁸

In order that the rule permitting nominal damages only may not govern, it is not necessary that the message disclose the particular business contemplated, nor the details of the transaction to which the message relates.⁶⁹

Knowledge Derived From Other Messages. — Thus, in determining that the company had knowledge of the importance of the message in question, it is proper to consider that the operator knew or should have known the importance of the message from other messages handled by him relating to the same transaction.⁷⁰

e. *Particular Elements Proper To Be Inquired Into.* — (1.) **Loss of Employment.** — When the negligence or default of the telegraph company in the transmission or delivery of a message results in the loss of employment, the injured party is entitled to show the amount so lost to him.⁷¹ Of course in determining the damages so to be

Tel. Co., 1 Tex. Civ. App. 143, 20 S. W. 860.

68. *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835.

See also *Western Union Tel. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554.

In *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526, 69 S. W. 181, where it appeared that the defendant company received for transmission from the plaintiff, which was known to it to be dealing in and selling cotton and whose messages were all "rush" messages, a message partly in cipher but commencing "All right, sell," it was held that the message was sufficient to charge the company with notice that it related to a cotton transaction and was important.

69. *Fererro v. Western Union Tel. Co.*, 9 App. D. C. 455; *Evans v. Western Union Tel. Co.*, 102 Iowa 219, 71 N. W. 219; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

70. *Postal Tel. Cable Co. v.*

Lathrop, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Western Union Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707.

71. *Western Union Tel. Co. v. Hines*, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

In *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, the plaintiff had sent a telegram to a person named at Kansas City, Missouri, stating a time at which he would arrive and meet such person. The message as transmitted was incorrect as to the time when the plaintiff was to meet the addressee, in consequence of which the plaintiff lost a promised employment, and it was held that the company was liable for damages.

In *Western Union Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584, it appeared that the plaintiff, a school teacher, had sent the message in question accepting an offer as teacher, but that the telegram was not promptly delivered, as a result of which the plaintiff lost a contract which he was negotiating to teach a certain school as principal for the ensuing scholastic year; and it was held that the company was

awarded the circumstances surrounding the transaction, the character of the employment in question and its probable duration are to be considered.⁷² But it is not enough in such case to show that the plaintiff merely lost the opportunity of securing the contract of employment,⁷³ and the fact that the loss of employment was due to the negligence of the company must be established by competent evidence.⁷⁴

The Difference Between the Amount of Salary which the injured party would have earned in the employment in question and what he did actually earn, is ordinarily regarded as measuring the damages to which he is entitled.⁷⁵

liable for the difference between the salary the plaintiff would have received and that which he did receive as teacher of another school, although it further appeared that at the time of the default complained of the plaintiff had not received the requisite teacher's certificate for the ensuing year; but it further appearing that the certificate had been afterwards procured by him in time for the position so lost.

Where one having an offer of employment at a specific compensation per month, properly delivered to a telegraph company for transmission a message accepting the offer, and the company failed to transmit and deliver the message, in consequence of which the offer expired by reason of non-acceptance within the time limited in its terms, and thus the opportunity of employment was lost, the sender of the message may recover of the company for its breach of duty such damages as he actually sustained by reason of the failure to transmit and deliver his message of acceptance. *Prima facie* such offer of employment would cover the term of at least one month; and if he remained unemployed for that length of time and could not obtain employment elsewhere, he would be entitled to recover at least one month's wages. *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194.

^{72.} *Western Union Tel. Co. v. Pallotta*, 81 Miss. 216, 32 So. 310.

^{73.} *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366.

Failure to deliver a telegram which was merely an invitation to come and contract for certain work, being a mere possibility of a contract, is

too uncertain upon which to base judgment for damages. *Harmon v. Western Union Tel. Co.*, 65 S. C. 490, 43 S. E. 959.

In *Merrill v. Western Union Tel. Co.*, 78 Me. 97, 2 Atl. 847, the contract in question was one whereby the plaintiff was to work for the sender of the telegram at a stipulated wage per day, commencing on a certain day, but for no stipulated period; and it was held that since such a contract was defeasible at the will of either party, the telegraph company was liable only for nominal damages for failure to deliver the telegram promptly, notifying the plaintiff of the terms of the contract, whereby he lost the benefit of it.

^{74.} *Western Union Tel. Co. v. Pallotta*, 81 Miss. 216, 32 So. 310; *Freeman v. Western Union Tel. Co.*, 93 Ga. 230, 18 S. E. 647.

Hearsay Evidence Not Admissible.

Mondon v. Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853. In this case the plaintiff had sent a message accepting an offer of employment previously tendered to him, but the message was not delivered promptly in consequence whereof plaintiff claimed to have lost the position offered him, and it was held that he could not prove declarations of the person making the offer to the effect that the plaintiff would have been employed if his message had been duly received, or that he lost the situation tendered him because of delay in the delivery of the message, these declarations having been made after the situation in question had been in fact given to another.

^{75.} *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E.

(2.) **Loss of Professional Fees.**—Where the negligence of a telegraph company in the transmission or delivery of a message deprives a professional man of the opportunity of serving another in a professional capacity, thereby losing a fee which he might have secured, he is entitled to show by way of damages the amount of the fee he would have earned,⁷⁶ although it is held that it must appear that the company, either from the message itself or from some other source knew, or should have known, of the nature or importance of the message.⁷⁷ And some of the courts limit this rule by holding that from the amount of the fee so shown there should be deducted the amount the party earned at home during the time he would have been absent.⁷⁸

Speculative Damages.—But in order to come within the rule just stated it must be shown that the employment was not conjectural or contingent upon circumstances; otherwise the damages claimed fall within the rule excluding proof of merely speculative damages.⁷⁹

(3.) **Sale and Purchase of Property.**—(A.) **GENERALLY.**—A vendor of property who has suffered the loss of a sale through the negligence of a telegraph company in the transmission or delivery of a telegram may, on the question of the damages to which he is entitled, show the difference between the price which he would have realized had the sale been effected, and the market value of the property,⁸⁰ to-

894; *McGregor v. Western Union Tel. Co.*, 85 Mo. App. 308.

76. *Western Union Tel. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36; *Fairley v. Western Union Tel. Co.*, 73 Miss. 6, 18 So. 796.

A telegraph company sued for undue delay in the delivery of a message to a physician living at or near the terminal office and but a few miles distant from the sending office, cannot be permitted to show that it was not the custom or habit of the physician to answer professional calls at a distance without prepayment of his charges or a guarantee of payment. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148, *holding*, however, that though if it were shown that the physician would not have answered the call if the message had been promptly delivered, this might show that the plaintiff had suffered no injury from the delay.

77. *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, 8 So. 746; *Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67.

78. *Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339.

79. *Walser v. Western Union*

Tel. Co., 114 N. C. 440, 19 S. E. 366; *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75; *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316.

80. *Purdum Naval Stores Co. v. Western Union Tel. Co.*, 153 Fed. 327; *Western Union Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Evans v. Western Union Tel. Co.*, 102 Iowa 219, 71 N. W. 219; *Herron v. Western Union Tel. Co.*, 90 Iowa 129, 57 N. W. 696; *Western Union Tel. Co. v. Nye & Schneider Co.*, 70 Neb. 251, 97 N. W. 305; *Western Union Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336; *Brooks v. Western Union Tel. Co.*, 26 Utah 147, 72 Pac. 499.

Where the negligent delay of a telegraph company in the delivery of a message delivered to it for transmission by the plaintiff results in the loss to the plaintiff of a sale of a quantity of corn at a price above the market value of the corn at the time and place it would have been delivered, had such sale been made, the measure of damages is the difference in value between the price the plaintiff would have received for the corn, had the sale been made, and the

gether with the expense necessarily incurred by him as a result of the company's negligence;⁸¹ or as it is stated by some of the courts, the vendor is entitled to show the profits which he would have realized from the sale if it had been consummated.⁸²

market value of the corn at such time and place of delivery, unaffected by the price at which the plaintiff may have disposed of the corn after that time. *Western Union Tel. Co. v. Nye & Schneider Co.*, 70 Neb. 251, 97 N. W. 305.

Where sale effected by telegram is discovered, after delivery of goods, to be invalid by reason of the negligent alteration, by the telegraph company, of the seller's message, whereby the price was reduced, the company is liable to the seller for the difference between the real value of the goods and the price which the seller, by the exercise of due diligence, should, under the particular circumstances, have received. The difference between the prices named in telegram as sent and as delivered is not ordinarily the true criterion of damages in such case. But the difference between the prices named in telegram as sent and as received may be taken as basis of company's liability, where there is no evidence in record to show that such basis is unreasonable or unjust. *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

^{81.} *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515. See also *Manville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

But this rule does not extend to expenses which were not incurred or which might have been avoided. *Western Union Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336.

^{82.} *Western Union Tel. Co. v. Lindley*, 89 Ga. 484, 15 S. E. 636; *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 370; *Postal Tel. Co. v. Rhett* (Miss.), 33 So. 412, 35 So. 829; *Wallingford v. Western Union Tel. Co.*, 53 S. C. 410, 31 S. E. 275. See also *Western Union Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83.

The loss of profits from a sale of horses resulting from the failure of

a telegraph company to deliver a telegram directing the shipment of the horses to a specified place may be shown by the owner of the horses as damages naturally arising from the breach of the contract. *Evans v. Western Union Tel. Co.*, 102 Iowa 219, 71 N. W. 219.

Where a person has sold live stock for future delivery at the option of the purchaser, and the latter sends a telegram notifying the former that he will take the stock on the morning of the next day, in pursuance of a custom among stock dealers to take and weigh stock at early daylight, which message the telegraph company fails to deliver with promptness, the loss of weight so resulting from the company's default may be shown by the seller on the question of damages suffered by him. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

In *Western Union Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. 111, where the owner of a certain quantity of cotton had stored it with a factor in a distant city with instructions not to sell for less than a stated price, and the factor had delivered a message to the telegraph company directed to the owner stating that he could sell at a price less than that at which he was instructed to sell and the company incorrectly transmitted the message so as to make it read that the cotton could be sold at the price designated by the owner, whereupon the principal directed the factor to sell and he sold at the lesser price, and the market price shortly afterwards reached the price designated by the owner as the selling price, it was held that the measure of damages recoverable was the difference between the amount realized from the sale at the price at which the cotton was sold and that which could have been realized from a sale after the rise in the market price less the increased expenses to which the owner would have been put by holding the cotton in the meantime.

Loss Must Be Established. — In such an action it is incumbent upon the plaintiff to show the loss for which recovery is sought; the mere fact of negligence on the part of the company is not sufficient to raise a presumption of actual loss.⁸³

Profits Must Be Certain. — So, too, it must be shown that the profits sought to be recovered were reasonably certain, and not merely speculative or conjectural.⁸⁴

Proposal to Sell. — Compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell, since in such case they are contingent upon the acceptance of the proposal.⁸⁵

(B.) **TELEGRAM ORDERING GOODS.** — In the case of a telegram ordering goods the party injured by the default of the company is entitled to show, on the question of damages, the difference between the price he would have been obliged to pay for the goods and that which he was or would be obliged to pay at the same place in order to purchase a like quantity and quality of goods, in the exer-

Where plaintiff's telegram was sent in reply to an offer by his foreign correspondent to buy and sell cotton on different days in the future, and was an acceptance of the offer, the damages for a failure to send it are to be estimated on an acceptance of the offer as an entire contract; and if profits would have accrued to plaintiff from one part of the contract but losses would have resulted from the other, he can only recover the difference in his favor. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

83. *Mickelwait v. Western Union Tel. Co.*, 113 Iowa 177, 84 N. W. 1038; *Pennington v. Western Union Tel. Co.*, 67 Iowa 631, 24 N. W. 45, 25 N. W. 838, 56 Am. Rep. 367. See also *Western Union Tel. Co. v. Aubrey*, 61 Ark. 613, 33 S. W. 1063; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

Failure of a telegraph company to deliver a message whereby a purchase of property in the market was not consummated will not entitle the sender to recover more than nominal damages, although the property advanced in value before the delay was discovered, if no purchase was subsequently made and there is no evidence that if it had been made the property so purchased would have been sold at a profit. *Western Union Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81.

84. *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Reliance Lumb. Co. v. Western Union Tel. Co.*, 58 Tex. 395, 41 Am. Rep. 620.

85. *Beatty Lumb. Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Richmond Hosiery Mills v. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290.

Compare Lathan v. Western Union Tel. Co., 75 S. C. 129, 55 S. E. 134, where it was held that for the failure to deliver a commercial telegram offering a lot of goods at a certain price, which was the direct and proximate cause of delay on the part of the addressee in postponing the purchase of the goods, whereby he was compelled when he went into the market later to buy at an advanced price, he would be entitled to damages, although there was no evidence establishing the fact that he would have accepted the offer; but that such evidence was admissible as showing the intent and motive of the addressee, in postponing the purchase, as explanatory of the delay: *Disapproving Beatty Lumb. Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. The court, in speaking of the latter case, said: "It is predicated upon the theory that, when there is a failure to de-

cise of due diligence, after having knowledge of the company's default.⁸⁶ But he must, in order to recover, show that the goods could or would have been shipped to him if the message had been promptly sent and delivered.⁸⁷

Delay in Delivery. — So, too, where the action is based on delay in delivery of the message the same rule applies as in the case of non-delivery.⁸⁸

Erroneous Transmission. — Where a purchaser receives an excess of goods as a result of an error in the transmission of the message, he may on the question of damages show the difference between the market value of such excess at the place of shipment and that at the place to which they were shipped, together with the expense of transportation.⁸⁹

liver a telegram containing an offer to sell, and the market advances in price, the addressee cannot recover damages, unless it is made to appear that he would have accepted the offer; and that the testimony of the addressee that he would have accepted the offer cannot be considered in determining the company's liability, on the ground that it is conjectural and uncertain. The fallacy in the reasoning of the court in that case is in supposing that the telegraph company would not be liable, unless it was shown that the addressee would have accepted the offer."

86. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Squires v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751; *Carver v. Western Union Tel. Co.* (Tex. Civ. App.), 31 S. W. 432. See also *Walden v. Western Union Tel. Co.*, 105 Ga. 275, 31 S. E. 172; *Hays v. Western Union Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481.

In an action against a telegraph company for damages for failure to transmit a message containing an order for goods which had before the delivery of the message to the company been sold by the sender, profits lost by the failure to receive the goods as a result of the negligence of the company are not too remote to be shown and recovered.

Walden v. Western Union Tel. Co. 105 Ga. 275, 31 S. E. 172.

In *Western Union Tel. Co. v. Thompson Milling Co.* (Tex. Civ. App.), 91 S. W. 307, it appeared that because of the negligent failure of the defendant company to deliver a message ordering a certain quantity of wheat the plaintiff lost the opportunity to buy the wheat at a certain price, the wheat subsequently advancing, and it was held that because it did not thereafter buy any wheat at the advanced price did not preclude it from showing as its damages the difference between what it would have been able to buy for in the open market, and the price at which it could have obtained the wheat if the telegram had been delivered.

87. *Cahn v. Western Union Tel. Co.*, 46 Fed. 40, 48 Fed. 810, 1 C. C. A. 107; *Meggett v. Western Union Tel. Co.*, 69 Miss. 198, 13 So. 815.

88. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021.

Negligent delay in delivering a telegram which merely rejected plaintiffs' offer to buy goods on certain terms did not entitle them to recover damages on account of their failure to make the purchase on other terms, as they might or would have done had the telegram been seasonably delivered. Such damages are not the proximate result of the company's breach of duty. *Fisher v. Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545.

89. *Leonard v. New York Electro*

Speculative Profits. — But the rule under discussion does not permit proof of profits which the plaintiff might have realized from a resale not then agreed on or effected.⁹⁰ Otherwise, however, if the plaintiff and his vendor had reached an agreement for a definite quantity at a stated price, and plaintiff had, assuming that his message would be promptly sent and delivered, resold the goods to be delivered upon their arrival,⁹¹ although it has been held that before such evidence can be received it must appear that the company had or was chargeable with notice of the facts.⁹²

Where the Subject of the Sale Is Bonds, stock or other securities the inquiry should be as to the increase in the loss, if any, sustained by the purchaser through the error in the transmission making the amount purchased larger.⁹³ So, too, where but for the error in transmission there would have been a larger profit, the loss or decrease in the profit realized may be shown.⁹⁴

Where the Goods Are Shipped to the Wrong Destination in consequence of the company's error, the difference between the price obtainable at the proper destination and the market value, or the best obtainable price at the place to which they were sent, may be shown.⁹⁵

(C.) **MESSAGE DIRECTING PURCHASE OR SALE.** — Again, where a message directing the sender's agent, or some one on his behalf, to purchase certain property, or a stated quantity of certain goods, is not transmitted or delivered, or is unreasonably delayed in transmission or delivery, or is erroneously transmitted, the party injured in consequence of such default may show the actual loss incurred by him.⁹⁶

Magn. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; New York Prtg. Tel. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338.

90. Western Union Tel. Co. v. Hall, 124 U. S. 444; Western Union Tel. Co. v. Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; Squire v. Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Hubbard v. Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775. See also Bennett v. Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13.

91. Walden v. Western Union Tel. Co., 105 Ga. 275, 31 S. E. 172; Western Union Tel. Co. v. Landis (Pa.), 12 Atl. 467; Western Union Tel. Co. v. Brown, 84 Tex. 54, 19 S. W. 336.

92. Western Union Tel. Co. v. Thomas, 7 Tex. Civ. App. 105, 26 S. W. 117.

93. Washington & N. O. Tel. Co. v. Hobson & Son, 15 Gratt. (Va.) 122.

94. Marr v. Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

95. Western Union Tel. Co. v. Reid, 83 Ga. 401, 10 S. E. 919; Western Union Tel. Co. v. Stevens (Tex.), 16 S. W. 1095.

In *Olympe de la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, it appeared that a telegram had been sent to the plaintiff ordering certain goods to be sent to a point named in the telegram, but that the telegram as received directed the goods to be sent to another point, to which they were sent, and after some months were returned and tendered to the plaintiff, and the damages fixed by experts at a certain amount for which damage was rendered.

96. Bartlett v. Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437; United States Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 751; Marr v. Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496; Washington & N. O. Tel. Co. v. Hobson & Son, 15 Gratt. (Va.) 122; Pennington v. Western Union Tel. Co., 67 Iowa 631, 24 N. W. 45, 25 N. W. 838, 56 Am. Rep. 367.

And the same rule applies in the case of a telegram directing a sale of property.⁹⁷

In *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673, the message in controversy was one instructing the plaintiffs' brokers to "buy five Hudson," but as transmitted and delivered it read, "buy five hundred." Upon learning of the mistake, the plaintiffs again telegraphed to their brokers, but owing to the delay so occasioned the plaintiffs lost by the advance in the price of the stock ordered to be purchased, several hundred dollars. It was held that this sum was the measure of their damages.

Message Directing Sender's Agent To Buy or Sell.—Where a message directing the sender's agent to close an option to buy is so delayed that it does not reach the agent until after the option has expired, the difference between the price fixed by the option and the market price at the same place on that day may be shown. *Brewster v. Western Union Tel. Co.*, 65 Ark. 537, 47 S. W. 560, *holding*, however, that subsequent speculative advances cannot be considered.

97. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Hocker v. Western Union Tel. Co.*, 45 Fla. 363, 34 So. 901; *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 So. 418; *Western Union Tel. Co. v. Stevens* (Tex.), 16 S. W. 1095. See also *Western Union Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336; *Western Union Tel. Co. v. Wilhelm*, 48 Neb. 910, 37 N. W. 870; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; *Western Union Tel. Co. v. Simpson*, 64 Kan. 309, 67 Pac. 839, *reversing* 10 Kan. App. 473, 62 Pac. 901.

In *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, the message was, "Sell one hundred (100) Western Union; answer price." The message as delivered read, "Sell one thousand (1000)," instead of "one hundred (100)." The message was intended as an order to sell one hundred shares of

stock in Western Union Telegraph Company. The agent, obeying the order as delivered, sold one thousand shares of said stock, and to fill the order was compelled to buy nine hundred (900) shares. It was held that the plaintiff was entitled to recover the difference between the price for which the shares of stock were sold and that which he was compelled to pay for those purchased.

In *Herron v. Western Union Tel. Co.*, 90 Iowa 129, 57 N. W. 696, where the sale of a horse, which had no regular market value in the neighborhood where kept, failed because of the delay in a message to the owner containing an offer for the purchase of the horse, and it was sold later at the best price obtainable with reasonable effort; it was held that the owner might show on the question of damages the difference between the price offered in the message and that actually realized, together with cost of keeping from the date of the offer, and interest.

In *Leonard v. New York & B. Electro Magn. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446, the plaintiffs were manufacturers of salt at Syracuse, having an agent at Chicago and another at Oswego, the shipping port for their product. Their agent at Chicago telegraphed their agent at Oswego to send 5000 sacks of salt to Chicago immediately, but as delivered to the agent at Oswego the telegram read casks instead of sacks. It appeared that fine salt was put up in sacks, while coarse salt was in casks. The agent shipped the 5000 casks as directed by the telegram. On arrival of the salt at Chicago there was no market for it, and after storage for some time it was finally sold at less than the market price at Oswego. In an action by the plaintiffs to recover damages it was held that the measure of their damages was the difference between the market value of the salt at Oswego and what it actually sold for at Chicago, together with the expense of transportation.

(D.) MESSAGE GIVING PRICE. — Where a message giving prices is erroneously transmitted, the party injured in consequence of having acted on the message may show the amount of his actual loss caused by the decrease in the price he actually obtained.⁹⁸ And where the party injured by such a message is a purchaser, he may show the increased price which he is obliged to pay because of the error.⁹⁹

(E.) MESSAGE ADVISING AS TO STATE OF MARKET. — Where a message directed to a person contemplating making a shipment of goods advising him as to the state of the market is delayed or not delivered, in consequence whereof he ships to a less favorable market, he may show the difference between the market prices prevailing at the two places at the time, together with the increased cost of transportation.¹

In *Western Union Tel. Co. v. North Pkg. & Prov. Co.*, 188 Ill. 366, 58 N. E. 958, where the message in question was one directing the plaintiffs not to buy, and in consequence of delay in its delivery the agent had already purchased a large quantity of the articles, the agent's only authority being to buy and ship according to instructions sent him from time to time, it was held that on the question of damages the plaintiff was entitled to show the difference between the price paid and the prevailing market price at the time when, in the exercise of reasonable promptness, plaintiffs' agent could have notified plaintiff and received instructions.

Where the message in question directed the sender's agent to sell a specified number of certain stocks then held by the sender for a customer, but the message as delivered directed the sale of a larger number of stocks, whereupon the addressee sold that amount, having to go into the market to buy the residue, the rule is that if the sender of the message was compelled and did purchase stocks to replace the stock sold by reason of the error in the message, and if in the interval between such selling and the repurchase to replace the extra number of stocks sold the stocks in question had advanced in price, this advance should be the measure of damages.

^{98.} *Western Union Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. 111; *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119; *Reed v.*

Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660. See also *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605.

In answer to a telegram to a lumber company asking whether it could furnish certain lumber and at what price, a reply telegram that it could furnish it at a certain price was delivered to a telegraph company for transmission, but was either never sent or never delivered. In an action for damages by the lumber company against the telegraph company the measure of damages is not the difference between the actual state of the delivered at the point of delivery and the fixed price, but the difference between such price and the market value of the lumber at the time when delivery would have been made, if the contract had been consummated. *Beatty Lumb. Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

^{99.} *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4.

^{1.} In *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515, it was held that where a telegraph company neglects to deliver a message to a live stock shipper as to the state of the market at a certain point, in consequence whereof the shipper sends his stock to the next nearest market, at which he receives a price less than the market price for the same stock ranged at the first point on the same day,

And if the message advises him not to ship, and in consequence of a delay in its delivery he ships when the market is unfavorable, he may show the difference between the value of the stock at the place of shipment and the price actually obtained together with the cost of transportation and the increased expense necessary to keep the stock at the market.²

In case of the non-delivery of the message, if the addressee has the right to believe that from the fact of his receiving no message, the market has not changed, and buys at the last prices given him, the excess of price which he paid over that which he would have

the shipper was entitled to show on the question of damages the difference between the market price of the two points, together with the difference in freight added.

The measure of damages against a telegraph company for deviating from the terms of a message correctly reporting the state of the market for a particular article which the receiver of the message is induced by it to send forward for sale, is the difference between the actual state of the market and the terms of the message as erroneously transmitted overstating it, provided the plaintiff's actual loss amounts to that much. *Hollis v. Western Union Tel. Co.*, 91 Ga. 801, 18 S. E. 287.

In *Hollis v. Western Union Tel. Co.*, 91 Ga. 801, 18 S. E. 287, the plaintiff's correspondent, in reply to a message inquiring as to the state of the market for watermelons, furnished to the company a message in these terms: "No melons on the market; will bring twelve to fifteen dollars per hundred." As transmitted by the company and delivered to the plaintiff it read thus: "No melons on the market; will bring twenty to twelve dollars per hundred." At the trial, the evidence in behalf of the plaintiff (the sender of the message being the witness) was: "I sent a dispatch, and it did give the correct market price of melons at the time. I do not remember the exact words of it, but it quoted melons at fifteen to twenty cents." In fact the message did not so quote them. It was held that a jury could infer from this evidence that the market was not as the witness remembered it, but as this message stated, that is, from twelve to fifteen

dollars per hundred, an average of thirteen and a half cents per melon, and that as the average per melon indicated by the erroneous message was sixteen cents, the plaintiff's loss may have amounted to two and a half cents per melon. It was held, further, that the plaintiff's misconduct or negligence in trying to sell the melons himself instead of employing a proper agent to do so, would not affect his right to recover, inasmuch as he realized less than the actual market price, and nothing appears to suggest even a possibility that more than the market price could have been realized. He should be treated as having obtained the market price, no matter how much less he did obtain or what caused him to do so.

In *Manville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8, an action against a telegraph company for damages resulting from failure to deliver a message for four days, directing the plaintiff to "ship his hogs at once," it was held that the plaintiff was properly permitted to show as damages the difference between the market value of the hogs on the day that plaintiff was enabled to place them on the market after receiving the message and their value on the day he could (had there been no delay in the delivery of the message) have gotten them into the market by the ordinary course of transportation.

2. *Western Union Tel. Co. v. Linney* (Tex. Civ. App.), 28 S. W. 234; *Western Union Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989. See also *Western Union Tel. Co. v. Linney* (Tex. Civ. App.), 28 S. W. 234.

paid but for the non-delivery of the message may be shown.³

Where one person in answer to a telegraphic inquiry from another asking for prices on goods, delivers to a telegraph company to be transmitted to the inquirer a telegram stating prices, and the telegram as delivered to the addressee states a price less than that named in the message as delivered for transmission, the sender is bound by the terms of the proposal as contained in the telegram delivered to the addressee, and may in an action against the telegraph company show on the question of damages the difference between the price stated in the telegram as delivered to the company and the price stated in the one as delivered to the addressee.⁴

(4.) **Mental Anguish.** — (A.) **STATEMENT AS TO CONFLICT OF AUTHORITIES.** Upon the question whether or not mental anguish or suffering, independent of, and disconnected with, any other loss or injury, alleged to have been sustained by the plaintiff in an action against a telegraph company for default or neglect in the transmission and delivery of a message, and independent of any statutory provision on the subject, can be considered as an element of damages, and evidence in relation thereto be received, is one upon which the courts are in irreconcilable conflict. Upon the one hand, numerous courts, and what appears to be the weight of authority, deny the doctrine that mental anguish alone can be so considered. While against this will be found arrayed the courts of several other states recognizing the doctrine, subject only to such qualifications and limitations as will be hereafter discussed.

(B.) **COURTS DENYING MENTAL ANGUISH DOCTRINE.** — (a.) *Generally.* As has just been stated, the courts in most of the states flatly refuse to recognize the doctrine that mental anguish alone can be considered as an element of damages in an action against a telegraph company, and of course in those jurisdictions evidence to prove the fact and extent of such anguish or suffering would not be received.⁵

3. In *Garrett v. Western Union Tel. Co.*, 92 Iowa 449, 58 N. W. 1064, the plaintiff had an arrangement with a Chicago firm that if he received no answer to a telegram asking for market prices in Chicago, such prices remained unchanged. He sent such a message requesting answer at Kansas City. The telegraph company knew that he bought for the Chicago market. Through its fault no answer was received. Plaintiff bought cattle at Kansas City on the assumption that Chicago prices last given him still ruled. It was held he can recover as damages the difference between the price ruling when last advised and that ruling in Chicago when he purchased at Kansas City. See also *Garrett v. Western Union Tel. Co.*, 83 Iowa 257, 49 N. W. 88.

4. *Western Union Tel. Co. v. Flint River Lumb. Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36.

5. *Dakota.* — *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408.

Florida. — *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810.

Georgia. — *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430.

Illinois. — *Western Union Tel. Co. v. Halton*, 71 Ill. App. 63 (the question seems not to have been presented to or passed upon by the supreme court of that state).

Indiana. — *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E.

674, 1080, 54 L. R. A. 846, (*overruling* Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163; Western Union Tel. Co. *v.* Adams, 28 Ind. App. 420, 63 N. E. 125, and other cases in that state which up to the time of the decision in the Ferguson case had recognized the mental anguish doctrine).

Kansas. — West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530 (this appears to be the latest telegraph case in that state involving the question; but that case has been *reaffirmed* in Kansas City, F. S. & M. R. Co. *v.* Dalton, 65 Kan. 661, 70 Pac. 645).

Maine. — Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303.

Minnesota. — Francis *v.* Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406.

Mississippi. — Western Union Tel. Co. *v.* Watson, 82 Miss. 101, 33 So. 76; Western Union Tel. Co. *v.* Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859.

Missouri. — Connell *v.* Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; Newman *v.* Western Union Tel. Co., 54 Mo. App. 434.

New York. — Curtin *v.* Western Union Tel. Co., 13 App. Div. 253, 42 N. Y. Supp. 1109.

Ohio. — Morton *v.* Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735; Kester *v.* Western Union Tel. Co., 8 Ohio C. C. 236.

Oklahoma. — Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087.

South Carolina. — In this state this question is regulated by statute. See *infra*, this section, "Statutory Enactments."

Virginia. — Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

West Virginia. — Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

Wisconsin. — Summerfield *v.* Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17.

In Peay *v.* Western Union Tel. Co., 64 Ark. 538, 43 S. W. 965, the

court said: "It will be borne in mind that the damages claimed in this case are alleged to have been caused by a breach of contract. In a majority of instances the breach of a contract merely causes disappointment, annoyance and more or less mental trouble or distress. But it would be an unwarranted stretch of the law, in our opinion, to hold that, for mental anguish caused by violation of a contract merely, damages could be recovered in an action at law. We do not think that damages for mental pain and suffering alone can be measured by any practical or just rule. It is asked, what difference can there be between allowing damages for mental pain and anguish unattended with physical injury, and allowing damages for pain and anguish resulting from physical injury? There is this difference with us,—that damages for mental pain and anguish caused by physical injury have always been allowed by law, while damages for mental pain and anguish, unattended with physical injury, have been allowed by law only since the decision of the So Relle case in 1881, when the Texas court departed from the doctrine of the common law, which we think sound, and announced a new doctrine, unsupported by the authority, as we believe, of any well-considered case before it. While we do not want to be understood as clinging to ideas and doctrines that are ancient, because they are ancient merely, if they are contrary to reason and right, yet we have great respect for the conservatism of the law, and will not depart from its long and well-settled doctrines, supported by eminent authority, and founded in reason and justice. Even if the difference in principle between allowing damages for mental pain and anguish, the result of physical injury, and disallowing damages for such pain and anguish unaccompanied by physical injury, be such as not to be defined—merely chimerical—this is no reason why we should say that damages for mental anguish, independent of physical injury, should be allowed. No statute allows them in such case; the common law does not allow them;

(b.) *Reason for Rule.* — Various reasons have been assigned by the courts in support of their position in this respect, but the one most usually given is that mental anxiety is of itself too refined and vague in its nature to be considered as a proper subject for compensation, except where, in case of personal injury, it is so inseparably connected with the physical pain that it cannot be distinguished therefrom, and is therefore considered a part thereof.⁶

(c.) *Statute Subjecting Telegraph Companies to Special Damages.* Nor will a statute subjecting telegraph companies to special damages occasioned by the negligent failure of their agents to deliver messages, and allowing the jury, in the determination of the question of damages, to consider the grief and mental anguish occasioned by such negligent failure, give any new cause of action for damages.⁷

(d.) *Rule in Federal Courts.* — In the federal courts the majority of the cases adhere to the rule denying the mental anguish doctrine;⁸

and, in our opinion, the weight of adjudication is against the right of recovery in such cases. In determining a principle in the law which, in its application, at least, seems to be new and but recently thought of, it is highly important to consider precedents, and is legitimate, in our view, to look to consequences that will follow, as certainly as night follows the day, from the recognition of a doctrine that will affect most seriously the welfare of the people. The intolerable and interminable litigation such a doctrine would foster is beyond the reach of an ordinary imagination." At the time this case was decided, the courts of that state denied the doctrine; but since then the legislature has changed the rule. See *infra*, "Statutory Enactments."

"The law protects the person and the purse. The person includes the reputation. *Johnson v. Bradstreet Co.*, 87 Ga. 79. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be

helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give, in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries." *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430.

6. *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 N. E. 1026. See also *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406.

7. *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

8. *Western Union Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281; *Stansell v. Western Union Tel. Co.*, 107 Fed. 668; *McBride v. Sunset Tel. Co.*, 96 Fed. 81; *Gahan v. Western Union Tel. Co.*, 59 Fed. 433;

but, while this is true, it is held that it is within the province of the state legislature to change that rule and affirm the doctrine;⁹ and in one case such a statute was applied.¹⁰

(C.) COURTS RECOGNIZING MENTAL ANGUISH DOCTRINE. — (a.) *Generally.* On the other hand, the courts of several of the states have, subject to certain qualifications to be hereinafter discussed, recognized mental anguish and suffering as a proper subject of compensation, and hence of course will permit it to be shown on the question of damages.¹¹

Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Tyler v. Western Union Tel. Co.*, 54 Fed. 634; *Kester v. Western Union Tel. Co.*, 55 Fed. 603; *Crawson v. Western Union Tel. Co.*, 47 Fed. 544; *Chase v. Western Union Tel. Co.*, 44 Fed. 554.

9. *Rowan v. Western Union Tel. Co.*, 149 Fed. 550.

10. *Western Union Tel. Co. v. Baker*, 140 Fed. 315, 72 C. C. A. 87, where the action was founded upon the Arkansas statute.

11. *Alabama.* — *Western Union Tel. Co. v. Long*, 41 So. 965; *Western Union Tel. Co. v. Blocker*, 138 Ala. 484, 35 So. 468; *Western Union Tel. Co. v. McNair*, 120 Ala. 99, 23 So. 801; *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 So. 607; *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. 45; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Iowa. — *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268.

Kentucky. — *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *Western Union Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963; *Western Union Tel. Co. v. Steenberg*, 107 Ky. 469, 54 S. W. 829; *Western Union Tel. Co. v. Johnson*, 107 Ky. 631, 55 S. W. 427; *Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428; *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; *Western Un-*

ion Tel. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880 (the leading case in that state); *Howard v. Western Union Tel. Co.*, 119 Ky. 625, 84 S. W. 765, 86 S. W. 982.

Louisiana. — *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 So. 91.

Nevada. — *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666.

North Carolina. — *Bryan v. Western Union Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Meadows v. Western Union Tel. Co.*, 132 N. C. 40, 43 S. E. 512; *Darlington v. Western Union Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493, 124 N. C. 459, 32 S. E. 746; *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429, 117 N. C. 352, 23 S. E. 277; *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669.

Tennessee. — *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *Western Union Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725.

Washington. — In this state there does not appear to be any decision upon a telegraph case, but the principle is fully recognized in *Davis v. Tacoma R. & P. Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802, in which telegraph cases are cited with approval.

Mental anguish resulting from failure of the plaintiff to be present

The addressee of a telegram announcing the sickness or death of a relative must in order to recover show that he would have gone to such relative or to his funeral in response to the telegram.¹²

Telephone Companies.—The rule applied to actions for damages against telegraph companies for non-delivery of messages in respect of mental anguish, applies to telephone companies.¹³

(b.) *Origin of Doctrine.*—The "mental anguish" doctrine, so-called, was first announced by the Texas court¹⁴ in 1881, basing their decision upon the language of a text-writer.¹⁵ And the courts

at his brother's funeral, caused by delay in the delivery of a telegram, may be considered as an element of damages in an action against the telegraph company for the delay. *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366, adhering to *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880, holding that mental anguish and injured feelings alone and unaccompanied with physical injury furnishes ground for recovery.

In *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579, the plaintiff having sent a telegram to his brother's wife in a distant town inquiring about the condition of his mother who was very ill and asking for an immediate answer, to which his brother replied, it was held that he might recover damages for his mental anguish and distress on account of the negligent delay in the transmission of the reply message which prevented his arrival at his mother's bedside until several hours after her death.

In *Hamrick v. Western Union Tel. Co.*, 140 N. C. 151, 52 S. E. 232, it appeared that the defendant delayed for twenty-eight hours to deliver the plaintiff the following telegram: "Come home at once; your wife is bad off"; that immediately upon its receipt he started home, having been informed of the delay, and on arriving found his wife very ill, and that she continued so for some weeks, but finally recovered, and it was held that there was some evidence of mental anxiety.

A wife cannot recover against a telegraph company for mental suffering caused by failure to deliver

a telegram to her husband announcing the death of her grandmother, whereby she was prevented from attending the funeral, no notice appearing that the purpose of the telegram was to bring her to the funeral. *Morrow v. Western Union Tel. Co.*, 107 Ky. 517, 54 S. W. 853.

12. *Howard v. Western Union Tel. Co.*, 119 Ky. 625, 84 S. W. 765, 86 S. W. 982. See also *Western Union Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 63 S. W. 341; *Western Union Tel. Co. v. Bell* (Tex. Civ. App.), 92 S. W. 1036.

13. *Cumberland Tel. & Tel. Co. v. Atherton*, 28 Ky. L. Rep. 1100, 91 S. W. 257. See also *Southwestern Tel. & Tel. Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076; *Sabine Valley Tel. Co. v. Oliver* (Tex. Civ. App.), 102 S. W. 925.

14. *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

15. *Shearman & Redfield on Neg.* The following is the language taken therefrom which the *So Relle* case refers to as the basis for its decision: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages."

of that state have steadily adhered to the doctrine,¹⁶ although there have been some apparent inconsistencies in the various decisions of the courts of that state.

(c.) *Rationale of Doctrine.* — The courts so holding generally proceed on the theory that by reason of the breach of the contract on the part of the company, or by virtue of statutes declaring the duties and fixing the liabilities of telegraph companies, the party claiming to be injured has a cause of action, and is accordingly entitled to compensation for the entire injury suffered by him in consequence of the company's default.¹⁷ The courts, however, do not present harmony of reasoning and uniformity of result. Some hold that mental anguish is not a cause of action, but is merely a dependent incident to be taken into consideration in addition to pecuniary dam-

16. *Western Union Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336; *Western Union Tel. Co. v. Rosenreter*, 80 Tex. 406, 16 S. W. 25; *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Loper v. Western Union Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; *Western Union Tel. Co. v. Seffel*, 31 Tex. Civ. App. 134, 71 S. W. 616; *Western Union Tel. Co. v. Kinsley*, 8 Tex. Civ. App. 527, 28 S. W. 831; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.), 100 S. W. 974; *Western Union Tel. Co. v. Shaw* (Tex. Civ. App.), 90 S. W. 58.

When injury to the feelings is the proximate result of the negligence of a telegraph company in the transmission or delivery of a message, such injury forms an element of the actual damage, and the mental suffering caused by and contemplated in the doing of the wrongful act is the principle of the liability, whether the mental suffering is an incident of bodily pain or not. *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

In *Western Union Tel. Co. v. De Andrea* (Tex. Civ. App.), 100 S. W. 977, where the telegram in controversy was one announcing the illness of the plaintiff's infant child, the evidence showed that although the child was only ten months old it was unusually intelligent, greatly attached to its father, and capable of manifesting its affection for him and appreciating the father's affection for it. And it was held that the father was entitled to recover for mental anguish resulting from his failure to reach the child's bedside before it lost consciousness prior to its death, although that time was only an hour or two.

In *Gulf, C. & S. F. Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689, an action to recover damages for delay in transmitting a message to a physician advising him of the illness of the sender's child and asking him to come at once, by reason of which delay the physician arrived too late and the child died after much suffering, it was held that the mental anguish suffered by the plaintiff as the proximate result of the failure upon the part of the defendant company to deliver the message according to the terms of the contract was ground for damages for which he was entitled to compensation.

17. See cases cited in preceding sections, also *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880.

ages shown,¹⁸ while others assert that it is an independent cause of action, a distinct element of damage. Some hold that negligence sufficient to uphold a recovery must be wilful; others that simple negligence will suffice.¹⁹ Some uphold the recovery on the ground of punishment;²⁰ others upon the ground of compensation,²¹ and some blend both grounds. And indeed this disparity exists not only between the courts of the different states entertaining this view, but in one instance is exhibited in the decisions of a single state.²²

18. This seems to be the rule in Alabama. See *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 So. 607; *Western Union Tel. Co. v. Adair*, 115 Ala. 441, 22 So. 73. Compare *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 So. 386; *Western Union Tel. Co. v. Blocker*, 138 Ala. 484, 35 So. 468; *Blount v. Western Union Tel. Co.*, 126 Ala. 105, 27 So. 779; *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; cited with approval in *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172.

In an action *ex contractu* against a telegraph company for unreasonable delay in the delivery of a telegram, the breach of contract being shown, damages for mental anguish may be recovered by way of aggravation although the plaintiff's actual damages are nominal. *Western Union Tel. Co. v. Manker*, 145 Ala. 418, 41 So. 850.

Where telegraphic messages addressed to a sister, informing her of the serious illness, and later of the death, of her brother, were negligently delayed in their transmission and delivery, so that the sister was denied the opportunity of attending on her brother in his last sickness, and making necessary preparations for his funeral, she has a clear right to recover of the company some damages for its breach of duty and contract; and may, in such case, recover, in addition, such further sum as will reasonably compensate for the grief, disappointment, or other injury to her feelings, occasioned by

such default of the company. *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

19. *Sherrill v. Western Union Tel. Co.*, 117 N. C. 352, 23 S. E. 277; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493.

20. *Poteet v. Western Union Tel. Co.*, 74 S. C. 491, 55 S. E. 113. See South Carolina cases cited, *infra*.

21. Damages for mental suffering are actual and compensatory. They are not special nor punitive, and are given to indemnify for the injury suffered. *Green v. Western Union Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985. And see other North Carolina cases cited, *infra*.

22. In *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, where the alleged negligence consisted of delay in delivering a telegram from the plaintiff's son announcing the death of the latter's wife and child, and requesting the aid and presence of the plaintiff, and damage was claimed on account of mental anguish caused by the consequent inability of the plaintiff to attend the funeral and minister to his son's comfort and necessities, it was held that the contract between the son and the company could not be a basis for recovery by the father; that the action could only be sustained under the facts by showing that the plaintiff was injured in his person, property or reputation by the negligence of the defendant company. The court further held that the cases in which damages had been allowed for mental suffering resulting from the injury to the person are those in which the mental distress is the incident to the bodily injury suffered by the distressed person, or those

(d.) *Statutory Enactments.* — In South Carolina the courts formerly adhered to the rule denying the allowance of proof of mental anguish as an element of damages in such cases.²³ But in 1901 the legislature of that state abrogated this rule, and enacted a statute making mental anguish, independent of any physical injury, an element proper to be considered.²⁴ And this statute has been upheld as constitutional.²⁵

And in Louisiana the question seems to be governed by a provision of the code.²⁶ So, too, in Arkansas prior to 1903, the courts of that state had denied the doctrine.²⁷ But in that year the legislature enacted a statute similar in terms to that of South Carolina.²⁸

where there is injury to the reputation or property in which pecuniary damage is shown, or where the act is such that the law presumes some damage, however slight, from the act complained of. This case *overruled* *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, in so far as that case held that an action for mental suffering alone could be maintained.

In *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, where the alleged negligence consisted of delay in the delivery of a telegram announcing the death of the sender's wife and child, and directed to his father requesting his aid and presence, it was held that the sender was entitled to recover against the company over and above the amount he paid for the transmission of the message, if there was wilful or gross negligence in failing to deliver the message, such an amount of exemplary damages as the jury might award under proper instructions.

23. In South Carolina prior to the act of February 20, 1901, damages for mental suffering disconnected with and in the absence of bodily injury were not recoverable. *Lewis v. Western Union Tel. Co.*, 57 S. C. 325, 35 S. E. 556. And see *Butler v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

24. The Legislature of That State in 1901 passed the following act as a declaration of public policy, to wit: "All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury for negligence in receiving,

transmitting or delivering messages. . . . In all actions under this act the jury may award such damages as they conclude resulted from negligence of such telegraph companies."

South Carolina statute permitting proof of mental anguish or suffering even in the absence of bodily injury in telegraph cases construed and applied. *Marsh v. Western Union Tel. Co.*, 65 S. C. 430, 43 S. E. 953; *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448; *Butler v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

Under the South Carolina statute mental anguish is always considered as an element of damages. Not only must negligence be shown, but it must also be shown that the injury was the natural, direct and proximate result of such negligence. And the message must also show on its face, or it must be made to appear that the company had knowledge of such facts as enables it to foresee that the mental anguish may reasonably be expected to result from its default; and if it appears that the mental anguish is merely an incident, it should not be considered as not having been reasonably anticipated. *DuBose v. Western Union Tel. Co.*, 73 S. C. 218, 53 S. E. 175.

25. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607.

26. *Graham v. Western Union Tel. Co.*, 109 La. 1069.

27. *Peay v. Western Union Tel. Co.*, 64 Ark. 538, 43 S. W. 965.

28. *Western Union Tel. Co. v. Woodard* (Ark.), 105 S. W. 579; *Western Union Tel. Co. v. Shenep* (Ark.), 104 S. W. 154; *Western*

(e.) *Qualifications and Limitations of Rule.*—The courts, although affirming the doctrine, nevertheless recognize the fact that persons oftentimes assert claims for damages for mental suffering, which are in reality unreasonable and possibly unfounded, and hence will be found language of caution against abuse in the application of the doctrine.²⁹

Proximate Case.—As in other actions to recover damages, so where mental suffering is claimed as an element of damages in an action against a telegraph company, it must appear that the default complained of was the cause of the suffering³⁰ and where it appears that the suffering was the result of independent matters, which

Union Tel. Co. v. Raines, 78 Ark. 545, 94 S. W. 700.

In Western Union Tel. Co. v. Hogue, 79 Ark. 33, 94 S. W. 924, it was held that the words of a telegram "I will be there on the evening train" were not in themselves sufficient to give notice of relationship between parties which would give rise to mental anguish in case the message was not delivered. The court said: "Such damages may under our statute be recovered in some cases, but the statute does not change the rule that when a plaintiff seeks to recover of a defendant special damages on account of the breach of a contract, he must show that at the time the defendant entered into the contract he had notice of the special circumstances out of which the special damages arose, so that it may reasonably be said as a matter of law that such special damages were in contemplation of the parties at the time they made the contract."

The Arkansas statute does not preclude the allowance of exemplary damages, but in order to warrant such damages, the negligence, however gross, must be characterized by wilfulness, wantonness and conscious indifference to consequences. Arkansas & L. R. Co. v. Stroude, 77 Ark. 109, 91 S. W. 18.

²⁹. See Cashion v. Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, where the court said: "While reaffirming the doctrine, we must again earnestly caution juries against its abuse." And see other cases cited in succeeding notes.

³⁰. *United States*,—Western Un-

ion Tel. Co. v. Baker, 140 Fed. 315, 72 C. C. A. 87.

North Carolina.—Cashion v. Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160.

South Carolina.—Mitchiner v. Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222.

Tennessee.—Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

Texas.—Western Union Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Western Union Tel. Co. v. Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148; Gulf, C. & S. F. R. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269; Western Union Tel. Co. v. Andrews, 78 Tex. 305, 14 S. W. 641; Western Union Tel. Co. v. Taylor (Tex. Civ. App.), 81 S. W. 69. See also Western Union Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; Hughes v. Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107; Western Union Tel. Co. v. Edmondson, 91 Tex. 206, 42 S. W. 549.

In Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826, where the message in controversy was one notifying the addressee of the death of some one, it was held that it could not be regarded as in contemplation of the parties as proximately the result of the breach of the contract that the body of the decedent would be buried in a place unsatisfactory to the addressee of the telegram, nor could it have been known that in such event he would desire to disinter and remove the body, and that hence the extra expense of so doing could not

would have been avoided if the company had discharged its duty promptly and faithfully, the suffering must be excluded from consideration.³¹

The Suffering Must Be Real and Not Imaginary, nor the result of a too sensitive or excitable mental constitution.³² And it has been said great caution should be observed in the application of this doctrine to distinguish between the corroding grief occasioned by the loss of the relative with the disappointment and regret occasioned by the default or neglect of the telegraph company, for it is only

be considered as an element of damages.

A dispatch was delivered to the agent of the telegraph company at Bonham, Texas, April 9, 1890, addressed to E. U. Motley, care of J. C. & W. W. Witherspoon, at Smith's Cove, Kentucky, as follows: "Mr. Neighbors is very sick. Will probably not live 24 hours. (Signed) B. Saunders." Mr. Neighbors was father of Mrs. F. P. Motley, and she was wife of E. U. Motley. Alleged cause of action, mental suffering on part of Mrs. Motley from delay in delivery of the message. It was claimed that upon prompt delivery the funeral of her father would have been postponed so that she could have been in attendance. *Held*, that damages growing out of a failure to secure from a person not named in the dispatch a postponement of the funeral by reason of the delay in the delivery of such message, are too remote, and that no cause of action appears.

In *Lawrence v. Western Union Tel. Co.* (Tex. Civ. App.), 95 S. W. 27, the telegram in controversy was one informing the plaintiff that his father was seriously ill and not expected to live through the day. Plaintiff's evidence showed that the defendant failed to exercise proper diligence to deliver the message, and that if such diligence had been exercised he could and would have reached his father's home in time for the funeral, and it was held that the plaintiff was entitled to have the case go to the jury.

In *Klopf v. Western Union Tel. Co.* (Tex. Civ. App.), 97 S. W. 829, the message in controversy was one asking the addressee to postpone the funeral of the plaintiff's father. The

evidence showed that even if the greatest diligence had been exercised the message could not have been delivered until about an hour after the time set for the funeral, and it was held that the sender was not damaged by a delay of two hours in the delivery of the message.

31. *McCarthy v. Western Union Tel. Co.* (Tex. Civ. App.), 56 S. W. 568; *Western Union Tel. Co. v. Parks* (Tex. Civ. App.), 25 S. W. 813.

In *Sabine Valley Tel. Co. v. Oliver* (Tex. Civ. App.), 102 S. W. 925, where the plaintiff claimed damages on account of being prevented from being with his child at its death, because of the negligent delay on the part of the defendant in delivering a telephone message, the evidence showed that even if the message had been delivered with reasonable promptitude the plaintiff could not, because of a train being late, have reached his child before its death, and it was held that under the circumstances the defendant was not liable.

In *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585, it was held that where a husband received a message announcing the death of his grandchild in time to take the train, the fact that his wife was prevented from doing so because she did not succeed in placing her children in the care of a neighbor was something for which the telegraph company was in no way chargeable.

32. *Morrison v. Western Union Tel. Co.*, 24 Tex. Civ. App. 347, 59 S. W. 1127.

Mere Anger because of the company's default is not mental anguish within the meaning of the doctrine.

the latter which the courts recognize as the element proper to be considered in determining the damages.³³

Suffering of Injured Person. — The suffering set up must be that of the person claiming compensation therefor, and not that of another person.³⁴

Merely Not Being Present With Other Relatives Not Enough. — Mental anguish suffered by the addressee of a telegram by reason of his not being able to be with other relatives and members of the family does not come within the mental anguish doctrine.³⁵

(f.) *Necessity of Relationship of Parties.* — In the case of the negligent transmission and delivery of a message announcing the illness, death or time and place of interment of a near blood relation, whereby the sender is prevented from reaching the bedside or funeral of his relative, the law presumes mental anguish.³⁶ But where the

Western Union Tel. Co. v. Bell (Tex. Civ. App.), 61 S. W. 942.

33. *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

"Mental Anguish Must Be Something More Than Mere Disappointment, and like every other material allegation, relied upon by the plaintiff, must be alleged and proved. It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart. It is useless to tell the jurors of the anguish of a true wife, waiting for hours to take the train to the bedside of a dying husband, knowing well that the sands of life are falling fast, but uncertain of the vital measure, and finally reaching her journey's end only to bestow her last greeting upon lifeless clay. But beyond the marriage state, this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder into the family circle. It is true that with him such affection may exist, but it must be shown. Moreover, there is a differ-

ence between those cases where the plaintiff is herself kept away from the bedside of a dying relative, and where she is merely deprived of the company of another relative whose sympathetic love might tend to comfort and console her in her hour of sorrow. This difference may be considered by the jury in fixing the damages." *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493.

34. *Western Union Tel. Co. v. Lovett*, 24 Tex. Civ. App. 84, 58 S. W. 204.

35. *Western Union Tel. Co. v. Butler* (Tex. Civ. App.), 99 S. W. 704. See also *Western Union Tel. Co. v. Wilson* (Tex.), 75 S. W. 482.

In *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.), 100 S. W. 974, where the plaintiff was prevented from attending his brother's funeral because of delay in the delivery of a telegram summoning him, it was held that he was entitled to recover for mental anguish suffered from not being present at the funeral, but not that caused by not being present with other relatives.

36. *Alabama.* — *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 So. 386; *Western Union Tel. Co. v. Adair*, 115 Ala. 441, 22 So. 73; *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. 45; *Western Union Tel. Co. v. McNair*, 120 Ala. 99, 23 So. 801.

Kentucky. — *Western Union Tel. Co. v. Fisher*, 107 Ky. 513, 54 S. W. 830.

parties are not related by blood, but by affinity only, there is no such presumption; mental suffering must be established by competent and sufficient evidence.³⁷ And it has been said that the mental

North Carolina. — *Lyne v. Western Union Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Dowdy v. Western Union Tel. Co.*, 124 N. C. 522, 32 S. E. 802.

Tennessee. — *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

Texas. — *Western Union Tel. Co. v. McLeod* (Tex. Civ. App.), 22 S. W. 988; *Western Union Tel. Co. v. Porter* (Tex. Civ. App.), 26 S. W. 866; *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.), 100 S. W. 974.

In *Western Union Tel. Co. v. Ayers*, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92, where the father of a sick child sent a telegram summoning his brother-in-law to the child's bedside and on account of the negligence of the company the sendee, who was the child's uncle, did not receive the telegram in time to reach the child before its death; it was held that the father could not recover damages for mental anguish and suffering because there did not exist between the sender, the sendee and the person concerning whom the message was sent that close degree of relationship from which natural love and affection are presumed.

In *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. 45, where the father of a sick child had sent a telegram summoning his mother-in-law to the child's bedside, and on account of the negligence of the telegraph company the sendee, who was the child's grandmother, did not receive the telegram in time to reach it before its death; it was held that the father of the child could recover damages for mental anguish and suffering, the relationship existing between the sender and sendee and the person concerning whom the message was sent being of that close degree from which natural love and affection are presumed. The court said that the relationship between the sender and sendee was "the closest relationship by affinity, and from which, if love

and affection do not spring, it is on account of some exceptional reason or cause. A love, too, that is strengthened in the birth of the grandchild. The tender and doting love of the grandmother for her grandchild, and the reciprocal confiding love of the little child, is a matter of common knowledge. The father in sending the message knew of the affection existing between his child and the grandmother, and would have been an unnatural father, not to have been sustained and comforted by her presence, or pained and grieved by her absence, in the trying hour of the death of his son."

Mental anguish caused by failure to deliver a telegram to the plaintiff announcing his brother's death whereby he was prevented from attending the latter's funeral furnishes ground for recovery. *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

37. *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Western Union Tel. Co. v. Garrett* (Tex. Civ. App.), 34 S. W. 649; *Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 30 S. W. 298; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896.

Where suffering actually results from failure to deliver a telegram, the relationship being one of affinity only will warrant recovery for mental anguish. The law does not regard so much the technical relation between the parties or other legal status in respect to each other as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but if mental suffering does actually result from the negligence of the telegraph company when there is only affinity between the parties, the suffering may be shown and damages recovered. *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841.

anguish doctrine should be confined to cases where close blood relationship exists between the parties.³⁸

(g.) *Disclosure of Relationship of Parties.* — While it must be established that the company had notice of the special circumstances in consequence of which neglect or default in the transmission and delivery of a message will entail mental suffering,³⁹ it is nevertheless held that the message itself need not disclose the relationship

The Relationship of Stepmother and Stepson does not raise the presumption of mental suffering; in such case the fact of mental suffering is a matter of proof necessary to be established. *Harrison v. Western Union Tel. Co.*, 136 N. C. 381, 48 S. E. 772.

In *Alexander v. Western Union Tel. Co.*, 141 N. C. 75, 53 S. E. 657, where there was evidence tending to prove that the plaintiff and deceased were not only brothers-in-law, but very intimate friends, and that most affectionate relations existed between them, and that plaintiff was very much affected by reason of his inability to be present at the funeral, it was held that the court committed no error in submitting the case to the jury on the mental anguish.

Mental anguish will not be presumed from failure of a father-in-law to be at the funeral of his daughter-in-law, but is matter to be shown by competent evidence. *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 294.

From the Relationship of Son-in-law and Mother-in-law the law does not presume such ties of affection as will support an action by the son-in-law to recover for mental anguish caused by the failure of a telegraph company to deliver a telegram announcing her illness, whereby he was prevented from being present at her death. *Davidson v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1292, 54 S. W. 830.

A Father-in-law cannot recover damages for mental anguish caused to him by the failure of a telegraph company to deliver a telegram to his son-in-law announcing the serious illness of the latter's mother-in-law, whereby he was prevented from being present at her deathbed. *Western Union Tel. Co. v. Steenberg*, 107 Ky. 469, 54 S. W. 829.

38. *Robinson v. Western Union*

Tel. Co., 24 Ky. L. Rep. 452, 68 S. W. 656.

Compare other Kentucky cases in succeeding notes. See also *Randall v. Western Union Tel. Co.* (Ky.), 107 S. W. 235, wherein it was held that the doctrine does not apply to the case of failure to deliver a telegram announcing the death of the addressee's fiancée in time to attend her funeral; that the rule permitting mental anguish in those cases only where the person mentioned in the telegram was a near relative would be strictly adhered to.

39. *Kennon v. Western Union Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Darlington v. Western Union Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896.

In *Dayvis v. Western Union Tel. Co.*, 139 N. C. 79, 51 S. E. 898, which was an action by the plaintiff to recover for mental anguish from the failure of the defendant to deliver to him a message from his wife informing him that she had missed her train, and would be with him the next day, it was held that the testimony of the wife that when she gave the message to the operator she told him she had missed her connection, had two children with her, that they were sick, that her husband was to meet her, and would be worried when he got the message, was ample to notify the defendant that unless it delivered the message it might result in mental anguish and suffering.

In *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112, the message related to the physical condition of the plaintiff's father-in-law, and contains the admonition "You had better come at once," and the court said: "Taking a common-sense view of its language no other interpretation could have been put upon the message than that it meant to convey that Mr. Robertson's

of the parties;⁴⁰ the courts proceeding on the theory that when a message relates to sickness or death there of necessity follows the

physical condition remained unchanged since the last communication, and that the plaintiff was interested in him by ties of affection and should come to him at once." It should be further noted that the court in this case disapproved the doctrine followed by the Texas cases that even though the message gives notice on its face that it concerns sickness or death of another and contains summons to the addressee, still there can be no recovery for mental anguish by one not related by blood unless the company was notified of the relationship which would give rise to mental anguish. The Texas doctrine was followed in *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482, where the court held that an uncle could not recover for mental anguish caused by failure to promptly deliver a telegram containing information of the illness of his niece and summoning him to come, because there was no notice to the company that the relationship was such as might cause mental suffering on account of the delay in delivering the message.

For the purpose of charging a telegraph company with notice of the importance of a message which the company did not deliver promptly, social conversations had between the sender and the defendant's agent on the street several days before the message was sent cannot be shown. Nor can the declarations of the same agent after the sending of the message. *Darlington v. Western Union Tel. Co.*, 127 N. C. 448, 37 S. E. 479.

A telegram, "Smithville, 9-4, 1889. To W. S. Carter, Taylor: N. B. Gorsuch is dead. Answer. F. S. Faust," was not promptly delivered. M. E. Carter was wife of W. S. Carter, and daughter of the deceased Gorsuch. Action was for damages by W. S. Carter against the telegraph company. *Held*, that the defendant company is not chargeable with notice, from the terms of the dispatch, of the fact that M. E. Carter was wife of W. S. Carter, or

daughter of the deceased Gorsuch. *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

In *Western Union Tel. Co. v. Butler* (Tex. Civ. App.), 99 S. W. 704, where there was no evidence of importance other than the message itself which contained anything giving the defendant company notice that depriving the plaintiff of the opportunity of being with his mother at his father's funeral and giving aid and comfort to her at such time would cause the plaintiff mental anguish; it was held that mental anguish was not permissible as an element for recovery of damages.

40. *North Carolina*. — *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; *Havener v. Western Union Tel. Co.*, 117 N. C. 540, 23 S. E. 457; *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429.

Texas. — *Western Union Tel. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Western Union Tel. Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869 (in this case the court overrules *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914, as not being sustained upon either principle or authority); *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Craven* (Tex. Civ. App.), 95 S. W. 633; *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *Western Union Tel. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25; *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western Union Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336; *Potts v. Western Union Tel. Co.*, 82 Tex. 545, 18 S. W. 604.

In an action against a telegraph company by the sendee or addressee of a telegram relating to sickness and death and advising as to when the funeral would be held, the presumption is that the message is one of

importance and that the person addressed has a serious interest in its prompt delivery. *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371.

In *Harrison v. Western Union Tel. Co.*, 136 N. C. 381, 48 S. E. 772, it was held that a telegram in the following words, "Bansen died this morning at six o'clock. Buried four o'clock tomorrow," stated upon its face the pregnant facts of death and burial, and was of itself sufficient to put the company on notice of its importance, aside from any testimony tending to show special information given by the plaintiff to the company.

In *Western Union Tel. Co. v. Campbell* (Tex. Civ. App.), 91 S. W. 312, it was held that a message addressed to W. O. Campbell and stating, "Bob fatally shot. Want Minnie at once," and signed W. R. Watson, was sufficient to charge the company with knowledge that the parties referred to in the message were brother and sister, rendering important its prompt transmission.

A telegram announcing the illness of the addressee's wife not only puts the company on notice of that fact but of the nature and character of the illness. *Western Union Tel. Co. v. Craven* (Tex. Civ. App.), 95 S. W. 633.

In *Western Union Tel. Co. v. Blackmer* (Ark.), 102 S. W. 366, the message in controversy read as follows: "Call at Worthing Co., bankers, for ten dollars. Mother very low with pneumonia." The court said: "We think that the message comes within the rule and was all sufficient to suggest that a near relationship existed between the person mentioned in the message and the person addressed, and that the object of the communication was to afford the latter the means of coming to her relative. The telegraph company could have well inferred that the mother mentioned was the mother of Mrs. Blackmer. Prudence, reason and humanity ought to have prompted it to have acted on that assumption." And the court accordingly held that the defendant company was liable for mental suffering resulting from the plaintiff's failing to reach the bedside of her mother before she died.

In *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, the court said: "It is well known to the public, and cannot be unknown to telegraph companies, that the utmost brevity of expression is cultivated in correspondence by telegraph. It is as well known that that mode of communication is chiefly resorted to in matters of importance, financially and socially, requiring great dispatch. When such communications relate to sickness and death there accompanies them a common sense suggestion that they are of importance, and that the persons addressed have in them a serious interest. It would be an unreasonable rule, and one not comporting with the uses of the telegraph, to hold that the dispatcher will be released from diligence unless the relations of the parties concerned, as well as the nature of the dispatch, are disclosed. When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the busy operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desires information about such matters, for him to obtain it from the sender, and if he does not do so to charge his principal with the information that inquiries would have developed."

In *Texas* it is not necessary that a telegraphic message must disclose the relationship of the persons named in it in order that the mental anguish doctrine may be applied. *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826, *overruling* *Western Union Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323.

In *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25, it was held that a dispatch as follows: "Emma died last night; will be buried this evening," was sufficient to put the company on notice of the importance of the telegram; that to require the family pedigree to be inserted in telegrams announcing serious illness or death would deprive the greater part of the public of the benefits of telegraphy.

common sense suggestion that it is of importance and that the persons addressed have in it a serious interest.⁴¹

Person Not Beneficiary of Telegram.—A telegraph company is not responsible to a person not appearing on the face of a telegram, nor otherwise known to it, to be a beneficiary of the contract for damages for mental suffering resulting from failure to deliver the message,⁴² and this for the reason that the company is not given the

In *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58, where the dispatch read as follows: "Grace is very low; can you come and bring Maud?" it was held that the terms of the message were sufficient to put the company on notice that the plaintiff addressee had a serious interest in the condition of "Grace," and that if there were any reasons why it desired to know more particularly that relationship, it was its duty to make inquiry, and not the duty of the sender to communicate them in the first place.

A telegraph company is chargeable with notice of the relationship existing, if any, between all the parties named in the message, and with notice of such purposes as may reasonably be inferred from the language used in connection with the subject-matter of the communication, taking into consideration the usual manner of expressing messages sent by this means. *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

⁴¹. *Lyne v. Western Union Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Meadows v. Western Union Tel. Co.*, 132 N. C. 40, 43 S. E. 512.

⁴². *Kentucky*.—*Davidson v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1292, 54 S. W. 830; *Morrow v. Western Union Tel. Co.*, 107 Ky 517, 54 S. W. 853.

Massachusetts.—*Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

North Carolina.—*Dayvis v. Western Union Tel. Co.*, 139 N. C. 79, 51 S. E. 898; *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585.

South Carolina.—*Rogers v. West-*

ern Union Tel. Co., 72 S. C. 290, 51 S. E. 773. See also *Poteet v. Western Union Tel. Co.*, 74 S. C. 491, 55 S. E. 113.

Texas.—*Western Union Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323; *Elliott v. Western Union Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *Western Union Tel. Co. v. Gotcher*, 53 S. W. 685.

In *Helms v. Western Union Tel. Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, an action for damages for mental anguish on account of defendant's failure to promptly deliver the following telegram: "Mother very sick; come at once," signed by plaintiff's son, the evidence showed that the son filed the telegram with the defendant's operator, who asked for the number and street of the addressee; that the son told the operator that he did not know the street, but that his father knew it; that he went back to his father and got the address; that the operator knew the father and the son; that the son told the operator that the addressee was his brother-in-law; that the plaintiff sent his son to send the telegram and gave him the money to pay for it, but the son failed to so inform the operator. It was held that there was no evidence which charged the defendant with knowledge that the son filed the telegram as the agent of and for the benefit of his father.

See also *Cranford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896.

Compare Landie v. Western Union Tel. Co., 124 N. C. 528, 32 S. E. 886, holding that plaintiff in that case was not debarred from recovery because her name was not signed to the telegram, and the defendant not then notified that it was sent by her direction or for her benefit.

means of anticipating such suffering as a consequence of its negligence.⁴³

(h.) *Character and Purpose of Message.*— Courts very generally hold that the mental anguish doctrine extends to all cases where mental anguish or suffering may be reasonably anticipated as a natural result of a breach of the contract or duty on the part of the telegraph company⁴⁴ although there are cases to the effect that the doctrine should not be so extended.⁴⁵

43. *Southwestern Tel. & Tel. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686, holding that notice to a telephone or telegraph company that the words sought to be communicated to a person related to the death of a brother of such person's wife and sought to secure such person's attendance at the funeral, was not sufficient to give notice of any interest of the wife in the intelligence, or create liability for her mental suffering for failure to receive the telegram and attend the funeral.

44. *Postal Tel. & C. Co. v. Terrell*, 30 Ky. L. Rep. 1023, 100 S. W. 292. In this case a husband had telegraphed to his wife's father advising the latter of the wife's intended arrival at Memphis late that night, and requesting him to meet her. The telegram showed on its face the residence of the addressee, which was several miles from the railroad station. The telegram was transmitted promptly, but was not delivered. And it was held that the telegraph company was liable for mental anguish suffered by the wife, resulting from her being compelled to remain in the railroad station the remainder of the night until the street cars commenced to run in the morning.

See also *Green v. Western Union Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985; *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427.

In Kentucky the rule is settled that in respect of actions against telegraph companies for mental suffering, the right to recover in such cases is not confined to those only involving the failure to deliver telegrams announcing to a relative the sickness or death of a member of the family. On the contrary, this right

is extended to all cases in which mental suffering may be reasonably anticipated as a natural result of a breach of the contract. *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880.

In an action to recover for mental anguish for negligence in the transmission and delivery of a telegram, it is not necessary that the claimant should be a very near relative, nor that the telegram should contain a message concerning sickness or death, but it is necessary that the grievance complained of should amount to a high degree of mental suffering and not consist merely of annoyance or disappointment and regret. *Dayvis v. Western Union Tel. Co.*, 139 N. C. 79, 51 S. E. 898.

45. The South Carolina mental anguish statute does not authorize recovery for feelings of disappointment, annoyance and vexation, which the sender of a telegram would naturally feel because of the dishonor of his check by reason of failure to deliver his telegram in time; the statute is confined to purely social or personal matters. *Capers v. Western Union Tel. Co.*, 71 S. C. 29, 50 S. E. 537.

See also *Western Union Tel. Co. v. Westmoreland (Ala.)*, 44 So. 382. In this case the telegram was sent by the plaintiff to her brother reading "Meet me tonight," and she claimed damages for mental anguish because of the failure of the company to deliver the telegram in time. The court, in holding that the doctrine did not apply to such a case, said: In this case the message did not relate to matters which would bring within the contemplation of the parties of the contract the idea of mental anguish as a result from a failure to deliver, nor is there any proof in the case that any did result. We therefore hold that there

The sender of a telegram is entitled to damages for mental anguish occasioned by the negligent failure of the telegraph company to deliver the same, although the suffering would not have occurred had the company not informed him of the non-delivery thereof.⁴⁶

Message Summoning Physician. — It has been held that in an action to recover damages for the negligence or default of a telegraph company in the transmission and delivery of a telegram summoning a physician to attend a patient, mental anguish suffered by the patient may be considered;⁴⁷ but this rule as in other mental anguish

was no right of recovery therefor. We consider it a point of wisdom to restrict the allowance of damages for mental anguish for non-delivery of telegrams to the occasions of sickness and death of the close relations in which it has been allowed."

In *Western Union Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856, the court said: "The court has held that parties injured could recover damages for mental anguish and grief sustained by them in being denied the privilege of attending the bedside of near relatives during their last hours, of superintending the preparation of their bodies for interment, and of being present at their burial; but in no other cases. The rule upon which such damages are allowed is of difficult application, and it is a policy the soundness of which has been questioned in many courts of high authority, and we do not deem it proper to extend it to other cases than those to which it has been applied in this state. . . . The mental anguish claimed here is not for failure to reach the son of the plaintiff before his death, or for loss of the privilege of attending his funeral, but for delay in the reception of money with which to bring the body to the home of the father for burial. This is a right and a privilege that can yet be exercised in every respect to the fullest gratification of the desire of the father." And it was accordingly held that the measure of damages in such case was the cost and expense of disinterring the body and reinterring it at the place originally desired.

In *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549, it was held that a recovery for mental anguish suffered by the wife on account of exposure

to smallpox was not warranted by evidence consisting of her testimony that when told of her brother's death from smallpox it was a great shock to her at the time, especially on account of the baby, but that if she had been alone she would not have felt the same shock; that the telegraph company was not liable for her alarm because of the exposure of the baby.

In *Western Union Tel. Co. v. Shenep (Ark.)*, 104 S. W. 154, the plaintiff had sent a telegram to his daughter-in-law as follows: "I will be there tonight. Be ready to go back on noon train." The defendant company negligently failed to deliver the message until late the following day. On his arrival, and failing to find his daughter-in-law, he claimed that he suffered mental anguish, as well as bodily inconvenience, and was forced to spend the night without food or shelter, and that it was cold and rainy. He further claimed to have been much worried and anxious because of fear of losing his position inasmuch as he had obtained leave of absence for merely one day. It was held that the Arkansas statute did not cover such a case so as to permit proof of and recovery for mental anguish.

46. *Green v. Western Union Tel. Co.*, 136 N. C. 506, 49 S. E. 171.

47. *Western Union Tel. Co. v. Church (Neb.)*, 90 N. W. 878, 57 L. R. A. 905. See also *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728, where the court said: "Damages in a suit against a telegraph company for failure to deliver a message to a physician summoning him to attend a woman in confinement cannot be based upon the death of the child before birth and the grief

cases is confined to the mental anguish suffered by the patient.⁴⁸

Message Intended To Relieve Anxiety. — So, too, it is held that where the message in question was intended to relieve mental anxiety on the part of the addressee, mental anguish suffered in consequence of the negligence of the company may be considered.⁴⁹

Mere Continued Anxiety suffered by the sender of a telegram as the result of the company's default in its transmission and delivery does not come within the rule.⁵⁰

(i.) *Conflict of Laws.* — It is held that mental anguish may be considered in an action in the state whence the message was sent, although the doctrine is denied in the state where the message was to be delivered.⁵¹ So, too, mental anguish may be considered in an action in the state where the telegram was to be delivered, although it may appear that the courts of the state from whence the

of the parents occasioned thereby, but a reasonable consideration should be allowed for any increased pain and mental suffering caused to the mother by the physician's absence." *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

48. In an action by a husband against a telegraph company for failure to deliver a telegram summoning a physician to his wife's bedside, the husband's mental suffering caused by his wife's condition cannot be shown to increase the damages. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728.

49. In *Western Union Tel. Co. v. Hollingsworth* (Ark.), 102 S. W. 681, it was held that the failure of the defendant company to deliver a message to the plaintiff announcing the improved condition of a sick brother entitled the plaintiff to damages for mental anguish.

Compare, *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *Western Union Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229; *Sparkman v. Western Union Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *Dayvis v. Western Union Tel. Co.*, 139 N. C. 79, 51 S. E. 898, *overruling* *Sparkman v. Western Union Tel. Co.*, 130 N. C. 447, 41 S. E. 881.

50. *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, 12 S. W. 534.

Proof merely of increased mental anxiety on the part of the sender of a telegram as the result of failure to deliver it does not bring the case

within the rule permitting damages for mental anxiety. *Western Union Tel. Co. v. Bass*, 28 Tex. Civ. App. 418, 67 S. W. 515.

In *Kopperl v. Western Union Tel. Co.* (Tex. Civ. App.), 85 S. W. 1018, the plaintiff had received a message informing him of the illness of his wife and had immediately telegraphed her asking her if he should come to her. Her answer to the last message was never delivered to him, in consequence of which he went to her. It was held that the failure to deliver the message last mentioned merely prolonged existing mental anguish which had already arisen from the news of his wife's illness, for which damages could not be recovered.

Compare, *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, *holding* that the South Carolina statute as to mental suffering has been held to extend to damages for anxiety and for negligence which prolongs anxiety and for other kinds of mental suffering.

51. *Bryan v. Western Union Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427.

In *Walker v. Western Union Tel. Co.*, 75 S. C. 512, 56 S. E. 38, where a message from South Carolina to be delivered in Louisiana was not delivered as written, and upon request to correct, the evidence showed that the mistake in repeating occurred at the initial office, it was held that the addressee might recover damages for mental anguish without

message was sent deny the doctrine.⁵² But it will not be considered as an element of damages in an action in a jurisdiction other than those of sending and delivery, although the doctrine is recognized in that jurisdiction, where it appears that in such other jurisdictions the doctrine is denied.⁵³

f. *Nature and Competency of Evidence.* — (1.) *Generally.* — In proving the elements proper to be shown on the question of damages in an action against a telegraph company, the general rules of evidence as to competency, etc., govern.⁵⁴

proving that the common law rule as to mental anguish had been changed in Louisiana.

52. *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301. See also *Arkansas & L. R. Co. v. Lee*, 79 Ark. 448, 96 S. W. 148; *Western Union Tel. Co. v. Ford* (Ark.), 92 S. W. 528; *Western Union Tel. Co. v. Woodard* (Ark.), 105 S. W. 579; *Western Union Tel. Co. v. Lacer*, 29 Ky. L. Rep. 379, 93 S. W. 34; *Ligon v. Western Union Tel. Co.* (Tex. Civ. App.), 102 S. W. 429.

Where a contract for the transmission and delivery of a message was made in West Virginia but was to be consummated by delivery in Kentucky, and the negligence complained of consists of delay in the delivery occurring merely in Kentucky, the contract is governed by the laws of that state. *Howard v. Western Union Tel. Co.*, 119 Ky. 625, 84 S. W. 765, 86 S. W. 982.

An action for damages for mental suffering for failure to deliver a telegram in South Carolina, sent from Virginia, is *ex delicto* and may be maintained in South Carolina although the common law doctrine denying damages for mental anguish obtains in Virginia. *Harrison v. Western Union Tel. Co.*, 71 S. C. 386, 51 S. E. 119.

The Arkansas statute on mental anguish is applicable to an action against a telegraph company where the evidence shows that the negligence occurred and the injury was sustained in Arkansas, although the mental anguish doctrine is denied in the state where the telegram was received for transmission. *Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528, citing as supporting

this same doctrine, *Harrison v. Western Union Tel. Co.*, 71 S. C. 386, 51 S. E. 119; *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; *Howard v. Western Union Tel. Co.*, 119 Ky. 625, 84 S. W. 765, 86 S. W. 982; *Western Union Tel. Co. v. James*, 162 U. S. 650.

53. *Thomas v. Western Union Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501.

54. Where the action is for damages against the telegraph company, on account of its failure to forward a telegram to plaintiff's correspondent in Bremen, Germany, accepting his offer to buy and sell cotton for future delivery in New York, evidence as to the price of cotton on those days in Liverpool, England, is irrelevant and inadmissible, in absence of all proof as to a connection or mutual dependence of the two markets on each other. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

In an action against a telegraph company for damages for non-delivery of a telegram concerning an offer to purchase property belonging to the plaintiff, it is proper to permit the plaintiff to testify what would have been his answer to the telegram if it had been received. *Wallingford v. Western Union Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629. See also *s. c.* 53 S. C. 410, 31 S. E. 275.

The embarrassed financial condition of the plaintiff at the time of sending his telegram, accepting an offer to buy and sell cotton for future delivery, has no legitimate connection with the liability of the telegraph company for failing to forward the message, nor with the measure of damages he is entitled to recover; and evidence of it is

(2.) **Proof of Mental Suffering.**—(A.) **GENERALLY.**—The usual rules of evidence as to competency, relevancy, materiality, etc., of course, are applicable to evidence offered for the purpose of proving mental suffering.⁵⁵ In the case of negligent delay in delivering a telegram announcing the illness of the plaintiff's father, it is not competent for the plaintiff to testify that when he arrived at his home

not admissible against him. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

In an action against a telegraph company for undue delay in the delivery of a message, the plaintiff cannot be permitted to prove that the defendant is a wealthy corporation. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 143.

In an action against a telegraph company to recover damages for failure to deliver a telegram informing the plaintiff of his wife's illness in childbirth, it is relevant and material on question of damages to which the plaintiff may be entitled for him to show who lived with his wife on the occasion of her sickness, the age of such person or persons, their ability or capacity to assist her at the time. *Western Union Tel. Co. v. Craven* (Tex. Civ. App.), 95 S. W. 633.

In an action against a telegraph company for failure to deliver a telegram announcing a death and requesting a conveyance, it is proper to show the amount of money the sender had on arrival at his destination as a means of procuring other conveyance. *Tinsley v. Western Union Tel. Co.*, 72 S. C. 350, 51 S. E. 913.

55. In *Western Union Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438, an action to recover for delay in delivering a telegram summoning the plaintiff to the deathbed of her brother, the plaintiff in order to show the extent of her grief sought to prove that after sufficient time had elapsed for the delivery of the telegram and for her to have reached him, her brother expressed strong desire to see her and disappointment at her failure to come, and also spoke bitterly of her, remarking that she considered herself above him and was too proud and rich to care

for him, and that he died with that belief, all of which was communicated to the plaintiff on her arrival after his death, and aggravated and intensified the grief which she was suffering. It was held that the evidence was not admissible because it did not tend to prove the state of the plaintiff's feelings toward her brother, nor did it tend to prove any result of the failure to deliver the message for which the company was liable; that the evidence taken as a whole tended more to prove, so far as the deceased was concerned, that there had existed on his part some unkind feeling toward his sister than it did to prove any affectionate regard for her, and therefore did not in any way tend to establish that the sister was affectionate toward her brother. The court in this case distinguished the case of *Western Union Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701.

In *Western Union Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701, an action against a telegraph company for negligent delay in delivering a message sent by the plaintiff inquiring as to his mother's condition, causing his failure to reach his mother before her death, it was held proper to permit the plaintiff to testify that "he was his mother's favorite child" as against the objection that such evidence indicated what the mother's feelings were rather than the plaintiff's.

In an action against a telegraph company for the negligent failure to deliver a message sent by the father of a sick child summoning the child's grandmother to its bedside, which message was not received until too late to reach the child before its death, where the father sues for damages for mental anguish and suffering, it is not competent for the defendant upon the cross-examination of the sendee to inquire as to

he was told that his father who had just died had inquired for him, and had expressed his desire to see him before he died, such testimony being mere hearsay. It would be competent in such case, however, on the question of damages to produce the person who informed the plaintiff of such facts, and permit him to testify as to what the father had said, and as to his conversation with the plaintiff in regard to it.⁵⁶

(B.) DIRECT TESTIMONY OF CLAIMANT.—The plaintiff in an action against a telegraph company may, on the question of mental anguish, testify directly to the state of his feelings as to grief and disappointment suffered by him in consequence of the defendant's default.⁵⁷ And certainly when the defendant has elicited testimony

how many children and grandchildren she had and how widely scattered they were. *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. 45.

In *Western Union Tel. Co. v. Bell* (Tex. Civ. App.), 90 S. W. 714, an action by the sender of a telegram addressed to her brother, advising him that their mother was dying and requesting him to come at once, by reason of the company's failure to deliver which the brother did not attend the funeral of the mother and was not present to sympathize with and console the plaintiff in her distress during such time, it was held that testimony by the brother as to the state of feeling existing between his mother and the plaintiff was not error, and was admissible.

In *Western Union Tel. Co. v. Campbell* (Tex. Civ. App.), 91 S. W. 312, where the telegram in controversy was one informing the plaintiff's wife that her brother had been fatally shot and requesting her to come to him at once, and damages for mental suffering resulting from her failure to reach her brother before his death were claimed, it was held that evidence of the effect on her of the announcement of her brother's death before she reached him was admissible as tending to show the mental anguish suffered by her by reason of her failure to reach him before his death. The court said: "In a suit for a recovery of damages for mental anguish resulting from the failure of a sister to reach the bedside of her brother before his death, the effect of the an-

nouncement of the death of the brother before the sister reached him would be evidence of the anguish suffered by her because of her failure to reach him before his death. Of course the very announcement would cause her anguish; but as the anguish caused by the realization that she had not been able to get to him before his death could only result after knowing of his death, it necessarily included the anguish due to the knowledge of that fact."

In an action by a husband for mental anguish claimed to have resulted from the negligent failure of the telegraph company to deliver to him a telegram from his wife informing him of her having missed a connecting train and a consequent delay, evidence of the privation and suffering of the wife and children is not admissible. *Dayvis v. Western Union Tel. Co.*, 139 N. C. 79, 51 S. E. 898.

56. *Whitten v. Western Union Tel. Co.*, 141 N. C. 361, 54 S. E. 289.

57. *Shepard v. Western Union Tel. Co.*, 143 N. C. 244, 55 S. E. 704. See also *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427 (where a similar exception was said to be without merit); *Hunter v. Western Union Tel. Co.*, 135 N. C. 458, 465, 47 S. E. 745 (where it was said that mental anguish "is a matter of proof and may be inferred from all the surrounding circumstances, as well as the personal testimony of the plaintiff"); *Harrison v. Western Union Tel. Co.*, 143 N. C. 147, 55 S. E. 435 (where the court said: "There is no presumption of

tending to show an absence of or but little affection on the part of the plaintiff for the relative concerning whom the message was sent, he should be permitted to rebut such evidence.⁵⁸ So, too, a person can testify directly to a desire on his part to be with his family upon the occasion of his father's death.⁵⁹ And it is proper to permit the sendee to testify as to what he would have done if he had received the message.⁶⁰

The Opinion of Plaintiff as to the money value of his mental suffering is not competent.⁶¹

(C.) **FACT OF OBSERVATION.**—The mental state of a person so far as it can be derived from observation as distinguished from medical examination may be proved by the opinion of one who has had opportunities to form it;⁶² and within this rule it is competent to permit a person who has lived with the plaintiff, in an action against

mental anguish growing out of the relation of stepmother and son, but under our decisions it is a fact the plaintiff may prove if she can, to the satisfaction of the jury, for the state of the mind is as much susceptible of proof as the condition of the stomach").

In *Willis v. Western Union Tel. Co.*, 73 S. C. 379, 53 S. E. 639, where the plaintiff had telegraphed to his father, inquiring about the condition of his mother who was ill, it was held proper to permit him to testify whether or not on failing to receive the answer he suffered any mental anguish, distinguishing the same case on a former appeal, where it had been held that the plaintiff could not testify to his own peculiar apprehensions and conclusions as to his mother's condition when he failed to receive a telegram from his father in answer to his inquiry. The court said: "The failure to receive an answer to a telegram about an ill mother would have brought the suffering of suspense and anxiety to any normal human being circumstanced as the plaintiff was, whatever might be his peculiar temperament. The question and answer therefore, involved no claim for damages due to particular conclusions and fears which might be peculiar to plaintiff. To sustain this exception would require an extension of the rule laid down in the former appeal in this case beyond its reason."

^{58.} In *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.), 100

S. W. 974, where the delay in delivering the message in controversy prevented the plaintiff from attending his brother's funeral, the company had elicited evidence tending to overcome the presumption indulged by the law of that natural affection entertained by one brother for another, and it was held error to refuse to permit the plaintiff to relate the state of his feelings as to grief and disappointment when he first heard of his brother's death, and that he was grieved because of his failure to be present at the funeral.

^{59.} *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697.

^{60.} *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841.

The addressee of a telegram may testify as to whether or not if the telegram had been received he would have answered it, and what answer he would have made. *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828.

In an action against a telegraph company for damages for failure to deliver promptly a telegram summoning a physician, it is competent for the physician to testify that if he had received the telegram he would have gone at once. *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274.

^{61.} *Newman v. Western Union Tel. Co.*, 54 Mo. App. 434.

^{62.} Testimony of a witness who was present when the addressee of a telegram received it that he saw her

the telegraph company to recover for mental anguish, to testify to the mental anguish which the plaintiff experienced as manifested by his manner and appearance by reason of the default of the defendant company complained of.⁶³

(D.) APPEARANCE, ETC. — For the purpose of proving mental suffering in such cases, it is proper to admit evidence as to the appearance of the person in question, and declarations made by him at the time showing such distress.⁶⁴

6. Defenses. — A. IN GENERAL. — A telegraph company sued for damages cannot exonerate itself by showing that its line of telegraph was in good order, that approved instruments were used, and that faithful and competent servants were employed, where the particular act complained of shows negligence in the performance of its duty.⁶⁵ Nor can a telegraph company, for the purpose of excusing its failure to transmit and deliver a message received by it and on which the charges have been prepaid, show that the operator, on learning that the company did no business at the place to which the message was addressed, forwarded the message by telephone, the telephone message not being promptly addressed to the addressee.⁶⁶ A telegraph company cannot, as an excuse for delay in the delivery of a telegram, show that part of the time of its agent was consumed in attending to his other duties as railroad agent or in handling the mail.⁶⁷ Nor can the company excuse non-delivery

crying is admissible to show mental suffering. *Western Union Tel. Co. v. Manker*, 145 Ala. 418, 41 So. 850.

63. *Sherrill v. Western Union Tel. Co.*, 117 N. C. 352, 23 S. E. 277.

64. In *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, a witness was permitted to testify that the plaintiff who was the beneficiary of the message in question, while waiting for a train after the message had been delivered to her, seemed to be in great distress, and said that she would give everything that she possessed to see her brother, who was the person named in the dispatch, and talk to him before he died. The court in holding the admission of this evidence proper, said: "As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of her mental condition, including expressions of it at the time, might be given. As juries may from their own knowledge and experience of human nature estimate damage proceeding from that cause without any

evidence, it is not important to produce it, and when produced it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt and was exhibited by speech or otherwise may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain."

The natural utterances and expressions indicative of pain or suffering are competent original evidence proper to be received in proof of the mental state of the person in question on the issue of mental anguish. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

65. *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

66. *Western Union Tel. Co. v. Jones*, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579.

67. *Kernodle v. Western Union Tel. Co.*, 141 N. C. 436, 54 S. E. 423, where the court said: "If the de-

of a telegram by showing a mistake in the initials of the addressee, unless it is further shown that the non-delivery was caused by such mistake, or unless the mistake contributed thereto.⁶⁸ Nor can such default be excused by showing that the addressee lived beyond the delivery limits where it appears that by the exercise of ordinary diligence the company could have delivered the telegram within the limits.⁶⁹

Wire Out of Order. — Default in the transmission and delivery of a message cannot be excused by proof that the wire used to transmit such messages was out of order, where it appears, that the company had other available wires and no reason is shown why they were not used.⁷⁰ And where a message is destined beyond the lines of the receiving company the sender has the absolute right to select the connecting route and if the company undertakes to use a different route, it cannot excuse its default by showing that the route selected was out of order.⁷¹

Extent of Business. — **Terminal Office.** — In an action against a telegraph company for undue delay in delivering a message sent from one office to another only a few miles distant, the defendant cannot be permitted to prove that its business and emoluments at the terminal office were not sufficient to justify the employment of a messenger boy to deliver messages.⁷²

B. CONTRIBUTORY NEGLIGENCE. — Contributory negligence on the part of the plaintiff in an action to recover damages for alleged

defendant employs an agent on joint account with the railroad company, it must abide the consequences of a conflict of duty upon the part of the agent."

See also *Mott v. Western Union Tel. Co.*, 142 N. C. 532, 55 S. E. 363, where the court said: "The contract of the telegraph company is for prompt delivery. It is no defense that its agent had other duties to attend to as agent for another company, any more than it would have been an excuse that it had so much business of its own that one agent or the messengers it had could not properly handle it. In both cases the defendant is negligent if it does not have sufficient employees to properly discharge the duty it contracts to do and is chartered and paid to do."

68. *Arkansas & L. R. Co. v. Stroude* (Ark.), 100 S. W. 760.

69. *Arkansas & L. R. Co. v. Stroude* (Ark.), 100 S. W. 760.

70. In *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.), 100 S. W. 974, it appeared that the company had three wires between the

points in controversy, one for commercial business and two for railroad business, and it was held that the company could not be permitted to show, by way of excusing its delay in transmitting and delivering the message in question, that the wire used for commercial business, became crossed with one of the others, and put out of use, in order that the other wire might be used for railroad business, unless it showed further an emergency requiring the exclusive use of such other wire for railroad business, and that the sender or sendee had notice of that fact. See also *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036.

71. *Western Union Tel. Co. v. McDonald* (Tex. Civ. App.), 95 S. W. 691. See also *Western Union Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. 432.

72. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

negligence of a telegraph company in the transmission or delivery of a telegram is a matter of defense available to the defendant company, the burden of proving which is upon it.⁷³

C. STIPULATION IN CONTRACT OF SENDING, LIMITING OR EX-EMPTING COMPANY FROM LIABILITY. — a. *Assent.* — (1.) **Generally.** **Sender.** — The general rule recognized by all the courts is that the sender of a telegraphic message in affixing his signature to the message, as written by him on the blank furnished by the company, is conclusively presumed, in the absence of fraud or imposition upon the part of the company or its agents, to have assented to the terms of the contract of sending as printed on the blank, at least in so far as they are valid,⁷⁴ and this even though he may not have read them

73. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521.

See also *Southwestern Tel. & Tel. Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076, recognizing the rule stated in the text, but holding that the evidence was not sufficient to convict the plaintiff of contributory negligence inasmuch as it appeared that under all the circumstances surrounding the plaintiff at the time he acted with the diligence and prudence of a reasonably prudent and diligent person.

Whether or not the sender of a message suing the company for damages for negligent delay in its delivery was under the circumstances chargeable with contributory negligence is a question of fact, the burden of establishing which is upon the defendant company. *Western Union Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701.

In *Higdon v. Western Union Tel. Co.*, 132 N. C. 726, 44 S. E. 558, an action against a telegraph company to recover damages for a delay in delivering a message, where the plaintiff, on receiving the delayed message announcing the death of his mother, at a time when the only train by which he could have reached his mother's residence and attended the funeral was scheduled to leave immediately, telephone to the railroad station and, on being erroneously informed that the train was on time, made no effort to take it, which he could have done if he had been correctly informed that it was two hours and a half late, the telegraph company, in an action for neg-

ligence, in delivering the message, was entitled to an instruction that, if plaintiff was misinformed as to the time when the train left, then the negligence of the defendant, if any, was not the proximate cause of plaintiff's injury, and no damage could be assessed on account of plaintiff's failure to reach the funeral."

The fact that a message announcing a death in the family of the parties communicating by telegraph was delayed before it reached the telegraph office is irrelevant and cannot be set up by the company as contributory negligence in an action against the company for negligence in the transmission of the message. *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25.

74. *United States.* — *Primrose v. Western Union Tel. Co.*, 154 U. S. 1.

Georgia. — *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

Iowa. — *Albers v. Western Union Tel. Co.*, 98 Iowa 51, 66 N. W. 1040; *Sweatland v. Illinois & I. Tel. Co.*, 27 Iowa 433.

Kentucky. — *Camp v. Western Union Tel. Co.*, 1 Metc. 164.

Maryland. — *Birney v. New York Prtg. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607, *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

Massachusetts. — *Redpath v. Western Union Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Grinnell v.*

or have been able to read them.⁷⁵ And accordingly evidence of usage and understanding is not admissible on the part of the sender to vary the terms or effect of the printed contract between the parties.⁷⁶

Addressee.—Most of the courts hold also that the addressee of a telegraphic message is conclusively presumed to have assented to the printed terms of the contract of sending to the same extent as the sender,⁷⁷ especially where it appears that he has been a patron of the company for years sending and receiving messages.⁷⁸

Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

Michigan.—Western Union Tel. Co. v. Carew, 15 Mich. 525.

Minnesota.—Cole v. Western Union Tel. Co., 33 Minn. 227, 22 N. W. 385.

Nebraska.—Becker v. Western Union Tel. Co., 11 Neb. 87, 38 Am. Rep. 356.

New York.—Young v. Western Union Tel. Co., 65 N. Y. 163; Schwartz v. Atlantic & Pac. Tel. Co., 18 Hun 157; Breese v. United States Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; Pearsall v. Western Union Tel. Co., 44 Hun 532.

Pennsylvania.—Passmore v. Western Union Tel. Co., 78 Pa. St. 238; Wolf v. Western Union Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387.

South Carolina.—Young v. Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448.

Tennessee.—Marr v. Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.—Anderson v. Western Union Tel. Co., 84 Tex. 17, 19 S. W. 285; Western Union Tel. Co. v. Edsall, 63 Tex. 668; Womack v. Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; Western Union Tel. Co. v. Culbertson, 79 Tex. 65, 15 S. W. 219; Western Union Tel. Co. v. Rains, 63 Tex. 27.

75. Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

76. Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

77. *Georgia.*—Western Union Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83; Western Union Tel. Co. v. Waxelbaum, 113 Ga. 1017, 39 S. E. 443.

Kansas.—Russell v. Western Union Tel. Co., 57 Kan. 230, 45 Pac. 598.

Massachusetts.—Ellis v. American Tel. Co., 13 Allen 226.

Missouri.—Massengale v. Western Union Tel. Co., 17 Mo. App. 257.

South Carolina.—Aiken v. Western Union Tel. Co., 5 S. C. 358.

Tennessee.—Manier v. Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.

Texas.—Western Union Tel. Co. v. Culbertson, 79 Tex. 65, 15 S. W. 219; Western Union Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589.

78. Manier v. Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.

The Reason Assigned is that his right to recover is grounded on the contract of sending, and on the rule of law that when two parties have entered into a contract for the benefit of a third person, the latter may maintain an action upon his own behalf to recover for a breach of that contract. See cases cited *supra* in next preceding notes.

The Addressee of a Telegram Written on the Blank of Another Company containing printed instructions that the message shall be sent subject to the terms and conditions printed on the back thereof, and in answer to a telegram of inquiry from him, is bound by the reasonable conditions therein set out, notwithstanding they are in the form of a contract with a company other than the one to which the message is delivered for transmission; the delivery and acceptance of such a message is in effect an adoption by the parties of the contract made in the name of the other company. Western Union Tel. Co. v. Waxelbaum, 113 Ga. 1017, 39 S. E. 443.

The Courts Are, However, Not Unanimous in adhering to, or rather applying this doctrine, due perhaps not to a dissent from the soundness of the doctrine, but rather to the character of the action necessary to be resorted to by the addressee to recover damages for the default of the company.⁷⁹

(2.) **Stipulation Printed in Small Type.**—The fact that the stipulation in question was printed in very small type is not material and is not sufficient to overcome this presumption,⁸⁰ where there are words in large type calling attention to the stipulation.

(3.) **Opportunities To Know Stipulations.**—The fact that the party sought to be charged with notice of the stipulations in question had the opportunity to know them, while competent evidence, is not of itself sufficient to raise a conclusive presumption of knowledge.⁸¹

79. *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N. E. 670. In this case, *Manier v. Western Union Tel. Co.*, 94 Tenn. 442, 29 S. W. 732, was cited as authority for the position, that such conditions and stipulations, including the limit of sixty days, are binding upon the receiver, as well as the sender of the dispatch. But the Illinois court declined to assent to the doctrine of the Tennessee case. The court said: "The author of the opinion in that case refers to cases holding that the addressee of the message is not bound by the stipulation as to the sixty day limit, because he did not make the contract; and also to cases holding to the contrary, and says that it is not necessary to determine, in the case there under consideration, where the weight of authority lies. The conclusion announced in that case rests mainly upon two considerations, namely: *first*, that, where the receiver of the message is a patron of the company, he will be presumed to have knowledge of the form of the contract embodied in the blanks used; *second*, that the receiver's right to recover rests entirely upon the contract of sending, and upon the principle that, where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right. We are unable to see that these considerations can have any influence where the action brought by the receiver of the dispatch is an action in tort for damages for the careless and

negligent performance of a public duty." See also *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4.

80. *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387. In *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485, the stipulation in question was printed in very small type on the blank form and was not read or made known to the sender, but the court held that his omission to read the printed form could not relieve him from being bound by his signature.

81. *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662. Compare *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75. **Stipulations Conspicuously Posted in Office.**—It has been held that where it appears that the company had posted the stipulations in a conspicuous place in its office in which the message was written and sent, the sender is conclusively presumed to have assented to such stipulations, even though they are not embraced in the printed contract on the blank. *Birney v. New York Prtg. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607. Compare *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394.

(4.) **Message Written on Blank of Another Company.**—Although the blank on which the message was written was that of another company, the sender is nevertheless conclusively presumed to have assented to the printed stipulations thereon.⁸²

(5.) **Message Written on Mutilated Blank.**—Although a mutilated blank was used, the sender's assent will be presumed where it appears that sufficient of the blank still remained to put the sender on inquiry as to the full terms of the contract; especially where it appears that the sender was a frequent user of the blanks.⁸³

(6.) **Message Written by Operator.**—Where the message was written by the operator on one of the company's blanks, at the request of the sender, and signed by him, he is conclusively presumed to have assented to the printed stipulations.⁸⁴ So, too, where the message, written on plain paper, is handed to the operator, who copies it on a blank and then reads it over to the sender.⁸⁵ But no such presumption arises where the sender did not see and sign the message, nor otherwise agree to the printed stipulations.⁸⁶

(7.) **Message Not Written on Blank.**—When the message is not written on one of the blanks, but is received by the operator for transmission, the sender's assent to the printed stipulations on the blank is not presumed; but it must be shown that he had knowledge thereof.⁸⁷

82. *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Clement v. Western Union Tel. Co.*, 137 Mass. 463; *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448.

Although the blank used is not that usually furnished by the defendant company but is one furnished by another company, the sender is as much bound by the stipulations therein when the message was accepted by the sending company as if he had used one of its blanks. *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448.

83. *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75.

84. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668.

So in *Western Union Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754, the sender wrote the message and upon its being read over, he, the sender, detected an error which the clerk undertook to correct by an interlineation, but which he made in the wrong place; and it was held that the clerk was acting as the

agent of the sender and that the latter was bound by the terms of the contract.

85. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638.

86. *Beasley v. Western Union Tel. Co.*, 39 Fed. 181; *Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.), 72 S. W. 232.

A telegraph company, in the absence of a contract restricting its liability for services which it undertakes to render, cannot rely upon endorsements made on its message blanks to restrict such liability, when the plaintiff neither signed the blank nor authorized any one to do so for him. *Western Union Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828.

A stipulation that claims for damages must be presented within a specified time does not govern where the party to be charged therewith did not know and could not reasonably ascertain within that time what damage, if any, he had sustained by reason of the default. *Herron v. Western Union Tel. Co.*, 90 Iowa 129, 57 N. W. 696.

87. *Western Union Tel. Co. v.*

(8.) **Message Received Verbally.**—Where the message was received by the operator verbally or by telephone, there is no presumption of assent; it is then a question of fact to be established by competent evidence.⁸⁸

(9.) **Message Written on Plain Paper and Pasted on Blank.**—Where the operator receives a message for transmission written on a plain piece of white paper and without calling attention to the rules of the company printed on its blank, pastes the message on one of the blanks, he acts as the agent of the company only, and the sender's assent to the printed stipulations is not presumed; that he had any knowledge of them from any source prior to the sending of the message must be shown by the company.⁸⁹

Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75.

Compare Gulf, C. & S. F. R. Co. *v.* Geer, 5 Tex. Civ. App. 349, 24 S. W. 86, where the message written upon a piece of brown paper was rejected by the operator as unintelligible and by him handed back to the person sent by the plaintiff to deliver it. The plaintiff's messenger stated to the operator that he was hot and nervous and asked the operator to write down the message, which the latter did as dictated, and sent it. It was held that the operator in the preparation of the message was acting for the sender and not for the company, and that the plaintiff could not therefore complain of his act in writing the message upon the form commonly used for that purpose; and that accordingly he was bound by the conditions upon the blank.

88. Western Union Tel. Co. *v.* Todd, 22 Ind. App. 701, 54 N. E. 446; Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394; Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

In Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, the message in question had been received by the operator for transmission over the telephone, and it was held that in such case the agent was acting for the company and not for the sender,

and consequently the latter was not bound by the terms of the printed contract; that if he had knowledge of the rules and regulations under which the company did business he would be bound by them so far as they were valid and binding upon others, but that it was a question of fact whether or not he had such knowledge to be determined from competent evidence introduced for that purpose.

Message Received and Delivered Orally.—Where it appears that the exigencies of the business were such as to require that the usual methods of procedure should be dispensed with and the company receives messages orally and delivers them orally, it is a question of fact whether or not under the circumstances the telegraph company by dispensing with the use of the usual blanks did not intend to relieve their patrons from the stipulations contained therein. Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

89. Harris *v.* Western Union Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70; Western Union Tel. Co. *v.* Arwine, 3 Tex. Civ. App. 156, 22 S. W. 105; Western Union Tel. Co. *v.* Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109.

In Anderson *v.* Western Union Tel. Co., 84 Tex. 17, 19 S. W. 285, the message in question was not written upon one of the blanks supplied by the company, but was subsequently attached to one in the office. It was held that the written message should have been admitted

b. *Non-Compliance*. — Notwithstanding the courts hold as just shown with reference to the assent of the sender or addressee of a telegraphic message to the printed stipulations on the blank, yet when non-compliance with any one or more of those stipulations on the part of the sender or addressee is relied on by the company as a defense to an action for damages, the burden is on the company to show it.⁹⁰

Variance Between Defense and Particular Stipulation. — Where the default complained of is failure on the part of the company to deliver the message at all,⁹¹ or within a reasonable time,⁹² the company cannot show, by way of defense, failure on the part of the sender to comply with the stipulation as to repeating messages. Nor can the company in such case show failure to comply with the stipulation as to presenting a claim for damages within a stated time.⁹³

The Existence of a Regulation Not Incorporated in the Contract of sending is a question of fact, and evidence that the company's agent constantly and habitually observed no such rule is competent as conducing to show that no such rule existed.⁹⁴

without the attached blank containing conditions as to free delivery limits and making claim for damages within a certain time; that the message having been received for transmission without conditions, it was the duty of the company to exercise due care in the delivery of the telegram to the person addressed, and that under such circumstances the fact that the person so addressed is outside of the free delivery limits does not excuse want of that care.

90. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192; *Beatty Lumb. Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

Failure To Present a Claim for Damages Within the Time Specified in the contract of sending is an affirmative defense, the burden of proving which is upon the defendant company. *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192.

By Statute in Texas, the rule is that compliance with the stipulations of the contract of sending is presumed unless denied by the company under oath. *Texas Tel. & Tel. Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258.

91. *Western Union Tel. Co. v.*

Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

The failure of a sender of a message to have the same repeated cannot be shown in defense of an action based on the negligence of the company in failing to deliver the message, even though the blank on which the message was written contains a stipulation exonerating the company from liability for any amount beyond that received for sending the message if delay should occur in its delivery, unless the message be repeated. *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653.

92. Where the default complained of is failure on the part of the company to deliver the message in a reasonable time, the company cannot by way of defense show failure on the part of the sender to comply with the stipulation in the contract of sending providing for repeating messages and exonerating the company from liability for delays in the transmission or delivery of an unrepeatable message beyond the charges prepaid. *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

93. *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542.

94. *Western Union Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963,

Evidence of Compliance. — Where a person injured by the negligence or default of a telegraph company in the transmission or delivery of a message is required to make written demand upon the company for damages resulting from such negligence or default, the written instrument itself is the best evidence of its contents, and the usual rules as to secondary evidence of its contents are applicable.⁹⁵

Waiver of Time Limit for Filing Claim. — The letters of the superintendent of the defendant telegraph company in response to a letter of the addressee of the telegram in question, asking for information as to what point the message was sent from, at what date, and the name of the sender, is not evidence of the intention on the part of the company to waive its right to require the claim for damages to be filed within the time designated in the contract of sending.⁹⁶

7. Statutory Penalties for Breach of Duty. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *Contract of Sending.* — In an action to recover a penalty imposed upon a telegraph company for default in the transmission or delivery of a telegraphic message, the burden of proof is upon the plaintiff to show not only the contract of sending, but he must also show a valid contract.⁹⁷

where the regulation in question was whether or not there was no night delivery at a certain office.

95. In *Western Union Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639, holding further that the mere fact that the agent on whom the demand was made answered it verbally by a refusal on the part of the company to settle and saying that the plaintiff would have to bring suit, did not dispense with the necessity of producing the written instrument itself.

96. *Eaker v. Western Union Tel. Co.*, 75 S. C. 97, 55 S. E. 129, *distinguishing* *Hays v. Western Union Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481. In the latter case it was held that waiver of the printed conditions of the message requiring the claim for damages to be made in writing within a stipulated time, may be shown by the acts of an agent of the company authorized to gather information as to such claims, in accepting the verbal statement of damages and seeking information of plaintiffs as to the merits of the claim within the limit.

97. Thus where it appears that the contract of sending was made on Sunday, the plaintiff in such an

action must establish the validity of the contract by proof of the existence of a necessity for its making on Sunday, and that the company knew of that necessity. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222. The court said: "This is so, because he seeks to enforce a penalty inflicted by way of punishment and not given by way of compensation. It is essential to his cause of action that he should show a valid contract. The case is not governed by *Heavenridge v. Mondy*, 34 Ind. 28, for here the action is to recover a statutory penalty, and the plaintiff must show an effective contract in order to bring himself within the terms of the statute on which alone his action is based. Here, too, the act contracted for was within the usual vocation of the telegraph company, and as it was done on Sunday and the contract for its performance made on that day, the contract was *prima facie* invalid. Principle and authority require that, in order to enable the plaintiff to recover a statutory penalty for an act done on Sunday, he should show that the defendant was guilty of a wrong, and to accomplish this it is incumbent upon him to show that

b. *Right of Recovery in Sender of Message.* — So, too, where the right of recovery for such penalty is confined to the sender of a message, the burden is upon the plaintiff in such an action to show that he was the sender of the message in question.⁹⁸

c. *Breach of Duty, Etc.* — (1.) **Generally.** — And of course in an action to recover a penalty it cannot be presumed that the defendant violated the law; on the contrary, the presumption is that the law was obeyed and the statutory duty performed.⁹⁹

(2.) **Refusal To Transmit.** — In some of the states, notably Arkansas, the statute imposes a penalty upon a telegraph company for refusing to "transmit over its wires to localities on its wire", and of course it is necessary, in order that the penalty may attach, to show a refusal within the terms of the statute.¹ So in Mississippi,

the contract was legal. One who procures another to make a contract forbidden by law, ought not to be permitted to avail himself of the contract to enforce a statutory penalty for a breach of duty springing from the contract, unless he shows that there was a necessity for making the contract, and so brings his case within the exception created by the statute."

And the plaintiff in such case may show reasonable necessity and notice of the fact from the contents of the message itself, or he may show knowledge by extrinsic facts. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222.

^{98.} *Western Union Tel. Co. v. Brown*, 108 Ind. 538, 8 N. E. 171.

^{99.} *Western Union Tel. Co. v. Jones*, 116 Ind. 361, 18 N. E. 529; *Little Rock & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79; *Western Union Tel. Co. v. Steele*, 108 Ind. 163, 9 N. E. 78; *Western Union Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93. See also *Western Union Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828. And see cases cited in succeeding notes.

In a statutory action for the recovery of a penalty for negligence in the transmission and delivery of a message, the rule is that where the plaintiff in the action proves the negligence complained of it is not necessary for him to prove also that it was intentional on the part of the telegraph company or its agents. When the negligence in question is established, the burden is shifted to

the defendant company to excuse it. *Little Rock & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79.

In *Brooks v. Western Union Tel. Co.*, 56 Ark. 224, 19 S. W. 572, the court in construing the Arkansas statute as to whether or not it inflicted a penalty for merely refusing to deliver a message, said: "The statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt such an act should not be construed to inflict a penalty which the legislature may not have intended."

1. The Arkansas statute does not create a liability for negligence in the transmission where there is a *bona fide* effort to transmit. *Baltimore & O. Tel. Co. v. State (Ark.)*, 6 S. W. 513.

The Arkansas statute (Kirby's Digest, §7946) imposing upon telegraph companies the duty to transmit telegrams without discrimination as to charge or promptness, under a certain penalty for each and every refusal so to do, is intended to apply in all cases of a wilful or intentional refusal to transmit a telegram, and does not apply to a case where the evidence shows merely a refusal resulting from negligence on the part of the company's agent.

State v. Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834. And see also *Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78, 6 S. W. 236, where it was held that where a message was received by a telegraph company for transmission from a point in Arkansas to a point in Mis-

where the statute imposes a penalty on a telegraph company for neglect, failure or refusal to transmit and deliver a message within a reasonable time, without good and sufficient excuse, proof of mere erroneous transmission is not enough.²

(3.) **Bad Faith, Partiality, Discrimination, Etc.** — Where the statute imposes a penalty for bad faith, partiality and discrimination in the transmission of telegraphic messages, proof of mere negligence in transmission is not enough.³ In an action to recover a penalty im-

souri, and was transmitted to a relay station in the latter state and was lost between that place and its destination by negligence of the defendant, there could be no recovery of a penalty under the statute. The court there said: "Under the act of 1885, no penalty is recoverable for a mere negligent omission to transmit or deliver a message. For the redress of such injuries the party aggrieved is remitted to his remedy for damages."

2. *Wilkins v. Western Union Tel. Co.*, 68 Miss. 6, 8 So. 678.

Under the Mississippi statute penalizing a telegraph company for its default in transmitting correctly and delivering within a reasonable time a telegram, proof of a departure from the exact terms used is not sufficient to subject the company to liability where it appears that the message was transmitted with such substantial accuracy as to perform its office and effect its purpose, and the departure results in no harm. *Western Union Tel. Co. v. Clarke*, 71 Miss. 157, 14 So. 452.

Under the Mississippi statute a telegraph company is not liable to a penalty for delay in the transmission of a message where the evidence showed that the message was in fact promptly delivered after reception at the receiving office. *Western Union Tel. Co. v. Hall*, 79 Miss. 623, 31 So. 202. See also *Marshall v. Western Union Tel. Co.*, 79 Miss. 154, 27 So. 614, 89 Am. St. Rep. 585.

The Mississippi statute (Act 1892, sec. 4326) penalizing a telegraph company for transmitting a message incorrectly and for unreasonable delay in the delivery of a message after transmission, has no application to a case where the evidence is of mere failure or delay in transmission. *Hilley v. Western Union Tel. Co.*, 85 Miss. 67, 37 So. 556.

3. *Western Union Tel. Co. v. Steele*, 108 Ind. 163, 9 N. E. 78; *Western Union Tel. Co. v. Swain*, 109 Ind. 405, 9 N. E. 927.

Under the Indiana statute (of 1885) proof merely of negligent failure to deliver a telegram is not sufficient to subject the telegraph company to liability for the statutory penalty. *Western Union Tel. Co. v. Jones*, 116 Ind. 361, 18 N. E. 529.

Under the Indiana statute, proof that a telegraph company failed to receive and transmit a message (1) with impartiality and good faith, or, (2) in the order of time in which they are received, or, (3) without discrimination in rates or conditions of service subjects the defaulting company to the penalty provided by the statute in favor of the aggrieved party. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679.

The **Michigan Statute** imposing upon the owners of telegraph lines the duty of transmitting telegrams with impartiality and good faith under a penalty of \$100 for every neglect or refusal so to do is designed to punish cases of wilful discrimination or partiality, and it is not enough to show mere negligent omission to transmit a message. *Weaver v. Grand Rapids & I. R. Co.*, 107 Mich. 300, 65 N. W. 225.

In **Missouri** the statute makes it the duty of every telegraph company to *transmit* telegrams promptly and with impartiality and in good faith under a penalty of \$200 for every neglect or refusal so to do. But there seems to be some confusion amongst the cases as to whether or not the duty thus imposed upon the telegraph company involves the further duty of delivering the message. In *Rixie v. Western Union Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265, it was held that the duty of

posed by statute upon a telegraph company for default in the transmission of a telegraphic message where the sender suing to recover such penalty proves that there was an unreasonable delay, the burden of explaining the delay is upon the defendant company.⁴

d. *Loss or Damage*. — In an action to recover from a telegraph

delivering the message was not embraced within the terms of the statute, and hence no proof of the non-performance of that duty was necessary to subject the company to a liability for the penalty. See also *Connell v. Western Union Tel. Co.*, 108 Mo. 459, 18 S. W. 883. Compare *Parker v. Western Union Tel. Co.*, 87 Mo. 553, in which case the presiding judge in the main opinion ruled that the transmission of a message necessarily involved the delivery of that message to the addressee. It should be noted further in this case that the other two judges of that court while they dissented from Judge Bland on this question placed their dissent not on the merits, but on the mere fact that the *Connell* case had ruled to the contrary, which ruling they regard as binding upon that court. See also *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391.

Under the Missouri statute it is sufficient to show either that the message as delivered was not transmitted or that it was not transmitted with impartiality, or that it was not transmitted with good faith; and where the non-transmission of the message is established it is not necessary that it also be shown that the telegraph company was guilty of partiality and bad faith. *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, the court said: "How, in the nature of things, could the sender of the dispatch prove, beyond the inference that would arise from the mere failure to transmit, that the company had been guilty of partiality and bad faith? How could he get out of the employes of the defendant, who alone would have knowledge of the real reason of the failure to transmit the dispatch, evidence which would convict them of so gross a violation of a duty? Under such a view of the statute, the agent of the telegraph company could receive the dispatch, and throw it into the waste

basket, or into the fire, the moment the sender's back was turned, and the latter could never recover the penalty denounced by the statute. This would cut the statute down so as to make it mean that the penalty could be recovered only in cases where the dispatch was in fact transmitted, but where it was not transmitted with impartiality, that is, where other dispatches received later had been sent before it; or where it had not been transmitted in good faith, that is, where the agents of the company had corruptly delayed sending it to effect some purpose that might be imagined. We think that this would be a partial repeal of the statute."

In *Georgia* the telegraph penalty acts were repealed in 1885. See *Meadors v. Western Union Tel. Co.*, 96 Ga. 788, 23 S. E. 837. Previous to that time the statute had been several times invoked. Thus, under *Georgia* statute penalizing a telegraph company for its default in the transmission and delivery of a telegram with due diligence, it is not sufficient to show merely a verbal though material inaccuracy in the transmission of the message in question. *Western Union Tel. Co. v. Rountree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

In *Wolf v. Western Union Tel. Co.*, 94 Ga. 434, 19 S. E. 717, an action to recover the statutory penalty under the *Georgia* statute then in force for alleged failure to transmit and promptly deliver a message, it was held that proof that the receiving operator by mistake substituted for the surname of the sender the surname of another person was not sufficient to charge the company with liability for the penalty; that it was a mere error in transmission which did not come within the terms of the statute.

4. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 2 N. E. 604, holding further that a delay of sev-

company the penalty imposed upon it by statute for breach of duty in the transmission and delivery of a telegram, it is immaterial whether or not the complaining party suffered actual loss or damage; and of course in such case actual loss or damage need not be shown.⁵

B. DEFENSES. — a. *Prepayment of Charges.* — It was held under the Georgia statute existing previous to 1895 that failure on the part of the sender to prepay the charges might be shown by the company in defense of an action to recover the statutory penalty.⁶ But in Indiana it is held that although the statute may require prepayment as a prerequisite to the right to recover the penalty yet, where it appears that the transmitting operator declined to receive the

eral hours in transmitting a message which requires only from five to fifteen minutes for that purpose shows a want of diligence on the part of the company.

5. *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; *Little Rock & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *Western Union Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 776; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692.

In an action against a telegraph company to recover the penalty provided by the Indiana statute for failure to transmit a message as in the statute provided, it is not necessary for the plaintiff to show that he has sustained any actual damages. He may recover compensation for such damages independently of the penal statute, which furnishes a cumulative remedy and warrants the recovery of fixed punitive damages. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679.

6. *Western Union Tel. Co. v. Ryals*, 94 Ga. 336, 21 S. E. 573, it was held further in this case that where by mutual agreement of the sender and the company's agent or operator, the charges are held open as a debt to be subsequently paid by the sender, or by himself and another jointly, this was neither actual payment nor any substitute therefor, under the terms of the statute making telegraph companies liable for the penalty only in cases where there has been "a payment or tender of the usual charge according to the regulations of such company;" and that it

makes no difference that the message is forwarded over the wire nominally as a prepaid message. The court said that while marking a message "paid" would in the absence of proof to the contrary raise a presumption against the company that it was a prepaid message, yet that where the company deduces evidence affirmatively showing that the charge for the message was not paid in advance, forwarding it nominally as a prepaid message would not make it such in fact. The court said further: "If a customer of the telegraph company chooses to do business with it on credit, he cannot hold the company liable to him for the penalty because of delay in transmitting or delivering a message. If he wishes the company to transact his business at its peril with reference to the penalty, he must either pay in cash, or make the tender required by the statute. Of course if any negligent delay occurs either after actual payment or tender of the charges, the rule would be different."

In *Western Union Tel. Co. v. Power*, 93 Ga. 543, 21 S. E. 51, an action for the statutory penalty for failure to transmit and deliver a message with due diligence, it was held that evidence that the sender of the message tendered prepayment and then withdrew the tender and had the message sent collect defeated the right of the plaintiff to recover the penalty.

In an action to recover the penalty under the Georgia statute for default in the transmission and delivery of a message with due diligence, the fact that the message delivered to the addressee was marked "paid" was

charges, and requested the sender to allow them to be paid by the addressee, the company could not set up the fact that the charges had not been prepaid as a defense to escape liability.⁷

b. *Non-compliance With Stipulation Requiring Presentation of Claim.*—A telegraph company, sued to recover the statutory penalty for a breach of duty in the transmission and delivery of a telegram, cannot in defense of the action show a failure on the part of the complaining party to comply with a stipulation in the contract of sending, exonerating it from liability unless a claim therefor was presented as required by the stipulation.⁸

c. *Non-Residence of Addressee.*—A telegraph company, sued for the statutory penalty for default in the transmission and delivery of a telegram, cannot, by way of defense, show the non-residence of the addressee within the delivery limits where it in fact appears that he himself called for the message at the company's office.⁹

d. *Accord and Satisfaction.*—In an action under the Georgia statute to recover the statutory penalty for default in the transmission and delivery of a message with due diligence, the company cannot by way of accord and satisfaction show merely that its agent had refunded to the addressee the money received by it from the sender in prepayment of its charges.¹⁰

III. TELEPHONE COMMUNICATIONS AS EVIDENCE.

1. *In General.*—Telephone conversations, in so far as concerns their admissibility in evidence, are in the main governed by the same

prima facie evidence that it was a prepaid message within the terms of the statute. *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100.

7. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222.

8. *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756.

In *Mathis v. Western Union Tel. Co.*, 94 Ga. 338, 21 S. E. 564, 1039, 47 Am. St. Rep. 167, the court in holding this, said: "The statute imposing upon telegraph companies a penalty for default in the transmission or delivery of messages is based upon public policy, and has for its object the quickening of the diligence of these companies in performance of their duties to the public. With this object in view, it seeks to encourage both the sender and sendee of messages to sue for the penalty by offering to the one who shall first sue the whole amount of the recovery. For a company to protect

itself against payment of the penalty by a contract with the sender, made at the time of receiving from him the message to be sent, that it will not be liable unless a claim for the penalty is presented to it or its agents in writing within sixty days after the message is filed for transmission, would be contrary to the policy of the legislature in enacting the statute, and all such contracts are void and of no effect. See also *Western Union Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Western Union Tel. Co. v. Cooleedge*, 86 Ga. 104, 12 S. E. 264.

9. *Western Union Tel. Co. v. Mansfield*, 93 Ga. 349, 20 S. E. 650.

10. *Western Union Tel. Co. v. Moss*, 93 Ga. 494, 21 S. E. 63. The court said that if the company incurred the statutory penalty, there was no remission of the penalty by receiving back the money which had been paid to the company for service which it never performed. It could not cancel the penalty by merely refunding this money. Had there been

rule of evidence which governs the admission in evidence of oral statements made in an ordinary conversation,¹¹ except, of course, the necessity of identification of the party against whom the conversation is sought to be used.¹²

Bystander.—A telephone conversation, being shown by other competent evidence to have been between the parties to the action and upon the subject-matter of the litigation, may be testified to by a bystander so far as he heard it.¹³

2. Identity of Party.—A NECESSITY.—Before such conversations may be received in evidence, however, the identity of the party sought to be charged therewith must be established.¹⁴

some express agreement amounting to an accord, and the refunded money had been received in satisfaction, the penalty might have been released or discharged, but that no such agreement appears to have been made.

11. *Shawyer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411; *Globe Prtg. Co. v. Stahl*, 23 Mo. App. 451; *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988.

In *People v. Ward*, 3 N. Y. Crim. 483, a criminal prosecution where a witness testified that he called up a particular person over a telephone and recognized his voice, it was held that he might testify to the communication which the latter made to him over the telephone. See also *Southwark Nat. Bank v. Smith*, 21 Pa. Co. Ct. 1.

In *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291, it was held that the admission of evidence on the part of the plaintiffs of a communication to them from the defendant shown to have been probably transmitted by telephone was not error, although it appeared that the message may have been sent by telegraph, it further appearing that if sent by telegraph the telegram delivered had been lost or destroyed.

The admission of a party sought to be charged, that, at a certain time, he had had a conversation in given terms by telephone, renders immaterial the objection that independently of such admission there was no direct evidence of the scope of such conversation, and that the conversation was mere hearsay. *Nebraska Nat. Bank v. Burke*, 44 Neb. 234, 62 N. W. 452.

12. See next succeeding section.

13. *Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644.

Where a conversation by telephone is carried on by the parties to an action concerning the subject-matter of the action and there is an issue as to what was said between them, a witness who heard one of the parties talk into the telephone may testify to what he heard. *Danne-miller v. Leonard*, 15 Ohio C. C. 686, 8 Ohio C. D. 735.

14. *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988, where the court said: "To hold parties responsible for answers made by unidentified persons in response to a call at the telephone from their offices or place of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party replying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line." See also *Globe Prtg. Co. v. Stahl*, 23 Mo. App. 451.

In *Swing v. Walker*, 27 Pa. Super. Ct. 366, the court said: "No testimony is necessary to show that a declaration or admission is not admissible unless the party making it is identified as the party sought to be charged. The introduction of the telephone has not changed the rule of evidence on that subject. If the witness had been in the presence of the person at the other end of the line, the declaration of that person would not have been admissible with-

B. MODE AND SUFFICIENCY. — This identity of person may be established by either direct or circumstantial evidence.¹⁵ But it is not essential in all cases that the witness testifying to the communication shall have recognized the voice of the other party;¹⁶ the fact that he did not goes only to the weight of the evidence.¹⁷

3. Conversation Through Operator. — In the case of a telephone conversation carried on through the medium of an operator, such operator is deemed the agent of the party invoking his aid, and is competent to testify to the conversation by his principal.¹⁸

out evidence that he was one of the defendants."

15. *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988; *Globe Prtg. Co. v. Stahl*, 23 Mo. App. 451; *Shawyer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411.

16. *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988.

In *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539, evidence of a conversation held through the telephone between some one at the instrument in plaintiff's private office and the witness was admissible, although the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The court in holding this to be correct, said: "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary use are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on."

17. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539.

In *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608,

27 Am. St. Rep. 861, a witness was permitted to testify to a telephone conversation had by him, that he did not remember who spoke to him through the telephone from the other end of the line, but that he recognized the voice of the person answering at the time as one of the employees of the office with whom he had transacted business at that office, and that he was accustomed to transact business with defendant's office by telephone. Objection was made to the admission of this evidence because the witness could not state the name of the person who answered his message, nor that he was the agent of the defendant. It was held that the objection was properly overruled, that the circumstances detailed by the witness indicated that the person with whom he was in communication was the defendant's agent, and that the inability of the witness to give the name of the person would bear rather upon the question of the weight than the admissibility of the evidence.

18. In *Sullivan v. Kuykendall*, 82 Ky. 483, it appeared that the appellee went to a telephone office at one place to communicate with the appellants at another town, directing the operator to converse for him with them. He first directed the operator to call for the appellant, Sullivan, and the operator at the receiving office reported that he would send for Sullivan to come to the telephone, and reported soon after that he was there. Sullivan using the telephone for himself and the sending operator for the appellee, the parties had a conversation at some length. It was held competent in a subsequent suit between the parties for the appellee to prove by himself and others what the operator, acting as his agent, re-

ported to him as coming from Sullivan, the operator himself not being able to remember what he reported to the appellee. It was objected that what the operator reported to the appellee, made as the telephone conversation progressed, was incompetent as being hearsay evidence. But the court in overruling this objection likened such testimony to the statements of an interpreter as to communications between third persons, and continuing, said: "We must not be understood, however, as holding the testimony competent upon the above ground, because there is another reason for so ruling, which is conclusive to our minds. Subject to various qualifications, the old rule, that a party must produce the best evidence within his power to prove a fact, should govern. But as business expands by the aid of new inventions, wider scope must be given to the rules of evidence. There is no need, however, of any departure or innovation in this case, because it is a well settled rule of evidence that the statements of an agent, when acting within the scope of his agency, are competent against his principal. When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and, in such a case, certainly the statements of the operator are competent, being the declarations of the agent, made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his

part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence." But see dissenting opinion in this same case, of Judge Pryor.

In *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440, defendant called at the public telephone station at Schuyler and asked the operator to request plaintiffs to step to the telephone in their place of business in Omaha as he desired to converse with them. H., one of the plaintiffs, answered the call, but owing to the conditions of the atmosphere the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station, proposed to and did transmit defendant's message to plaintiff offering to sell them a quantity of hay, and he also repeated to the defendant their answer accepting the proposition. In an action for a breach of the contract it was held, that the conversation was admissible in evidence, and that it was competent for the defendant to state the contents of plaintiffs' answer to his message as repeated by the operator at Fremont at the time it came over the wire.

TENANCY.—See Landlord and Tenant.

TENANTS IN COMMON.—See Title; Partition.

TENDER.

By BURREL D. NEIGHBOURS.

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I. BURDEN OF PROOF AND PRESUMPTIONS.

1. **Burden on Party Who Pleads Tender.** — The burden is upon the person pleading the tender to show that the same was in all respects made in accordance with law and that he was at all times ready, willing and able to perform the same on his part.¹ But where a defendant alleges such readiness and ability, he is not required to prove the same beyond the day specified, unless the plaintiff attempts to show a subsequent demand and refusal.²

2. **Must Be Clearly Proved.** — A tender must be clearly and regularly proved and cannot be inferred.³

1. *Butler v. Hannah*, 103 Ala. 481, 15 So. 641; *Pulsifer v. Shepard*, 36 Ill. 513; *Wiener v. Auerbach*, 98 N. Y. Supp. 686; *Lad & Tilton v. Mason*, 10 Or. 308; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94, 93 Am. Dec. 677; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

The Burden Is Upon the Party Alleging Tender to prove it, and to further prove that he has been at all times since the tender was made, prepared and willing to make payment at any time when the creditor might conclude to receive it, and that upon his plea of tender the money was paid into court. *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 90.

Paying Money Into Court. Where a statute authorized a tender

to be made by paying the money into court, it was held unnecessary to prove the fact by evidence, as the court would inform itself as to whether or not the money had been paid in. *Newton v. Allis*, 16 Wis. 210.

2. **Keeping Tender Good.** Where a plea states that the defendant was ready at the day specified, and is yet ready to deliver specific articles according to his contract, the defendant is not compelled to prove that he was ready after the day specified; it devolves upon the plaintiff to falsify it if he can, by replying and proving a subsequent demand and refusal. *Tiernan v. Napier*, 5 Yerg. (Tenn.) 410.

3. In *Arrowsmith v. Van Harlingen's Exrs.*, 1 N. J. L. 26, the court

3. Presumption as to Amount.—Where it appears that money was actually produced at the time of making the tender, the amount will be presumed to have been sufficient, if no objections were made thereto.⁴

II. NECESSARY PARTIES TO TENDER.

1. Party Making Tender.—A tender must be made by a party interested in the subject-matter of the same.⁵

said: "Tenders are *stricti juris*, and cannot be inferred by implications; they must be clearly proved; and equity never will supply any deficiency in the testimony."

4. Conway v. Case, 22 Ill. 127.

McDanel v. Kimbrell, 3 G. Gr. (Iowa) 335, was an action for specific performance of a contract for the conveyance of land. The main question was upon the sufficiency of a tender of purchase price pleaded by the complainant. He proved by two witnesses who were present that he tendered to the defendant in lawful money the amount named in the agreement on the day it became due, and that the defendant refused to accept the money and refused to give a deed. They further testified that they did not count the money nor see it counted, but that they saw the money; that it was in gold and silver, and that complainant said it was the amount. *Held*, that a tender was established, the court saying: "As there was no objection to the amount tendered, and as it is not pretended that there was a greater amount due, nor that the payment was not offered within the time stipulated, we cannot but regard the proof as sufficiently certain."

Money in Sacks.—In Behaly v. Hatch, 1 Walk. (Miss.) 369, 12 Am. Dec. 570, the court said: "An offer of money in bags is a legal tender, and it is the business of the receiver to count it and see that there is enough to satisfy him. . . It is not necessary to count the exact sum of money down; it is sufficient if the defendant offered to pay the amount, and had sufficient money to do it."

5. McDougald v. Dougherty, 11 Ga. 570; Noyes v. Wyckoff, 30 Hun (N. Y.) 466; Johnston v. Gray, 16

Serg. & R. (Pa.) 361, 16 Am. Dec. 577.

Tender by Assignee.—In Davies v. Dow, 80 Minn. 223, 83 N. W. 50, the evidence showed that the defendant took a stock of merchandise upon a note and mortgage. A few days thereafter the mortgagor made an assignment of all his property for the benefit of creditors to one Julius Smith, and Smith as assignee tendered to the defendant more than the full amount due upon the note and mortgage and the defendant refused to accept the tender. *Held*, to show a tender by the proper person, the court saying: "The assignee in such a case not only stands in the shoes of the assignor, possessed of all of his rights, but he also represents the creditors of the assignor; and we hold that a tender of payment of a mortgage by such an assignee has the same legal effect as if made by the mortgagor."

By Executrix.—In Sharp v. Garresche, 90 Mo. App. 233, it appeared from the evidence that defendant's testator had as an attorney collected money belonging to the plaintiff, and died before it was paid over to plaintiff, and that the executrix of his estate by her attorney tendered to the attorney of the plaintiff the full amount of money due at the time of the tender, and plaintiff's attorney refused to accept the tender on the ground that it was made by the defendant as executrix, the question being as to interest after the alleged tender. *Held*, that the tender was made by the proper party and was good.

In Whittaker v. Belvidere Roller-Mill Co., 55 N. J. Eq. 674, 38 Atl. 289, the court said: "To make an effectual tender, it must appear that at the time when it was made the

Agent of Party Making Tender.—A tender may be made by any authorized agent or person, but he must at the time inform the person to whom he makes the tender, of the party for whom he is making the same.⁶

2. Party to Whom Tender Is Made.—A tender must be made to the creditor or to some person authorized by him to receive it.⁷ If

party making it had the right to tender payment of the debt, as in the case of the debtor himself or his representatives, or the holder of the title to the estate on which the debt was a lien; or that he had the right to require a transfer of it, as in the case of subrogation of a surety, or redemption sought by the holder of some subsequent lien having that equity. The demand should clearly disclose the right of the party making the offer, so that the creditor may be notified of his duty to accept."

6. *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571; *Whittaker v. Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289.

7. *Alabama.*—*Birmingham Paint & Roofing Co. v. Crampton & Tharpe*, 39 So. 1020; *Camp v. Simon*, 34 Ala. 126.

Florida.—*Chandler & Wittich v. Wright*, 16 Fla. 510.

Illinois.—*McGwire v. Bradley*, 118 Ill. App. 59; *Steele v. Biggs*, 22 Ill. 643, 656.

Indiana.—*Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771; *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685.

Iowa.—*McLaughlin v. Royce*, 108 Iowa 254, 78 N. W. 1105.

Maine.—*Handy v. Rice*, 98 Me. 504, 57 Atl. 847.

Minnesota.—*Ersine v. McIlrath*, 60 Minn. 485, 62 N. W. 1130.

Missouri.—*Cassville Roller Mill Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 155, 79 S. W. 720.

Nebraska.—*McEldon v. Patton*, 93 N. W. 938; *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288.

New Jersey.—*Whittaker v. Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289.

Texas.—*Harris v. Staples* (Tex. Civ. App.), 89 S. W. 801.

Must Be Made to Proper Party. In *King v. Finch*, 60 Ind. 420, it appeared in evidence that the payee of

a promissory note which was not payable in bank, placed the same in a sealed envelope with other papers and deposited it in a bank for safe keeping. The bank through some inadvertence of its officers took the note out and notified the maker that it would become due on a certain day, but did not claim it as property of the bank. The maker by his agent went to the bank when the note became due, and offered to pay it, and tendered the amount to the cashier in United States legal tender notes, but was told by the cashier that he had been instructed not to receive the money. The note was shown to the agent of the maker and the money counted by the cashier. After the note was past due it was assigned by the payee to Finch, the appellee, to whom the maker paid the principal, but declined to pay interest, claiming it was stopped by the tender so made. The court said: "We are of opinion that the tender in this case was insufficient. It would not have been good against the payee of the note, because the person to whom it was made was not authorized to receive the money, and therefore cannot be good against her assignee."

To Creditor's Attorney.—Proof that the debtor tendered a sufficient amount to an attorney of the creditor who held the claim of indebtedness supports a plea of tender to the creditor. *McIniffe v. Wheelock*, 1 Gray (Mass.) 600.

To Clerk in Store.—*Hoyt v. Byrnes*, 11 Me. 475, was *indebitatus assumpsit* on an account. It appeared in evidence that the defendant's agent tendered the sum in controversy, partly in specie and partly in current bank bills to one Hamilton who was a clerk in the plaintiff's store at that time, clothed with the usual powers of such an agent, and who also sold and delivered the

there is more than one creditor it is sufficient if tendered to any one of them.⁸

III. SUFFICIENCY OF TENDER.

1. Medium of Tender. — A. **LAWFUL MONEY.** — To make a good tender of money it must appear that it was made either in legal tender notes or coin of the United States.⁹

goods to the defendant, but he refused to receive the amount tendered, saying that he had nothing to do with it—that the demand had been left with an attorney for suit—but making no objections on account of part of the money being in bank bills. The trial court ruled that this evidence was insufficient to prove a tender. *Held*, error on the ground, 1st, that the tender was made to the proper person, and 2nd, that no objection was made by the clerk that part of the amount tendered was in bank bills, and he thereby waived the production of legal tender.

Deposit With Justice of the Peace. In *Furniture & Carpet Co. v. Davis*, 86 Mo. App. 296, it appeared that the defendant had deposited the amount of plaintiff's claim with the justice of the peace before whom the cause was instituted, and after appeal the justice deposited the amount with the clerk of the appellate court. *Held*, insufficient to show a tender because not made to the plaintiff or his agent.

Tender of Payment of Note. Proof that the full amount of money due on a promissory note was offered to the payee after he had indorsed and transferred the note does not show a good tender; a tender upon a promissory note must be made to the holder of it in order to be available. *Goss v. Emerson*, 23 N. H. 38.

To Creditor's Husband. — In *Conrad v. Trustees Grand Grove U. A. O.*, 64 Wis. 258, 25 N. W. 24, there was a plea of tender to the plaintiff. The evidence showed that the tender was made to plaintiff's husband who was in fact her agent, and that the person making the tender supposed him to be the real party in interest. *Held*, to show a good tender to plaintiff.

8. To One of Two Joint Creditors. — Where two persons are both interested, proof of a tender to either

one is sufficient, especially if it appears that both were present at the time tender was made. *Beebe v. Knapp*, 28 Mich. 53, 63.

Where there are two or more joint creditors or mortgagees, proof of tender to either of them is sufficient. *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. 115.

9. Swamp Land Dist. No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151; *Edmunds Electrical Const. Co. v. Mariotte*, 162 Ind. 329, 69 N. E. 396; *Heywood v. Hartshorn*, 55 N. H. 476; *Strafford v. Welch*, 59 N. H. 46.

Foreign Coin. — Evidence that a tender was made in foreign gold coin is not competent to prove a tender. In *Goss v. Emerson*, 23 N. H. 38, the court said: "Foreign gold coins are not a legal tender; and it may well be doubted whether the creditor to whom foreign gold is tendered in payment is bound to make his objection at the time, as in case of current bank notes. Such foreign gold coin is of uncertain and fluctuating value and in that respect is more like a commodity than like cash."

Mutilated Bills. — In *North Hudson County R. Co. v. Anderson*, 61 N. J. L. 248, 39 Atl. 905, 68 Am. St. Rep. 703, 40 L. R. A. 410, *Anderson*, the plaintiff below, tendered the conductor on a car of the company a mutilated one dollar note for his car fare. The conductor refused to accept the note because it was imperfect, and put *Anderson* off the car for not paying his fare. The evidence of *Anderson* was that a piece one inch and a quarter by one inch and a half had been torn from the upper left-hand corner of the bill, while the evidence on the part of the company was that the piece torn off was two and a half inches by one

B. CHECKS. — A tender of money in a bank check is sufficient if it appear that no objection was made at the time that it was not lawful money.¹⁰

C. PROPERTY. — When property is tendered it must be set aside and designated.¹¹

D. WAIVER. — To establish a valid tender, production and proffer of the money must be shown, or that they were waived.¹²

inch and three-quarters. Upon this evidence the trial court charged that the note was a legal tender. *Held*, error, the court saying: "The portion torn off the bill presented in this case constituted a substantial mutilation of it. It was not legal tender."

10. Iowa. — *Shay v. Callanan*, 124 Iowa 370, 100 N. W. 55; *McWhirter v. Crawford*, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021.

Maine. — *Hoyt v. Byrnes*, 11 Me. 475.

Maryland. — *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496.

Michigan. — *Fosdick v. Van Huse*, 21 Mich. 576; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Lacy v. Wilson*, 24 Mich. 479; *Beebe v. Knapp*, 28 Mich. 53, 70.

Missouri. — *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Raymond Kepler & Co. v. McKinney Bros. & Co.*, 58 Mo. App. 303.

New York. — *Bunte v. Schumann*, 46 Misc. 593, 92 N. Y. Supp. 806.

Bank Check. — Proof that a tender was made in a bank check instead of money, and that it was refused not on the ground that it was not lawful money, but upon some other ground not well taken, shows a sufficient tender. *Kollitz v. Equitable Mut. Fire Ins. Co.*, 92 Minn. 234, 99 N. W. 892.

A Certificate of Deposit or a Bank Check if not objected to may be a valid tender, but it must be tendered to the proper party. Proof that it was merely deposited in bank in the name of such party, and that he was notified thereof, does not show a lawful tender. *Cassville Roller Mill Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 155, 79 S. W. 720.

A Certified Check for the amount tendered appellant was received in evidence by the trial court against the objection of appellant that it did

not show a tender of any sum. *Held*, properly admitted, the court saying: "This objection would have been doubtless sustained upon the familiar ruling that such an instrument constituted no tender valid in law for the sum for which it was drawn, if it had not appeared from the testimony of appellant, himself, that he had not objected to the check on that ground when it was proffered to him nor insisted upon the production of the money itself. Under these circumstances there was no error in the ruling of the trial court permitting such check to be read in evidence." *Beckham v. Puckett*, 88 Mo. App. 636.

Bank Notes Are Not a Lawful Tender in fulfillment of an agreement to pay money. *Donaldson v. Benton*, 20 N. C. (4 Dev. & B.) 435.

11. Schrader v. Wolfen, 21 Ind. 238; *Hambel v. Tower*, 14 Iowa 530.

12. United States. — *Ladd v. Paten*, 1 Cranch. C. C. 263.

Alabama. — *Camp v. Simon*, 34 Ala. 126; *McCalley v. Otey*, 99 Ala. 584, 12 So. 406.

Arkansas. — *Burr & Co. v. Daugherty*, 21 Ark. 559.

California. — *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Barnhart v. Fulkerth*, 73 Cal. 526, 15 Pac. 89; *Oakland Bank of Savings v. Aplegarth*, 67 Cal. 86, 7 Pac. 139, 476.

Connecticut. — *Sands v. Lyon*, 18 Conn. 18.

Illinois. — *Steele v. Biggs*, 22 Ill. 643, 656; *Wynkoop v. Cowing*, 21 Ill. 570, 588.

Iowa. — *Johnson v. Triggs*, 4 G. Gr. 97.

Minnesota. — *Deering Harvester Co. v. Hamilton*, 80 Minn. 162, 83 N. W. 44; *Pinney v. Jorgenson*, 27 Minn. 26, 6 N. W. 376.

Mississippi. — *Harmon v. Magee*, 57 Miss. 410, 418.

E. OBJECTIONS MUST BE STATED AT TIME. — A party to whom a tender is made must specify his objections to the same, if any, at the time the tender is made, or he will be deemed to have waived them.¹⁸

New York. — *Bolton v. Amsler*, 95 N. Y. Supp. 481; *Cashman v. Martin*, 50 How. Pr. 337; *Holmes v. Holmes*, 9 N. Y. 525.

Oregon. — *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601.

Pennsylvania. — *Seibert v. Kline*, 1 Pa. St. 38.

Tennessee. — *Farnsworth v. Howard*, 1 Coldw. 215.

Vermont. — *Bowen v. Holly*, 38 Vt. 574.

Virginia. — *Moore v. Harnsberger*, 26 Gratt. 667.

Tender of Check. — In *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496, a plea of tender was supported by evidence showing that a tenant gave a check in payment of rent, the check naming a sufficient amount; that the tenant then had sufficient money in the bank upon which the check was drawn to pay it, that the landlord had been in the habit of receiving from the tenant such checks to pay rent, and that he made no objections to the proffered payment because it was in a check instead of money, but refused to receive it upon other grounds. *Held*, sufficient to prove a tender, and that the production of the money was waived.

In *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362, the court said: "A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisites of a tender may be waived, but to establish a waiver there must be an existing capacity to perform." See also *Leask v. Dew*, 102 App. Div. 529, 92 N. Y. Supp. 891, to same effect.

Waiver of Production of Money. In *Koon v. Snodgrass*, 18 W. Va. 320, 333, the court said: "It is true that the legal incidents of a valid tender are the actual production and proffer of the precise sum due; but those may be dispensed with expressly or impliedly by the party to whom the money is to be paid. There is for instance no necessity for

the actual production of the money when the refusal to receive it is based not on its non-production, but on an entirely distinct ground in no-wise connected with the non-production, and such as by the strongest implication waives the necessity of such production."

13. Illinois. — *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435, 456; *Conway v. Case*, 22 Ill. 127.

Iowa. — *Shay v. Callanan*, 124 Iowa 370, 100 N. W. 55; *McWhirter v. Crawford*, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021.

Maine. — *Hoyt v. Byrnes*, 11 Me. 475.

Maryland. — *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496.

Michigan. — *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Fosdick v. Van Huse*, 21 Mich. 576; *Lacy v. Wilson*, 24 Mich. 479; *Beebe v. Knapp*, 28 Mich. 53, 70.

Missouri. — *Beckham v. Puckett*, 88 Mo. App. 636; *Cassville Roller Mill Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 155, 79 S. W. 720; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Raymond Kepler & Co. v. McKinney Bros. & Co.*, 58 Mo. App. 303.

New Hampshire. — *Goss v. Emerson*, 23 N. H. 38.

New York. — *Bunte v. Schumann*, 46 Misc. 593, 92 N. Y. Supp. 806.

In *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82, it was claimed that tender of purchase money was made for land which the vendor was unable to convey and failed to convey according to his contract. Tender was denied. The evidence showed that there was a judgment in a suit brought to quiet title, which affected a part of the land in question, declaring title thereto to be in some one other than the vendor. That knowing of this defect in the title the vendee made an offer in writing to the vendor of the principal sum due for the land under the contract, and demanded a deed in fee simple of the property; that at

the time of the making of the offer, the agent who made it had with him in a sack an amount of money equal to the amount named in the written offer, that then the agent of the vendor requested his clerk to count the money, and as a performance of the contract on the vendor's part, tendered to the agent making the offer a deed of the premises executed by it, but made no tender of any deed conveying the title to that portion of the premises affected by the judgment in the suit to quiet title; that no objection was made at the time of the offer, on the ground that it was insufficient, or on any other grounds. *Held*, that the evidence showed a sufficient tender in the absence of objections by the vendor.

Waiver of Objections to Conditions. — On a showing that a pledgor tendered to the pledgee a sufficient amount and at the same time demanded the return of a promissory note and warehouse receipt representing the property pledged, and the pledgee admitted the same and made no objection at the time, he is deemed to have waived all rights to object to the conditions accompanying the tender. *Barnhart v. Fulkerth*, 73 Cal. 526, 15 Pac. 89.

Objections Must Be Specific. — A person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he will be deemed to have waived it; and it must be shown if he had any objection either to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards, even though the amount tendered be insufficient. *Oakland Bank of Savings v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476.

If the evidence shows a tender in compliance with a decree to enforce a trust, which said decree required plaintiff to tender certain money to one of the defendants and a certain sum to another of the defendants and upon such tender one of the defendants was to transfer and release a certain judgment, and the evidence shows that the plaintiff tendered the

proper amounts of money, but at the same time demanded that both of the defendants execute the said transfer and release and the defendants' only objection was that they intended to appeal, the defendants cannot object on the grounds that the condition coupled with the tender was different from the terms specified in the decree and are deemed to have waived such objection, and the tender was held sufficient. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115.

In *Edmunds Electrical Const. Co. v. Mariotte*, 162 Ind. 329, 69 N. E. 396, the evidence showed that the appellee in the presence of the manager of the appellant, counted out and offered to him the amount that appellee claimed to be due. The money offered was shown to be money of the United States; the manager refused the money offered and did not object to the kind of money in which the tender was sought to be made. *Held*, to prove a sufficient tender, and that there was no merit in the contention of appellant that the money was not shown to be legal tender.

Objections Not Stated Are Waived. In *Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62, it appeared that the plaintiff's stock in the defendant company was advertised for sale for failure to pay a certain amount of money due thereon. The evidence showed that the plaintiff before the sale tendered to the secretary of the company more than the amount due, and demanded the stock, saying that he would tender more if that was not enough, as he had plenty of money with him to pay it. The secretary did not allege that any more was due, but simply declined to accept payment. *Held*, that the evidence showed a legal tender.

Conditional Tenders. — In *Clark v. Colfax County (Neb.)*, 96 N. W. 607, the court said: "The rule appears to be that where a tender is accompanied by a condition on which the party making the tender has no right to insist, and no objection is made to the condition, but the tender is refused on the sole ground that the amount tendered is insufficient, the accompanying condition does not vitiate the tender."

2. Amount of Tender. — A. MORE THAN AMOUNT DUE. — The tender of a larger sum of money than the amount due, does not render the tender invalid.¹⁴

B. FULL AMOUNT DUE. — A party making a tender must tender the full amount due according to the terms of the contract.¹⁵

C. LESS THAN AMOUNT DUE. — The tender of a less amount than due is not a sufficient tender, unless objection on that ground is waived as hereinbefore stated.¹⁶

In *Bristol v. Mente*, 79 App. Div. 67, 80 N. Y. Supp. 52, it was claimed that \$6,000 was tendered. It appeared from the evidence that \$5,550 of this amount was tendered in gold or legal tender notes, and \$450 of it in United States or National Bank notes, the description of which was not very clear, and that no objection to the kind of money was made at the time. *Held*, that a tender was sufficiently proved.

14. *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435, 456; *Patterson v. Cox*, 25 Ind. 261; *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50.

Tender of a Warrant for a greater amount than the sum due on an assessment is not a sufficient tender, where the party tendering the warrant was not the owner thereof and the tender was made for the purpose of having the amount due indorsed on the warrant. *Swamp Land Dist. No. 307 v. Gwynn*, 70 Cal. 566, 12 Pac. 462.

Tender of Fare on Street Car. — It is not necessary that a passenger on a street railway car should tender the exact amount of the fare; he may tender a larger amount, but the evidence must show that he tendered a reasonable sum or otherwise it will be held to be not a good tender. *Barrett v. Market St. R. Co.*, 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, 6 L. R. A. 336.

Demand for Change. — In *People's Furn. & Carpet Co. v. Crosby*, 57 Neb. 282, 77 N. W. 658, it appeared in evidence that the amount claimed to be due was \$5.50 and that \$6 was tendered with a demand for the change, and that the tender was refused because not deemed sufficient in amount. *Held*, that a valid tender was proved.

15. *United States*. — *Perkins v. Beck*, 4 Cranch C. C. 68; *L'Homme-dieu v. Dayton*, 38 Fed. 926; *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538; *Lilienthal v. McCormick*, 117 Fed. 89, 97, 54 C. C. A. 475.

Arkansas. — *Burr & Co. v. Daugherty*, 21 Ark. 559.

Illinois. — *Pulsifer v. Shepard*, 36 Ill. 513.

Iowa. — *McWhirter v. Crawford*, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021; *Shuck v. Chicago, R. I. & P. R. Co.*, 73 Iowa 333, 35 N. W. 429.

Maine. — *Handy v. Rice*, 98 Me. 504, 57 Atl. 847.

Massachusetts. — *Loeing v. Cooke*, 3 Pick. 48; *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Chemical Laboratory*, 9 Metc. 42.

Minnesota. — *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55; *Spoon v. Frambach*, 83 Minn. 301, 86 N. W. 106.

Mississippi. — *Connell v. Mulligan*, 13 Smed. & M. 388.

New Jersey. — *Wright v. Stone Harbor Imp. Co.*, 66 Atl. 417.

New York. — *Zeitlin v. Arkaway*, 26 Misc. 761, 56 N. Y. Supp. 1058; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

North Carolina. — *Rand v. Harris*, 83 N. C. 486.

Ohio. — *Smith v. Merchants' & Farmers' Bank*, 14 Ohio C. C. 199.

Texas. — *Kelly v. Collins* (Tex. Civ. App.), 56 S. W. 997.

Utah. — *McCauley v. Leavitt*, 10 Utah 91, 37 Pac. 164.

West Virginia. — *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

16. *San Pedro Lumb. Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309; *Shafer v. Willis*, 124 Cal. 36, 56 Pac.

D. IF AFTER SUIT. — If a tender is made after suit has been commenced the debtor must include interest and costs in the amount tendered, and also a reasonable attorney's fee if such be allowed by law, or is provided for in the contract.¹⁷

E. MUST CONFORM TO THE TERMS OF THE CONTRACT. — A tender must conform to the terms of the agreement between the parties, especially when property is tendered.¹⁸

3. **Manner of Tender.** — A. IN GOOD FAITH. — To prove a tender the evidence should be full, clear and satisfactory and it must be made in good faith.¹⁹

635; *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 70 Pac. 225; *Clarke v. Lyon County*, 7 Nev. 75; *Doty v. Crawford*, 39 S. C. 1, 17 S. E. 377; *Wistar, Siter & Price v. Robinson*, 2 Bailey (S. C.) 274.

17. *Arkansas*. — *Bagnell Timber Co. v. Brooks*, 72 Ark. 210, 79 S. W. 764.

Connecticut. — *Tracy v. Strong*, 2 Conn. 659.

Illinois. — *Rogers Grain Co. v. Jansen*, 117 Ill. App. 137; *Mason v. Uedelhofen*, 102 Ill. App. 116; *Fuller v. Brown*, 167 Ill. 293, 47 N. E. 202; *Healy v. Protection Fire Ins. Co.*, 213 Ill. 99, 72 N. E. 678; *Sweetland v. Tuthill*, 54 Ill. 215.

Kentucky. — *Samuels v. Simmons*, 60 S. W. 937.

Minnesota. — *Seeger v. Smith*, 74 Minn. 279, 77 N. W. 3.

Nebraska. — *McEldon v. Patton*, 93 N. W. 938.

New Hampshire. — *Thurston v. Blaisdell*, 8 N. H. 367.

New York. — *Globe Soap Co. v. Liss*, 36 Misc. 199, 73 N. Y. Supp. 153; *Osterman v. Goldstein*, 32 Misc. 676, 66 N. Y. Supp. 506.

Texas. — *Rogers v. People's Bldg., L. & S. Assn.* (Tex. Civ. App.), 55 S. W. 383.

Note Providing for Attorney's Fees. — *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674, was an action upon promissory notes which contained absolute provisions for the payment of attorneys' fees of five per cent. on the amount due. The evidence showed that while the notes were in the hands of Ayers and Jones, attorneys for collection, after maturity, the appellee tendered to Judge Ayers, one of said attorneys,

the amount due on the notes, but without any attorneys' fees. *Held*, that the evidence did not establish a sufficient tender.

18. *Howard v. Higgins*, 137 Cal. 227, 69 Pac. 1060; *Hall v. Appel*, 67 Conn. 585, 35 Atl. 524; *Davis v. Watson*, 89 Mo. App. 15, 35.

Agreement to Accept Bank Bills.

Warren v. Mains, 7 Johns. (N. Y.) 476, was an action on account for the conveyance of real property. It was proved that four days before the purchase price was to be paid the parties agreed that the same should be paid in bank bills, and that on the day when the same was to be paid it was duly tendered in bank bills, and refused because they were not a legal tender. The defendant objected to the evidence about the agreement to pay in bank bills, and the court overruled the objection. *Held*, that it was competent for the plaintiff to show that before the day of payment the defendant had agreed to accept bank bills as cash, and had dispensed with the necessity of a tender in gold and silver.

Tender of Chattels. — *Fleming v. Potter*, 7 Watts (Pa.) 380, was an action on a note for the payment of a certain sum in specific articles at a certain place. It was held not necessary to the maintenance of plaintiff's cause of action that he should have made a demand of the articles at the time and place; but to defeat the plaintiff's action the defendant must prove that he was ready at the time and place to deliver the articles, and continued ready. On failure to make this proof the plaintiff was entitled to recover the amount in money.

19. *Knight v. Abbott*, 30 Vt. 577.

B. OFFER NOT SUFFICIENT. — A mere offer to pay or to borrow money to pay is not sufficient.²⁰

C. UNCONDITIONAL. — The general rule is that a tender must be made free and clear from any and all conditions whatsoever.²¹

Clear Evidence Required. — In *Fotts v. Plaisted*, 30 Mich. 149, the bill was to foreclose a mortgage, and the defense was a tender of the amount due before the filing of the bill. In considering the evidence the court said: "In view of the serious consequences to the holder of a mortgage, upon the refusal of a tender — consequences which may often amount to the absolute loss of the entire debt — and in view of the strong temptation which must exist to contrive merely colorable or sham tenders, not intended in good faith, we think the evidence should be so full, clear and satisfactory, as to leave no reasonable doubt that the tender was so made that the holder must have understood it at the time to be a present, absolute and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must, in every case, have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and make the calculation."

20. *Davis v. Holbrook*, 25 Colo. 493, 55 Pac. 730.

21. *England*. — *Robinson v. Cook*, 6 Taunt. 336, 16 R. R. 624.

United States. — *Lilienthal v. McCormick*, 117 Fed. 89, 97, 54 C. C. A. 475; *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538; *L'Hommedieu v. Dayton*, 38 Fed. 926; *Coghlan v. South Carolina R. Co.*, 32 Fed. 316; *Perkins v. Beck*, 4 Cranch C. C. 68.

Alabama. — *Harden v. Collins*, 138 Ala. 399, 35 So. 357, 100 Am. St. Rep. 42; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571.

California. — *Jones v. Shuey*, 40 Pac. 17; *Perkins v. Maier & Zobelein Brewery*, 134 Cal. 372, 66 Pac. 482; *Barnhart v. Fulkerth*, 73 Cal.

526, 15 Pac. 89; *People v. Harris*, 9 Cal. 571.

Colorado. — *Butler v. Hinckley*, 17 Colo. 523, 30 Pac. 250; *Mitchell v. Pearson*, 34 Colo. 278, 82 Pac. 446.

Connecticut. — *Sands v. Lyon*, 18 Conn. 18; *Sanford v. Bulkley*, 30 Conn. 344; *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356.

Florida. — *Chandler & Wittich v. Wright*, 16 Fla. 510.

Georgia. — *Morris v. Continental Ins. Co.*, 116 Ga. 53, 42 S. E. 474; *Elder v. Johnson*, 115 Ga. 691, 42 S. E. 51; *DeGraffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560.

Illinois. — *Hess v. Peck*, 111 Ill. App. 111; *Connecticut Mut. Life Ins. Co. v. Stinson*, 86 Ill. App. 668; *Berger v. Peterson*, 78 Ill. 633; *Pulsifer v. Shepard*, 36 Ill. 513.

Indiana. — *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151; *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700.

Iowa. — *West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147, 90 N. W. 523; *Shuck v. Chicago, R. I. & P. R. Co.*, 73 Iowa 333, 35 N. W. 429; *Hopkins v. Gray*, 51 Iowa 340, 1 N. W. 637; *Kuhns v. Chicago, M. & St. P. R. Co.*, 65 Iowa 528, 22 N. W. 661.

Kansas. — *Latham v. Hartford*, 27 Kan. 249.

Massachusetts. — *Loeving v. Cooke*, 3 Pick. 48; *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Chemical Laboratory*, 9 Metc. 42.

Michigan. — *Potts v. Plaisted*, 30 Mich. 149.

Minnesota. — *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55.

Mississippi. — *Harmon v. Magee*, 57 Miss. 410, 418.

Missouri. — *Henderson v. Cass County*, 107 Mo. 50, 18 S. W. 992.

Nebraska. — *McEldon v. Patton*, 93 N. W. 938; *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085; *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288.

New Jersey. — *Whittaker v. Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289.

Exception. — If a condition is imposed and the person to whom the tender is made does not object to the condition at the time, the tender will be valid, and a person also has the right to impose such conditions as will protect his rights in the premises.²²

D. REASONABLE OPPORTUNITY TO ACCEPT. — A person to whom a tender is made must be given a reasonable opportunity to examine documents, property, or to make calculations in order to enable him to accept or make such objections as he sees fit.²³

New York. — *Noyes v. Wyckoff*, 114 N. Y. 204; 21 N. E. 158; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579; *Cashman v. Martin*, 50 How. Pr. 337; *Cass v. Higenbotam*, 27 Hun 406; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342, 35 Am. Dec. 569; *Wood v. Hitchcock*, 20 Wend. 47.

North Carolina. — *Rand v. Harris*, 83 N. C. 486.

Ohio. — *Redfern v. Uluery*, 12 Ohio C. C. 87.

Pennsylvania. — *Wagenblast v. McKean*, 2 Grant Cas. 393.

Texas. — *Kelly v. Collins* (Tex. Civ. App.), 56 S. W. 997.

Vermont. — *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292.

Wisconsin. — *Mann v. Roberts*, 126 Wis. 142, 105 N. W. 785.

Demand for Cancellation of Mortgage. — *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668, was an action upon a promissory note which was secured by a mortgage on real estate. The appellees who had assumed to pay the note proved that they had counted out and handed to the appellants the amount which was due, and that appellants then and there took the money, counted it, and remarked that it was all right and satisfactory and they would accept the same in payment of said note and mortgage. Appellees then and there demanded the surrender of said note, and the cancellation of said mortgage. The appellants refused to cancel the mortgage, and the appellees then reserved the money. The court held that this evidence did not establish a valid tender, saying: "The appellees had no right to demand a cancellation of the mortgage as a condition to the tender,—it would in no way have strengthened

their right nor placed them in any better legal status—for the surrender of the note, upon its payment, worked the destruction of all legal vitality in the mortgage."

Conditional Offer. — In *Tompkins v. Batie*, 11 Neb. 147, 7 N. W. 747, the evidence showed that the offer of payment was this: "I showed him \$500 and told him he could have it for his claim." *Held*, that this was a conditional offer, and unavailing as a tender.

22. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Clark v. Colfax County* (Neb.), 96 N. W. 607.

In *Osterman v. Goldstein*, 32 Misc. 676, 66 N. Y. Supp. 506, the defendants were sued as indorsers of a promissory note. The evidence showed that after suit was brought, but before the time to answer had expired, defendants caused the amount due with interest and accrued costs to be tendered to plaintiff upon condition that the note should be surrendered. Plaintiff refused to accept the tender upon the condition attached. *Held*, that the tender was good.

Certain Conditions Permissible. In *Engelbach v. Simpson*, 12 Tex. Civ. App. 188, 33 S. W. 596, the court said: "The general rule, and the one most frequently observed and enforced is, that a tender to be valid must be unconditional. This rule like all others has its exceptions which are as important as the rule itself, and which courts often lose sight of, when passing upon the validity of a tender. One is that a tender made upon conditions that the debtor has a right to impose for his own protection is valid."

23. *Potts v. Plaisted*, 30 Mich. 149. In *Lefferts v. Dolton*, 217 Pa. St. 299, 66 Atl. 527, the question was

E. RETURN OF NOTE OR STOCK. — When a person tenders money in payment of a note or for stock he has the right to demand the cancelation of the note or the return of the stock.²⁴

4. Time of Tender. — A tender must be made on the day named in the contract for the performance of the obligation.²⁵

whether a deed to real property had been tendered. The evidence showed that John Lefferts, a son of the vendor, took a deed of the said land which had been executed a day or two before to the residence of the defendant, and not finding him there, took the deed on the same day to the residence of a son of defendant where he found him, and said to him that he had come to tell him that everything was now ready; that he had brought the deed and had it in his pocket and that they had performed their part of the agreement, and wanted defendant to perform his part, that he did not produce the deed to the defendant, nor show it to him. *Held*, to be insufficient to prove a tender of the deed, the court saying: "The mere statement of Lefferts that he had the deed in his pocket without producing it to the defendant and giving him an opportunity to examine it was not sufficient."

Demand That Note Be Surrendered. — In *Malone v. Wright* (Tex. Civ. App.), 34 S. W. 455, it appeared that Wright, the appellee, was the pledgee of certain promissory notes. The amount of money necessary to redeem said notes was tendered to the attorney of the appellee upon condition that said notes should be then and there surrendered but the attorney did not then have possession of the notes, and informed the person making the tender that appellee had possession of the notes, and that for that reason the attorney could not then and there deliver them.

Held, insufficient to show a valid tender, the court saying, "The debtor has the right to demand that the note be surrendered when he pays the debt, but, when he is informed that the one to whom he makes the tender is not then in a position to comply with the request, it would be unreasonable to hold that a tender so conditioned would be good."

24. *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668; *Osterman v. Goldstein*, 32 Misc. 676, 66 N. Y. Supp. 506; *Strafford v. Welch*, 59 N. H. 46; *Malone v. Wright* (Tex. Civ. App.), 34 S. W. 455.

Demand for Return of Pledge. Upon a showing that the whole amount due, including principal and interest, was duly tendered, the fact that the party making the tender did at the same time demand the return of the stock pledged as security was not such a condition as to vitiate the tender. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

25. *England.* — *Poole v. Tumbridge*, 2 Mees. & W. 222; *Hume v. Peplow*, 8 East 168.

Alabama. — *Powe's Admrs. v. Powe*, 42 Ala. 113.

Arkansas. — *Day v. Lafferty*, 4 Ark. 450.

Connecticut. — *Tracy v. Strong*, 2 Conn. 659.

Indiana. — *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685; *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700.

Iowa. — *McDaniel v. Kimbrell*, 3 G. Gr. 335.

Kentucky. — *Williams v. Johnson*, Litt. Sel. Cas. 84, 12 Am. Dec. 275.

Maine. — *Wing v. Davis*, 7 Greenl. 31.

Texas. — *Kelly v. Collins* (Tex. Civ. App.), 56 S. W. 997.

Tender Within Reasonable Hours. Where an obligation fixes the time for its performance it must be shown that the tender was made at that time and within reasonable hours; and where the obligation does not fix the time for performance, it is sufficient to show that the tender was made at any time before the debtor, upon a reasonable demand, has refused to perform. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

Tender at Night. — In *McClartey v. Gokey*, 31 Iowa 505, the court

5. Place of Tender.—The general rule is that where the place of performance is not otherwise specified, a tender must be made at the creditor's place of abode unless it would be an unreasonable requirement.²⁸

said: "We are of the opinion that a tender of payment, in order to discharge the conditions of a contract, may be made at any hour of the day fixed for its performance, when it would not be unreasonable to require the party to whom the tender is made to accept payment. If made, therefore, at night, before the party has retired to rest, and under circumstances which would not impose inconvenience or risk upon him, we think the tender sufficient."

Tender on New Years Day.—In *Page v. Shainwald*, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173, it appeared that an agreement required the defendant, if requested to do so by the plaintiff, on the first day of January, 1898, to take certain stocks from plaintiff at an agreed price. The evidence showed that plaintiff did not tender the stocks till the third day of January, because the first day of January was a holiday, and the second day was Sunday. *Held*, that a tender was not proved, because by statute the first day of January is just enough of a holiday to allow the banks to close, from which one must get money to make a tender, but not enough of a holiday to avoid the necessity of a tender."

Tender Before Maturity of Debt. In *Moore v. Kime*, 43 Neb. 517, 61 N. W. 736, the evidence showed an offer to pay a debt secured by mortgage, before it was due, with interest in full until its maturity. *Held*, that not constitute a valid tender.

In *Sweet v. Harding*, 19 Vt. 587, the court said: "We are aware that the opinion has prevailed to some extent that in order to make a legal tender of either money or specific articles it must be made not only on the day specified in the contract, but, in the language of some of the old authorities, at the uttermost convenient time of the day, and before the setting of the sun, or at least before dark . . . but it is believed that those authorities when examined,

will be found to apply to those cases only, where the tender is made in the absence of the party to whom, by the terms of the contract, the tender is required to be made. To such cases these authorities are applicable and are unquestionably good. . . . There is no difference in this respect between a tender of money and specific articles."

26. *Westcott v. Patton*, 10 Colo. App. 544, 51 Pac. 1021; *Steele v. Biggs*, 22 Ill. 643, 656; *Stoker v. Cogswell*, 25 How. Pr. (N. Y.) 267; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Smith v. Smith*, 2 Hill (N. Y.) 351; *McCauley v. Leavitt*, 10 Utah 91, 37 Pac. 164.

Where No Place of Delivery Specified.—*Kauffman v. Raeder*, 108 Fed. 171, 186, 47 C. C. A. 278, 54 L. R. A. 247, was an action upon a written contract entered into in the city of St. Louis, Missouri, on June 19, 1895, by and between John W. Kauffman and eight other parties, whereby certain certificates of stock in a corporation were to be delivered by Kauffman to the eight other persons, some of whom lived in St. Louis and others in Chicago, on or before the first day of July, 1898, and said eight parties were to pay for said certificates a sum to said Kauffman upon such delivery, no place of delivery being named in the contract. The evidence showed that on May 16, 1896, Kauffman deposited the certificates in question in a bank in St. Louis, Missouri, and caused each of said eight parties to be notified in writing thereof, and requesting each of them to pay said money at said bank, and take up said certificates. *Held*, to establish a good and sufficient tender, the court saying: "Commercial agreements must be interpreted in the light of commercial usages, of reason and of justice. It must be presumed that the intention of the parties to them regarding their performance, as well as their terms, is reasonable, fair and prac-

6. Effect of Sufficient Tender. — A. ADMITS LIABILITY. — A sufficient tender is an admission of the legality of the claim for which it is made to the extent of the amount tendered.²⁷

ticable; and where a commercial contract between business men requires property, such as certificates of stock in a corporation to be delivered to several parties at the same time that it requires them to pay a sum certain to the holder of the stock, and no place of delivery is named in the agreement, a deposit of the property in a convenient business institution in the city in which the contract was made, in which its subject-matter was situated, and in which it was presumably to be performed, and a timely notice to the debtors that it has been so deposited, is a fair, reasonable and sufficient tender and offer of delivery by the holder of the property."

27. United States. — Ye Seng Co. v. Corbitt, 9 Fed. 423.

Colorado. — Denver S. P. & P. R. Co. v. Harp, 6 Colo. 420.

Illinois. — Mason v. Uedelhofen, 102 Ill. App. 116; Insurance Co. v. Fire Ins. Co., 77 Ill. App. 673; County of La Salle v. Hatheway, 78 Ill. App. 95; Miller v. Gable, 30 Ill. App. 578; James T. Hair Co. v. Hichcox, 45 Ill. App. 504; Monroe v. Chaldeck, 78 Ill. 429.

Iowa. — Young v. McWaid, 57 Iowa 101, 10 N. W. 291; Phelps v. Kathron, 30 Iowa 231; Johnson v. Triggs, 4 G. Gr. 97; Frink v. Coe, 4 G. Gr. 555, 61 Am. Dec. 141; Brayton v. County of Delaware, 16 Iowa 44; Burton v. Hintzinger, 18 Iowa 348; Fisher v. Moore, 19 Iowa 84; Wright v. Howell, 35 Iowa 288; Rainwater v. Hummell, 79 Iowa 571, 44 N. W. 814.

Massachusetts. — Currier v. Jordan, 117 Mass. 260; Hosmer v. Warner, 7 Gray 186.

Missouri. — Johnson v. Garlichs, 63 Mo. App. 578; Giboney v. German Ins. Co., 48 Mo. App. 185; Williamson v. Baley, 78 Mo. 636.

Nebraska. — Phoenix Ins. Co. v. Readinger, 28 Neb. 587, 44 N. W. 864; Cobbey v. Knapp, 23 Neb. 579, 37 N. W. 485; Murray v. Cunningham, 10 Neb. 167, 4 N. W. 319, 953.

New York. — Wilson v. Doran, 39 Hun 88; Wood v. Perry, 1 Barb. 114; Roosevelt v. New York & H. R. R. Co., 45 Barb. 554.

Oregon. — Simpson v. Carson, 11 Or. 361, 8 Pac. 325.

Pennsylvania. — Wagenblast v. M'Kean, 2 Grant Cas. 393; Bailey v. Bucher, 6 Watts 74.

Vermont. — Woodward v. Cutter, 33 Vt. 49.

Washington. — Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.

Wisconsin. — Fox v. Williams, 92 Wis. 320, 66 N. W. 357; Schnur v. Hickcox, 45 Wis. 200.

A Tender of Money Is an Admission that the amount of the tender is due, but such admission is not conclusive evidence excluding the consideration of all other evidence upon the subject. Abel v. Opel, 24 Ind. 250.

Tender by Way of Compromise.

In Latham v. Hartford, 27 Kan. 249, a tender was pleaded by the defendant, and the only evidence to support it was his testimony which was as follows: "I afterwards saw Latham and told him I would be lenient; I wanted no law suit, that it would not pay me nor him, and that while I owed him and Ireland nothing, yet to avoid a lawsuit, and compromise the dispute, I would pay them \$20 in addition to turning over the mare. The tender I made I am still willing to pay as a compromise (Defendant's attorney here offered \$20 to plaintiffs, and they refused to accept it.) He said he would have all the note or nothing." Held, that this did not prove a tender, nor amount to an admission of liability, the court saying: "Now this supposed tender (although a tender in popular language) was not a tender at all in law. In law, a tender to be valid must be without conditions, absolute. The supposed tender in this case was simply an offer to compromise — an offer to purchase peace. . . . A tender admits absolutely the amount tendered as due, while an

B. STOPS INTEREST AND COSTS. — A sufficient tender stops all interest and costs from and after the date of the tender.²⁸

IV. KEEPING TENDER GOOD.

1. General Rule. — A party making a tender must show that he

offer to compromise admits nothing, except that there is a dispute."

Admission of Cause of Action. *Bacon v. Charlton*, 7 Cush. (Mass.) 581, was an action to recover damages for personal injuries caused by an obstruction in the highway. Before suit the defendants tendered the plaintiff \$245 in full for his damages, and upon the return day of the writ paid the same into court. *Held*, that the tender must be taken to admit the existence of every fact which the plaintiff would be obliged to prove in order to maintain his action, and that as against this admission the defendant could not be allowed to prove contributory negligence upon the part of the plaintiff either upon the merits or in mitigation of damages.

In *Hubbard v. Knous*, 7 Cush. (Mass.) 556, the court in considering the effects of a tender as an admission of liability said: "We understand the rule to be that where a party pays money into court on a declaration which sets out a special contract, he thereby admits the contract as alleged, and a breach thereof with damages to the amount paid in. But where such payment is made in an action of *indebitatus assumpsit*, containing the money counts, the defendant thereby admits only some liability on some contract under the money counts, and if the plaintiff seeks to recover any further sum, he is bound to prove a contract or liability on the part of the defendant as well as a larger sum due." To same effect, *Bacon v. Charlton*, 7 Cush. (Mass.) 581.

Wells v. Missouri-Edison Elec. Co., 108 Mo. App. 607, 616, 84 S. W. 204, was an action for damages for personal injuries. The court after citing a number of authorities said: "The better rule supported by the above authorities, we believe to be, that the payment of the given sum

into court, and its tender thereby to plaintiff as sufficient compensation for his injury operated as a solemn and conclusive admission of every fact essential to maintain his action, and the extent of his injuries and consequent amount of plaintiff's damages only were remaining."

Tender of Smaller Sum Not an Admission. — In *Clarke v. Lyon County*, 7 Nev. 75, the court said: "The tender of a sum smaller than that demanded is certainly not a necessary admission that any sum is legally due. It is simply an implication or inference which might, under former rules of pleading, be sufficient to bar all contradictory proof, but under the practice which makes it the duty of courts to give a liberal construction to pleadings, with a view of effecting justice between the parties, it would be unreasonable to allow such mere implication to overcome a positive denial or direct allegation of the pleader."

Contra. — It is now held in England that the payment of money into court even when accepted by the plaintiff is not an admission of his cause of action. *Cootte v. Ford*, 80 L. T. N. S. (Eng.) 697.

28. *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 87.

Note Payable at a Bank. — When a note or bill is made payable at a bank and the maker or acceptor calls at the bank to pay it and take it up when it becomes due, and does not find it at the bank, he may deposit the money there to meet the note when presented, and proof of such deposit establishes a valid tender which exonerates him from all costs, interest and damages. *Wallace v. McConnell*, 13 Pet. (U. S.) 136, 150.

Tender Refused. — A sufficient tender of an obligation which is refused, renders a subsequent tender of interest unnecessary although a new ten-

has kept the same good and was at any and all times thereafter ready, willing and able to perform on his part.²⁹

der be made. *William Wolff & Co. v. Canadian Pac. R. Co.*, 123 Cal. 535, 56 Pac. 453.

29. *United States*.—*State v. Illinois Cent. R. Co.*, 33 Fed. 730; *Sanford v. Savings & Loan Soc.*, 80 Fed. 54, 64; *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538.

Alabama.—*Park v. Wiley*, 67 Ala. 310; *Birmingham Paint & Roofing Co. v. Crampton & Tharpe*, 39 So. 1020; *McCalley v. Otey*, 99 Ala. 584, 12 So. 406; *Commonwealth Fire Ins. Co. v. Allen*, 80 Ala. 571.

California.—*Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.

Colorado.—*Denver S. P. & P. R. R. Co. v. Harp*, 6 Colo. 420.

Georgia.—*Gray v. Augier*, 62 Ga. 596.

Illinois.—*Healy v. Protection Fire Ins. Co.*, 213 Ill. 99, 72 N. E. 678; *Thayer v. Meeker*, 86 Ill. 470; *Mason v. Stevens*, 91 Ill. App. 623; *Brooks v. Lawyer*, 61 Ill. App. 366.

Iowa.—*De Wolfe v. Taylor*, 71 Iowa 648, 33 N. W. 154; *West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147, 90 N. W. 523; *Hambel v. Tower*, 14 Iowa 530; *Rainwater v. Hummell*, 79 Iowa 571, 44 N. W. 814.

Kentucky.—*Woodland Cemetery Co. v. Ellison*, 80 S. W. 169.

Maine.—*McPheters v. Kimball*, 99 Me. 505, 59 Atl. 853.

Maryland.—*Middle States Co. v. Mattress Co.*, 82 Md. 506, 33 Atl. 886.

Massachusetts.—*National Mach. Co. v. Standard Shoe Mach. Co.*, 181 Mass. 275, 63 N. E. 900.

Minnesota.—*Davies v. Dow*, 80 Minn. 223, 83 N. W. 50.

Missouri.—*Raymond, Kepler & Co. v. McKinney Bros. & Co.*, 58 Mo. App. 303.

Nebraska.—*Tompkins v. Batie*, 11 Neb. 147, 7 N. W. 747, 38 Am. Rep. 361.

New Hampshire.—*Colby v. Stevens*, 38 N. H. 191; *Felker v. Hazelton*, 68 N. H. 304, 38 Atl. 1051.

New Jersey.—*Shields v. Lozeau*, 22 N. J. Eq. 447.

New York.—*Margulies v. Goldstein*, 85 N. Y. Supp. 1024; *Osterman v. Goldstein*, 32 Misc. 676, 66 N. Y. Supp. 506; *Rosenbaum v.*

Greenbaum, 31 Misc. 787, 65 N. Y. Supp. 212; *Railway Adv. Co. v. Posner*, 31 Misc. 783, 65 N. Y. Supp. 226; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Cass v. Higenbotam*, 27 Hun 406; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 177, 23 N. E. 482; *Noyes v. Wyckoff*, 30 Hun 466; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342, 35 Am. Dec. 569.

North Carolina.—*Dickerson v. Simmons*, 141 N. C. 325, 53 S. E. 850.

Pennsylvania.—*Seibert v. Kline*, 1 Pa. St. 38.

Texas.—*Rogers v. People's Bldg., L. & S. Assn. (Tex. Civ. App.)*, 55 S. W. 383.

Vermont.—*Curtiss v. Greenbanks*, 24 Vt. 536.

Washington.—*Andrews v. Uncle Joe Diamond Broker*, 87 Pac. 947.

West Virginia.—*Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248; *Thompson v. Lyon*, 40 W. Va. 87, 96, 20 S. E. 812.

Tender Under Order of Court.—A tender of money required to be paid under a conditional order of a court setting aside a default judgment appealed from need not be deposited with the court or in a bank in order to keep the tender good, but can be kept good by a renewal of the tender within ten days after the filing of the remittitur, and by depositing it in court before application for final relief from the judgment is made. *William Wolff & Co. v. Canadian Pac. R. Co.*, 123 Cal. 535, 56 Pac. 453.

Certificate of Deposit.—In *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489, the evidence showed that a sufficient tender of money had been made. It was pleaded in the answer that the amount of the tender had been deposited in court. The evidence showed that a certificate of deposit for the amount of the tender had been deposited with the clerk of the court, because he preferred it to the money, and that the money represented by the certificate was at all times subject to his order and under his control. *Held*, that the tender was kept good.

Identical Money. — It is not necessary to prove that the identical money tendered was kept; it is sufficient to show that the same sum or amount of money was kept ready.³⁰

2. Depositing Money Into Court. — The general rule is that in order to keep a tender good after an action is commenced the amount of the same should be deposited in court for the creditor.³¹ But

Exact Amount Must Be Brought In. — To keep a tender good by bringing the money into court it must appear that the exact amount originally tendered was brought into court. *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151.

Fleming v. Potter, 7 Watts (Pa.) 380, was an action on a note for the payment of a certain sum in specific articles, at a certain place. It was held not necessary to the maintenance of plaintiff's cause of action that he should have made a demand of the articles at the time and place. But to defeat the plaintiff's action the defendant must prove that he was ready at the time and place to deliver the articles and continued ready. On failure to make this proof the plaintiff was entitled to recover the amount in money.

30. *Colby v. Stevens*, 38 N. H. 191; *Curtiss v. Greenbanks*, 24 Vt. 536; *Thompson v. Lyon*, 40 W. Va. 87, 96, 20 S. E. 812.

Readiness at All Times To Pay. To keep a tender good the debtor must show that he has been ready, able and willing at all times to pay the debt. The identical money tendered need not be kept on hand, but if it appears that by making use of the money he is not ready to pay the debt in current money at any time when required, the effect of the tender is destroyed. *Dickerson v. Simmons*, 141 N. C. 325, 53 S. E. 850.

31. *England.* — *Cooté v. Ford*, 80 L. T. N. S. 697.

Alabama. — *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 87.

California. — *William Wolff & Co. v. Canadian Pac. R. Co.*, 123 Cal. 535, 56 Pac. 453.

Indiana. — *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151; *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771.

Iowa. — *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489.

Massachusetts. — *Hubbard v. Knous*, 7 Cush. 556; *Bacon v. Charlton*, 7 Cush. 581.

Missouri. — *Wells v. Missouri-Edison Elect. Co.*, 108 Mo. App. 607, 616, 84 S. W. 204.

New Hampshire. — *Colby v. Stevens*, 38 N. H. 191.

Vermont. — *Curtiss v. Greenbanks*, 24 Vt. 536.

West Virginia. — *Thompson v. Lyon*, 40 W. Va. 87, 96, 20 S. E. 812.

Offer To Pay Into Court Sufficient. *Cheney v. Libby*, 134 U. S. 68, 84, was a suit for specific performance of a contract for the sale of land bought by the vendee, who in his bill pleaded a tender of the money due, and offered to bring into court as the court may direct "all moneys due the said Cheney by said contract and notes, and offers to do equity in every respect, as to this honorable court shall seem just." It was objected that the money tendered was not brought into court upon the filing of the bill. *Held*, not necessary to show that the money was brought into court; that the offer to bring it into court whenever the court should so direct was sufficient.

When Must Be Brought Into Court. — In *McPheters v. Kimball*, 99 Me. 505, 59 Atl. 853, the court said: "We find that the plaintiff after having made a tender, and done all that was necessary to effect a rescission of the contract and authorize an action, failed to keep his tender good by bringing it into court with his writ, or at least at the trial. A tender must be kept good so that the other party shall know that he can at any time get his money or his goods back, without being put to an action to recover them."

In *Andrews v. Uncle Joe Diamond Broker (Wash.)*, 87 Pac. 947, the

where a tender does not discharge the debt but only defeats a particular remedy, it is not necessary to show a continued readiness to pay or bring the money into court.³²

3. Effect of Keeping Tender Good. — The keeping of a sufficient tender good stops all interest, costs and damages from and after the time it is made.³³

V. CIRCUMSTANCES EXCUSING TENDER.

1. Refusal of Creditor To Accept. — If the debtor goes to the creditor in good faith to pay the amount due and the creditor refuses to accept before an actual tender is made, or in any manner prevents the tender from being made, the debtor is excused from producing or tendering the subject-matter to be proffered; but a mere offer to pay would not be sufficient.³⁴

2. Refusal To Accept Apparent Before Tender. — Where it appears that a tender would have been a mere form or that the creditor would

fact of tender was admitted, and the court held that it was not only necessary to show that the money had been paid into court, but that it had at all times from the time of tender to the time of trial been kept ready to be paid over.

Contra. — Where no time is specified for the performance of an obligation or for the payment of the purchase price of property and it is shown that the purchase price was tendered within a reasonable time, said tender was held sufficient without it being kept good by depositing the amount into court. *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315.

32. *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145.

33. *Wallace v. McConnell*, 13 Pet. (U. S.) 136, 150.

Interest Chargeable Until Deposit Made. — In *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 42 Am. St. Rep. 87, the court said: "Unless the tender is kept good all the time, that is, unless the debtor is willing and prepared to make payment at any time after the tender, if the creditor should conclude to receive it, and until the money is paid into court upon his plea, the debtor is chargeable with interest. He cannot make a tender today, and then use the money for his profit, and escape the payment of interest. He is released

from the payment of interest upon the supposition that he has been deprived of the use of the money by holding himself in readiness all the time to pay his creditor upon his demand.

Exercising Option To Purchase.

A tender made by virtue of the option clause in a lease (to purchase) does not release the obligation to pay rent unless they should in some manner have sought the enforcement of the agreement on the part of the lessor or kept their tender good. *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.

34. *Alabama.* — *Birmingham Paint & Roofing Co. v. Crampton & Tharpe*, 39 So. 1020; *Rudolph v. Wagner*, 36 Ala. 698.

Arkansas. — *Burr & Co. v. Daugherty*, 21 Ark. 559.

Connecticut. — *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356.

Georgia. — *Ansley v. Hightower*, 120 Ga. 719, 48 S. E. 197; *Biggers v. Pace*, 5 Ga. 171.

Iowa. — *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489.

Louisiana. — *Sonia Cotton Oil Co. v. The Red River*, 106 La. Ann. 42, 30 So. 303, 87 Am. St. Rep. 294.

Maine. — *Wing v. Davis*, 7 Greenl. 31; *Wheelden v. Lowell*, 50 Me. 499.

Michigan. — *Lacy v. Wilson*, 24 Mich. 479.

Minnesota. — *Moulton v. Kolodzik*, 97 Minn. 423, 107 N. W. 154; *Nelson v. Robson*, 17 Minn. 284.

Missouri. — *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773; *Walsh v. St. Louis Ex. & Music Assn.*, 101 Mo. 534, 14 S. W. 722.

Nebraska. — *Guthman v. Kearn*, 8 Neb. 502, 1 N. W. 129.

New York. — *Bolton v. Amsler*, 95 N. Y. Supp. 481.

North Carolina. — *Smith v. Old Dominion Bldg. & Loan Assn.*, 119 N. C. 257, 26 S. E. 40.

Pennsylvania. — *Brewer v. Fleming*, 51 Pa. St. 102, 113; *Appleton v. Donaldson*, 3 Pa. St. 381.

Tennessee. — *Farnsworth v. Howard*, 1 Coldw. 215; *Pearson v. Douglass*, 1 Baxt. 151.

Texas. — *Haney v. Clark*, 65 Tex. 93.

Vermont. — *Cobb v. Hall*, 33 Vt. 233.

West Virginia. — *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

In California to excuse the making of a tender it must appear either, *first*, that it was prevented or delayed by the act of the creditor, or by operation of law; *second*, that it was prevented or delayed by an irresistible superhuman cause, or by the act of public enemies; *third*, when the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect. Section 1511 Civil Code of California. *Sanford v. Savings & Loan Soc.*, 80 Fed. 54, 63.

Offer to Borrow Money for Payment. — In *Davis v. Holbrook*, 25 Colo. 493, 55 Pac. 730, the object of the action was the recovery of the possession of real property. The defendants relied solely upon their rights under a parol contract with the grantor of the plaintiffs (having notice) for the purchase of the property at the price of \$300 per acre, to be paid within a reasonable time, and their continued possession, and the making of valuable improvements in reliance upon the contract. The defendants admitted on the trial that they never made any actual tender of the purchase price, but contended that they offered to borrow money for this purpose, but were dissuaded from so doing by the grantor, and

that they would have made an actual tender had he not said the same was unnecessary.

The court said: "We do not understand this to be a sufficient tender, or an excuse for a failure to make a legal tender. The mere offer to pay, or offer to borrow money to pay is not sufficient."

Clear Refusal Waives Tender. In *Ashburn v. Poulter*, 35 Conn. 553, the evidence showed that the plaintiff met the defendant upon the street, and said in substance, "I am now ready to pay you the \$17.85 which I owe you", having money in his pocket sufficient to pay the debt, and intending to pay it. The plaintiff replied, "There have been costs made, and you have got to settle with my attorney, Mr. Boughton." *Held*, sufficient to prove a valid tender, the court saying: "No money was produced and presented by the defendant, but I think the right of the plaintiff to have the money produced and presented in connection with the offer to pay was waived and the production and presentation dispensed with by the unequivocal declaration that it would not be received and must be paid to another."

In *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322, 39 N. E. 1110, the action was replevin of personal property which had been mortgaged by the plaintiff to the defendant, taken by defendant after breach of condition. The evidence showed the following facts in relation to a plea of tender, viz.: That an agent of the plaintiff went to the defendant's place of business for the purpose of paying to him the sum necessary to discharge the debt under the statute, having with him sufficient money for that purpose, and being ready and willing to pay the same, and made known his purpose, and his readiness and willingness so to pay to the defendant, and was prevented from making an actual tender of the proper sum only by the defendant's refusal to accept it and his assertion that a larger amount was due, and his withdrawal from further talk, and from the immediate presence of the agent for the purpose of preventing the making of the tender. *Held*, that the acts of the plaintiff's agent

peremptorily refuse to accept, it is not necessary to prove that a formal tender was actually made.³⁵

so proved were in law equivalent to a tender, the court saying: "The maxim that the law does not compel one to do vain or useless things applies to the circumstances of the attempted payment, with the result that the plaintiff must be deemed to be in the same position as if payment had been made, or if the required amount had been actually tendered."

Refusal or Absence of Creditor.

In *Otis v. Barton*, 10 N. H. 433, it was held that where the promisor showed himself ready, by himself or his agent, with means in his possession or control for immediate payment it was equivalent to a tender, provided the promisee either refused to receive such payment, or was not ready at the time and place specified in the contract to receive it.

³⁵. *Moore v. Crawford*, 130 U. S. 122; *Cheney v. Libby*, 134 U. S. 68; *Blanton v. Kentucky Dist. & Warehouse Co.*, 120 Fed. 318, 349;

*Johnson v. Garlich*s, 63 Mo. App. 578; *Schilb v. Pendleton*, 76 Mo. App. 454.

Austin v. St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450, was an action for damages for personal injuries. The evidence showed that pending a former suit on the same cause of action, plaintiff's attorney went to the office of the attorney of record for the defendant in the former suit and offered to pay back to him the ten dollars which had been paid by the company to obtain a release of plaintiff's claim, and stated to the defendant's attorney, that if he would not accept the tender, he would go to the general office of the defendant and make it there, whereupon the defendant's attorney replied that there was "no use to do that" as the defendant would not accept the money. *Held*, that this evidence was sufficient to show that a technical tender of the ten dollars was waived by the defendant.

TESTAMENTS.—See Wills.

TESTIMONY.—See Evidence.

THEFT.—See Burglary; Larceny; Robbery.

THREATS.—See Arson; Assault and Battery; Homicide.

TIDE LANDS.—See Waters and Watercourses.

TIMBER.

BY JOHN ABBOTT POWELL.

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I. TIMBER IN GENERAL.

1. **Proof of What Is Timber.** — A. AT COMMON LAW. — At common law, especially in actions of waste, the word "timber" came to have a well-settled signification. Whether particular varieties of trees were timber trees was determined by reference to the common law definition of "timber."¹

B. BY CUSTOM. — The common law definition of "timber" was subject to variation upon proof of a local custom by which trees not timber at common law were considered timber under the custom set up and proved.² Evidence of usage was admissible to aid in

1. *Bullen v. Denning*, 5 Barn. & C. 842, 12 E. C. L. 383; *Dunn v. Bryan*, 7 Ir. Rep. Eq. (Irish) 143, 152; *Leigh v. Heald*, 1 Barn. & Ad. 622, 20 E. C. L. 458.
 2. *Dashwood v. Magniac*, 3 Ch.

determining whether the parties intended that the custom should apply in the particular case.³ Trees once determined to be timber by proof of custom, were considered to be timber according to the common law signification of the term.⁴ At the present time, the custom of a community may be given in evidence to aid in the construction of a contract between parties, and the question of its adoption by the parties should be submitted to the jury.⁵

C. IN DEEDS AND WRITTEN INSTRUMENTS.—When the term timber is used in a deed or other written instrument, its interpretation and signification, while a question of fact, is within the province of the court.⁶ The court is not bound by any arbitrary definitions, but will consider the intention of the parties and the circumstances of the particular case.⁷ A grantee is estopped from asking of the

Div. (1891) 306, 351; *Chandos v. Talbot*, 2 P. Wms. 600, 24 Eng. Reprint 877.

3. "The custom simply makes 'beech' timber in the common law acceptance of the term, but the applicability of the custom, like the applicability of a rule of common law to a particular case, will depend upon the intention of the parties concerned; and where that intention is a matter of inference, usage becomes all important." *Dashwood v. Magniac*, 3 Ch. Div. (1891) 306, 351.

4. "It is laid down generally by Lord Coke and supported by adjudged cases, that beech is timber by the custom of the county of Bucks. Then why should we not be bound to take notice of that custom so declared and established, as we take notice of the custom of gavelkind in Kent? And when beech is declared to be timber by the custom, it must be taken to be timber according to the rules of the common law respecting timber." *Aubrey v. Fisher*, 10 East (Eng.) 446.

5. "If there had been any evidence in the case of any local custom or special signification which the parties might be presumed to have adopted, the question might properly have been submitted to the jury." *Nash v. Drisco*, 51 Me. 417.

In *Shiffer v. Broadhead*, 126 Pa. St. 260, 17 Atl. 592 (cited in *Donworth v. Sawyer*, 94 Me. 243, 255, 47 Atl. 521), it was held that in a grant of standing pine and hemlock timber, "timber" by a local custom meant logs ten inches in diameter at

the end of a twelve foot log, first cut from the butt of the tree.

6. *Canada*.—*Corbett v. Harper*, 5 Ont. 93.

Georgia.—*Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135.

Maine.—*Donworth v. Sawyer*, 94 Me. 243, 47 Atl. 521; *Nash v. Drisco*, 51 Me. 417.

Missouri.—*Hubbard v. Barton*, 75 Mo. 65.

New Hampshire.—*Alcutt v. Lakin*, 33 N. H. 507, 66 Am. Dec. 739.

New York.—*Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287.

Pennsylvania.—*Kaul v. Weed*, 203 Pa. St. 586, 53 Atl. 489.

Wisconsin.—*Fogo v. Boyle*, 130 Wis. 154, 109 N. W. 977.

7. In *Donworth v. Sawyer*, 94 Me. 243, 47 Atl. 521, the court says: "It is common learning that the construction to be given deeds must have relation to the time and circumstances under which they were given, and that they are ordinarily to be construed most strongly against the grantor. The converse rule applies however to grants by the sovereign power when not purely commercial and especially when they are gratuitous and are not moved by a full and adequate consideration. . . . Now the word 'timber' should be given the meaning suited to the purposes of the grant apparent from the whole deed."

The Burden of Proof that the terms "timber" and "growth" as used in a written contract were identical in meaning to the parties, or were from

court an interpretation of a written contract different from the interpretation he has placed upon it by his own acts.⁸

D. IN STATUTES. — The meaning of the word timber as used in a statute is a question of law for the court.⁹ The purposes to be gained by the enactment of the statute or the abuses sought to be remedied by it, are the main features to be considered in its construction.¹⁰ In certain clear cases it would seem to be proper for the court to take judicial notice of the fact that particular trees were or were not timber.¹¹ Generally, the court gives a definition of

the character of the growth, of the same effect, was in *Lord v. Meader*, 73 N. H. 185, 60 Atl. 434, held to be upon the plaintiff, the court declaring that it would not be bound by arbitrary definitions of the words employed, but would endeavor to gather the intention of the parties from the words used.

Written Contracts. — In *Banks v. Blades Lumb. Co.*, 142 N. C. 49, 54 S. E. 844, it was declared that the construction of a written contract, not ambiguous, was for the court, holding that a deed conveying all "the pine timber at and above the size of twelve inches in diameter at the base when cut, now standing or growing," included all trees twelve inches in diameter at the ground at the time of actual cutting, and evidence merely showing that it was customary in that section to cut timber two feet above the ground was inadmissible. And see *Strother v. American Cooperage Co.*, 116 Mo. App. 518, 92 S. W. 758.

8. "The grantees having unmistakably indicated by their conduct in exercising their rights under the grant to them what they understood as having passed to them under 'all and all manner of timber' cannot be heard now in support of their contention that another interpretation should be placed upon their words." *Kaul v. Weed*, 203 Pa. St. 586, 53 Atl. 489.

9. *United States v. Briggs*, 9 How. 351; *Bryant v. United States*, 105 Fed. 941, 45 C. C. A. 145.

California. — *O'Hanlon v. Denver*, 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19.

Maine. — *Sands v. Sands*, 74 Me. 239.

Massachusetts. — *Com. v. Noxon*, 121 Mass. 42.

Washington. — *Dexter, Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070.

Wisconsin. — *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67; *Babka v. Eldred*, 47 Wis. 189, 2 N. W. 102, 559; *Engi v. Hardell*, 123 Wis. 407, 100 N. W. 1046.

10. *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234; *Bearce v. Dudley*, 88 Me. 410, 34 Atl. 260.

In *United States v. Stores*, 14 Fed. 824, the court used this language: "The question is not what is the popular meaning as understood by any one class, but its meaning as used in the statute, and how the legislators have employed it; and this must be its most general and least restricted sense, including in such signification what each and all classes would under such circumstances understand timber to be. . . . The object of this prohibitory legislation is undoubtedly to prevent stripping the public lands of their growth of forests, regardless of the present size and character of the individual trees, and the term used is intended to apply generally for that purpose, and if it is found that live trees of such a character or sort as might be of use or value in any kind of manufacture, or the construction of any kind of useful articles, were cut, the charges in that respect, namely, the character of the timber, have been sufficiently proven. It matters not to what use the timber may have been applied after having been cut."

11. In *Bustamente v. United States*, 4 Ariz. 344, 42 Pac. 111, the court on appeal reversed the decision of the lower court and the finding of the

"timber" and leaves it to the jury to determine whether the trees or articles in question fall within the definition,¹² their decision being set aside if against the weight of evidence.¹³ Where it appears that the article could in no case come within the meaning of the statute as "timber"; a demurrer to that point will be sustained.¹⁴

2. Statute of Frauds in Relation to Timber.—A. OLDER RULE. The decisions in the earlier cases lay down the principle that a contract for the sale of growing trees is a contract for the sale of an interest in land and is subject to the fourth section of the statute of frauds and must be evidenced by a writing to be capable of enforcement.¹⁵ Under these cases the writing must also be a deed,¹⁶

jury that mesquite was "timber," saying: "I am compelled to hold that Congress did not intend to include mesquite in the term 'timber' within the meaning of section 2461, Rev. St. of U. S. and the court below erred in not sustaining the demurrer to the indictment." But compare *United States v. Soto*, 7 Ariz. 239, 64 Pac. 419.

12. *United States v. Stores*, 14 Fed. 824.

"Under the statute it was error to sustain a demurrer to an indictment charging the defendant with cutting mesquite trees on the ground that the mesquite tree is not timber within the meaning of the statute, since some mesquite timber is fit material for some constructive uses, and therefore the question as to whether or not that cut by the defendant was such timber was a question for the jury, and not to be decided on demurrer." *Wilson v. State*, 17 Tex. App. 393.

13. In *Wilson v. State*, 17 Tex. App. 393, the court charged the jury as to what "timber" was as used in the statute; the jury then found the defendant guilty upon the indictment, but on appeal the verdict was set aside as being against the weight of evidence.

14. *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234; *McCauley v. State*, 43 Tex. 374.

15. *England*.—*Teal v. Auty*, 2 Brod. & B. 99, 6 E. C. L. 32; *Scorell v. Boxall*, 1 Younge & J. 396.

Alabama.—*Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776.

Indiana.—*Terrell v. Frazier*, 79 Ind. 473; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295.

Iowa.—*Garner v. Mahoney*, 115 Iowa 356, 88 N. W. 828.

Maine.—*Dunn v. Burleigh*, 62 Me. 24.

Massachusetts.—*White v. Foster*, 102 Mass. 375.

Michigan.—*Jackson v. Evans*, 44 Mich. 510, 7 N. W. 79.

Minnesota.—*Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126.

Missouri.—*Lyle v. Shinnebarger*, 17 Mo. App. 66; *Alt v. Groschlose*, 61 Mo. App. 409.

New Hampshire.—*Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Olmstead v. Niles*, 7 N. H. 522; *Howe v. Batchelder*, 49 N. H. 204.

New Jersey.—*Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432.

New York.—*Green v. Armstrong*, 1 Denio 550; *Warren v. Leland*, 2 Barb. 613.

Ohio.—*Hirth v. Graham*, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721.

Pennsylvania.—*Bowers v. Bowers*, 95 Pa. St. 477; *Pattison's Appeal*, 61 Pa. St. 294, 100 Am. Dec. 637.

Vermont.—*Buck v. Pickwell*, 27 Vt. 157.

Virginia.—*Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509.

West Virginia.—*Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521.

Wisconsin.—*Keystone Lumb. Co. v. Kolman*, 94 Wis. 465, 69 N. W. 165, 59 Am. St. Rep. 904, 34 L. R. A. 821; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467.

16. *Potter v. Everett*, 40 Mo. App. 152; *Atlantic & P. R. Co. v. Freeman*, 61 Mo. 80; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173 (*overruling* *Olmstead v. Niles*, 7

under seal.¹⁷ A parol agreement reserving to the grantor certain timber is also within the statute,¹⁸ as is any agreement which must be proved to recover a verdict although not necessarily set out in the declaration.¹⁹ A parol agreement as to the transfer of timber will sometimes be enforced in equity where part performance has occurred.²⁰ The writing or memorandum must contain the substantial terms of the contract,²¹ but parol evidence is admissible to explain an ambiguity,²² or to prove that no absolute sale was intended, but that the contract was executed only as security for a debt.²³

B. MODERN TENDENCY. — The modern tendency is to regard such a contract, where severance of the trees from the soil in the near future is contemplated, as a contract for the sale of goods only,²⁴

N. H. 522); *White v. King*, 87 Mich. 107, 49 N. W. 518.

17. *White v. King*, 87 Mich. 107, 49 N. W. 518.

18. *Dodder v. Snyder*, 110 Mich. 69, 67 N. W. 1101.

19. "The Statute of Frauds in reference to the sale of lands is applicable to actions brought to enforce rights dependent upon and resulting from the contract itself, and in which it must be proved, though not counted upon, and not merely to those actions in which the contract must necessarily be set out in the declaration." *Buck v. Pickwell*, 27 Vt. 157.

20. **Part Performance.** — "The rigid requirements of the statute have, however, been so far relaxed by courts of equity that effect is sometimes given to verbal agreements for the sale of an interest in land; but it is only in cases where the contract, in all its essential parts, is established by clear and unequivocal proof, and where it has been so far executed that it would be unjust and inequitable to rescind it, and this is done that the statute itself may not become an instrument of fraud." *Bowers v. Bowers*, 95 Pa. St. 477.

21. **Memorandum.** — "The rational rule seems to be, that the memorandum must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence." *Buck v. Pickwell*, 27 Vt. 157. See also *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273, 14

Johns. 15, 7 Am. Dec. 427; *Trustees v. Bigelow*, 16 Wend. (N. Y.) 28; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675.

22. The court after deciding that a contract conveying standing timber was a contract in regard to an interest in land, said: "Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written." *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884.

23. *Germain v. Central Lumb. Co.*, 116 Mich. 245, 74 N. W. 644.

24. *England.* — *Marshall v. Green*, 1 C. P. Div. 35, 45 L. J. C. P. 153; *Smith v. Surman*, 9 Barn. & C. 561, 17 E. C. L. 443.

Connecticut. — *Bostwick v. Leach*, 3 Day 476.

Kentucky. — *Cain v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Metc. 372, 83 Am. Dec. 481; *Prater v. Campbell*, 22 Ky. L. Rep. 1510, 60 S. W. 918.

Maine. — *Erskine v. Plummer*, 7 Me. 447, 22 Am. Dec. 216; *Cutler v. Pope*, 13 Me. 377.

Maryland. — *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104.

Massachusetts. — *Claffin v. Carpenter*, 4 Met. 580, 38 Am. Dec. 381.

Minnesota. — *Herrick v. Newell*, 49 Minn. 198, 51 N. W. 819.

New Jersey. — *Silsby v. Trotter*, 29 N. J. Eq. 228.

and it would seem to follow that in that case the seventeenth section of the statute is applicable,²⁵ but in some jurisdictions such an agreement is treated as a mere revocable license to enter and cut the timber.²⁶ A valid conveyance in writing may work a constructive severance of growing trees from the land, and thereafter they may be treated as chattels personal.²⁷

3. Measurement of Timber.—A. PRESUMPTIONS.—a. *As to Method.*—Where the parties to a written contract for the sale of timber or logs had not expressly stipulated as to the method of measuring it, it was held that there was a presumption that there was some verbal arrangement between them governing the measurement;²⁸ in another case the presumption was declared to be that the ordinary method should be followed.²⁹ Where the law requires logs to be measured by an official scaler, the presumption is that the parties contracted with reference to this law;³⁰ and acting inspectors under such a law are presumed to have been legally appointed.³¹

b. *As to Accuracy.*—The parties having agreed to abide by the measurement of an arbitrator, every reasonable presumption is indulged in favor of the correctness of his measurement.³² The measurement of a scaler now dead, but originally selected by both parties, will be presumed to have been honestly and accurately made,

Pennsylvania.—McClintock's Appeal, 71 Pa. St. 365; Robbins v. Farwell, 193 Pa. St. 37, 44 Atl. 260.

25. Marshall v. Green, 1 C. P. Div. (Eng.) 35, 45 L. J. C. P. 153; Wright v. Schnieder, 14 Ind. 527; Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449.

26. Georgia.—Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135; Perkins v. Peterson, 110 Ga. 24, 35 S. E. 319.

Michigan.—Greeley v. Stilson, 27 Mich. 153; Haskell v. Ayres, 35 Mich. 89; Spalding v. Archibald, 52 Mich. 365; 17 N. W. 940, 50 Am. Rep. 253.

New Hampshire.—Hodson v. Kennett, 73 N. H. 225.

Oregon.—Elliott v. Bloyd, 40 Or. 326, 67 Pac. 202.

Pennsylvania.—Patterson v. Graham, 164 Pa. St. 234, 30 Atl. 247.

27. "Growing trees or grass may be severed in law from the land, and become personal property without an actual severance; as where the owner of the land in fee by a valid deed of conveyance in writing, sells the trees or grass to a third person, or where he sells the land, reserving the

timber trees, or grass. In both these cases, the timber, trees, and grass become chattels, distinct from the soil, and go to the executor instead of to the heir." Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173. And see Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542; Warren v. Leland, 2 Barb. (N. Y.) 613; Evans v. Roberts, 5 Barn. & C. 829, 12 E. C. L. 377; Stukely v. Butler, Hobart (Eng.) 300.

28. "Where a written contract is silent as to how logs sold shall be measured, the presumption is that the parties had some verbal agreement or arrangement covering the matter." McDowell v. Laev, 35 Wis. 171.

29. Heald v. Cooper, 8 Me. 32.

30. Morrow v. Delaney, 41 Wis. 149.

31. "Where a law requires that log inspectors shall be appointed by the governor, etc., there is a presumption that he has performed his legal duty and that the acting inspectors were so appointed." McCutchin v. Platt, 22 Wis. 561.

32. Herdic v. Bilger, 47 Pa. St. 60.

and evidence to establish these facts need not be introduced in the first instance.³³

Presumptions as to the Scale Bill. — A scale bill is merely presumptive evidence of the correctness of its contents and may be attacked.³⁴ A scale bill which states that the measurement is an "average" raises a presumption that no accurate measurement was made.³⁵

B. QUESTIONS OF FACT. — Where there is a dispute as to what method of measurement should be employed,³⁶ or as to whether the parties agreed to abide by the scaling of a certain third person,³⁷ the question is one of fact for the determination of the jury. Whether the scale actually made was that contemplated by the parties is also a matter for the jury to determine.³⁸

C. ADMISSIBILITY IN GENERAL. — *a. Parol Evidence.* — Parol evidence is admissible to prove that there was an oral agreement that logs sold under a written contract should be measured by a certain third party, as such an agreement is merely collateral to the written contract.³⁹

33. "Where the scaler is dead who was selected by both parties, the presumption is, without any evidence, that his measurement was honest and accurate. But if its honesty was substantially attacked, the burden of proof would be upon the plaintiffs to establish its accuracy. Admissions of the scaler as to the manner in which he did the work and statements of those who saw him would then be admissible" upon the question of his fraud. *Malone v. Gates*, 87 Mich. 332, 49 N. W. 638.

34. "No greater effect can be given to the lumber inspector's scale bill and certificate as evidence than is prescribed by the statute on the subject which makes the same presumptive evidence of the facts therein contained and of the correctness of such statement or measurement. Being only presumptive evidence of those facts such scale bill and certificate may be impeached for fraud or mistake on the part of the inspector making the same." *Gardner v. Wilber*, 75 Wis. 601, 44 N. W. 628.

35. *Churchill v. Holton*, 37 Minn. 519, 38 N. W. 611.

In *Hurst v. Webster Mfg. Co.*, 128 Wis. 342, 107 N. W. 666, it was held that where a lumber inspector measured about one-third of a quantity of logs, averaged the result, and multiplied such average by the whole number of logs, such process did not

constitute a "scalement" or measurement of the logs, and no official scale bill could be based thereon. The question was held to be one of law for the decision of the court. Also, the oral testimony of the scaler as to the quantity of logs thus measured was held to be improper since there was no evidence introduced to show that the logs estimated would average the same as those measured or that a correct estimate could be made in that way.

36. *Nelson v. Betcher Lumb. Co.*, 96 Minn. 76, 104 N. W. 833. Where a written contract was modified by a writing and there was dispute as to whether an oral agreement then made as to measurement was to be final or not, the question was left to the jury. *Nelson v. Mashek Lumb. Co.*, 95 Minn. 217, 103 N. W. 1027.

37. *Sovereign v. Mosher*, 86 Mich. 36, 48 N. W. 611; *Peterson v. Reichel*, 143 Mich. 212, 106 N. W. 877.

38. *Bresnahan v. Ross*, 103 Mich. 483, 61 N. W. 793; *Daggett v. Hayward*, 95 Mich. 217, 54 N. W. 764.

39. *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837. See *Sovereign v. Mosher*, 86 Mich. 36, 48 N. W. 611.

In *Savercool v. Farwell*, 17 Mich. 308, parol evidence was admitted to show that a scaling was allowed by a person other than the person named in the contract.

b. *Best Evidence Rule.*—Where the measurement of timber is required to be made and recorded by an official scaler, his scale book is the best evidence of the results of his measurement and must be produced and used where it is obtainable;⁴⁰ it is admissible in evidence without producing the testimony of the scaler himself, if properly authenticated.⁴¹ Failure to comply with the statutory requirement of certification does not render it inadmissible,⁴² neither does the fact that the scaling was done by the official scaler of another district.⁴³ Upon satisfactory proof of its loss being given, secondary evidence of its contents will be admitted.⁴⁴

c. *To Attack a Scale.*—A joint scale made pursuant to agreement is binding upon both parties,⁴⁵ and the scale of an official surveyor is conclusive unless impeached for fraud or mistake; the burden of proof in that case being upon the party attacking the scale.⁴⁶ The evidence to show fraud or mistake should be clear and convincing,⁴⁷ and the existence of the fraud is a question for the

40. *Haynes v. Hayward*, 41 Me. 488; *Peterson v. Anderson*, 44 Mich. 441, 7 N. W. 56; *Clark v. Nelson Lumb. Co.*, 34 Minn. 249, 25 N. W. 405; *Smith v. Schulenberg*, 34 Wis. 41.

"The legislature having provided that written measurement of logs and lumber should be made by a public officer and a record preserved in a public office and that a certified bill thereof made by him and delivered to the owner should be presumptive evidence of the correctness of such scalement or measurement in all courts, except in favor of the person making the same, such written evidence when it exists and is obtainable must be deemed the best evidence of the number of feet in the lot of logs so scaled and measured. . . . We are of the opinion that there was no foundation laid for proving by parol the contents of the scale bill; and we are also of the opinion that it is improper to give parol evidence of the quantity of logs in board measure, by estimates made by men who had seen and examined them, when it appears that a scale and measurement thereof had been made by an officer appointed for that purpose, unless it be further shown that no record of such scale has been made as required by law and no certified scale bill thereof is in existence, or that, if in existence, it is in the hands of the opposite party, who upon notice has refused to produce the

same, or is in some other way out of the reach of the party offering such proof." *Steele v. Schricker*, 55 Wis. 134, 12 N. W. 396.

41. *Bailey v. Blanchard*, 62 Me. 168.

42. *Christie v. Keator*, 49 Wis. 640, 6 N. W. 334.

43. *Carver v. Crookston Lumb. Co.*, 84 Minn. 79, 86 N. W. 871.

44. "A scale book not being produced, the testimony of the person who kept it is admissible as secondary evidence to prove the number of logs passing the plaintiff's dam." *Tewksbury v. Schulenberg*, 48 Wis. 577, 4 N. W. 757.

45. *Busch v. Kilborne*, 40 Mich. 297.

46. *United States v. Lindsay v. Mullen*, 176 U. S. 126; *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474.

Maine.—*Nutter v. Bailey*, 32 Me. 504; *Haynes v. Hayward*, 41 Me. 488.

Michigan.—*Savercool v. Farwell*, 17 Mich. 308; *Bresnahan v. Ross*, 103 Mich. 483, 61 N. W. 793; *Ortman v. Green*, 26 Mich. 209; *Malone v. Gates*, 87 Mich. 332, 49 N. W. 638.

Minnesota.—*Boyle v. Musser Mfg. Co.*, 77 Minn. 206, 79 N. W. 659; *Antill v. Potter*, 69 Minn. 192, 71 N. W. 935; *Libby v. Johnson*, 37 Minn. 220, 33 N. W. 783.

47. *Gardner v. Wilber*, 75 Wis. 601, 44 N. W. 628; *Gates v. Young*, 82 Wis. 272, 52 N. W. 178; *Sullivan v. Ross' Estate*, 124 Mich. 287, 82 N. W. 1071.

jury.⁴⁸ Gross negligence is not conclusive evidence of fraud.⁴⁹ A public surveyor will not be allowed by his oral testimony to contradict his recorded measurement;⁵⁰ nor can the official scale be impeached by mere estimates made without actual count or measurement;⁵¹ but other scales accurately made are admissible,⁵² and if the original scale is set aside the second may be substituted for it.⁵³ A party who acquiesces in a scale is estopped from later denying its accuracy.⁵⁴ The burden of proving that a scale made by a non-expert scaler is correct, is upon the party who hired him.⁵⁵

d. *Custom*. — Evidence of local custom and usage has been held to be admissible to show what particular scale rule was intended to be used by the parties,⁵⁶ and to determine upon whom the burden of paying for the scale shall fall.⁵⁷

e. *Expert Evidence*. — A person who is not an expert scaler may testify as to the results of a scale made by himself, as that is a question of fact.⁵⁸ The amount of experience necessary to make a person an expert scaler is itself a matter for expert opinion evidence.⁵⁹

f. *Refreshing Memory*. — A scaler may use a memorandum of his work to refresh his memory, although some entries in it were made upon the strength of the reports of other employees.⁶⁰

48. If there is any evidence tending to show a mistake by the inspector, the question should be submitted to the jury. "We think the plaintiff was entitled, in the absence of any explanatory evidence on the part of the defendant, to have it submitted to the jury whether the defendant had not been guilty of negligence in making the second scale." *Gates v. Young*, 78 Wis. 98, 47 N. W. 275.

49. *Leighton v. Grant*, 20 Minn. 345.

50. *Whitman v. Freese*, 23 Me. 212.

51. *Fornette v. Carmichael*, 41 Wis. 200.

52. *Ozan Lumb. Co. v. Haynes*, 68 Ark. 185, 56 S. W. 1068.

53. *Sullivan v. Ross' Estate*, 124 Mich. 287, 82 N. W. 1071.

54. *Sullivan v. Ross' Estate*, 124 Mich. 287, 82 N. W. 1071.

55. The burden of proof that a scaling is correct is on the party furnishing the scaler, if he was without experience, although the contract required the other party to do the scaling. *Atkinson v. Morse*, 57 Mich. 276, 23 N. W. 812.

56. *Headley v. Hackley*, 50 Mich. 43, 14 N. W. 693.

Technical Terms. — "The term 'quarter scale' is technical and has

a peculiar local signification on account of custom; and proof of such local usage or of the sense in which it was usually understood, and its interpretation, is for the court unless the meaning is obscure." *Bullock v. Consumers' Lumb. Co.* (Cal.), 31 Pac. 367.

57. *Kieldsen v. Wilson*, 77 Mich. 45, 43 N. W. 1054.

"Dealers in logs in that market may be presumed to contract with reference to the established usage of the business in respect to the delivery of logs and the payment of fees for scaling where there is nothing in the agreement to exclude the inference." *Clarke v. Hall & Ducey Lumb. Co.*, 41 Minn. 105, 42 N. W. 785.

58. *Thomas v. Conant* (Me.), 5 Atl. 533.

59. *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837.

60. In *Gardner v. Wilber*, 75 Wis. 601, 44 N. W. 628, entries by a sawyer in a millbook from figures given by the scaler, were admitted as original evidence, the other party having indorsed their correctness by paying his bill.

In *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837, the court said:

g. *Of the Scale Bill as Original Evidence.* — A scale bill made at a particular time is not admissible to prove the amount of logs converted from the same lot at a later time and a different place,⁶¹ but it may be used as evidence of the delivery of logs under a contract,⁶² and also as evidence of their possession.⁶³

4. *Marks or Brands.* — A *prima facie* case of ownership and title to logs is made out by evidence that the brand they bear is the brand of the claimant,⁶⁴ even though the brand has not been re-

"An employe of the vendor may use a memorandum in which she made entries as to the number of logs delivered according to the report to her of the men who did the delivering, to refresh her recollection." See also *Welch v. Palmer*, 85 Mich. 310, 48 N. W. 552; *Crane Lumb. Co. v. Otter Creek Lumb. Co.*, 79 Mich. 307, 44 N. W. 788.

As sawlogs were delivered to the purchaser at his mill, the measurements of such purchaser were entered upon a piece of smooth plank and on the same day transcribed and entered upon his general books of account. *Held*, that the entries were a part of the delivery and measurements of the logs, and the purchaser could refer to the book and read from it as a part of his own evidence. *Place v. Baugher*, 159 Ind. 232, 64 N. E. 852.

In *Hagerthy v. Webber*, 100 Me. 305, 61 Atl. 685, the scale books of a deceased scaler were admitted. "These books were competent evidence for the consideration of the jury as tending to prove the amount of bark taken off the tract in question. This was the important purpose for which they were kept, and the entries were original evidence and the best evidence obtainable to prove the facts therein stated."

But *compare Tingley v. Fairhaven L. and Co.*, 9 Wash. 34, 36 Pac. 1098, where a loss scaler used a memorandum book, some entries in which were made from reports to him by fellow servants. It was said in that case: "We have no hesitation in saying that the testimony derived from this book was incompetent under well known rules of evidence, because the entries contained in it did not pertain to matters wholly within the knowledge of the witness, who could not identify any entry in

it except for the first day or so, as the result of his own scaling."

61. *Itasca Lumb. Co. v. Gale*, 62 Minn. 356, 64 N. W. 916.

62. *Smith v. Schulenberg*, 34 Wis. 41; *Peterson v. South Shore Lumb. Co.*, 105 Wis. 106, 81 N. W. 141.

63. *Clark v. C. N. Nelson Lumb. Co.*, 34 Minn. 289, 25 N. W. 628.

64. *Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; *Long v. Davidson*, 77 Wis. 509, 46 N. W. 805.

"The evidence should have been allowed to go to the jury." If the assignor was engaged in lumbering as stated in the offers, and if he stamped all the logs which he cut in the forest and prepared for market with his mark, how could he show title to them after they were floated down the river and caught with other logs except by showing that they had his mark upon them and the mark of no other person denoting their ownership? If they were not his logs why were they stamped with his mark? The presumption is always in favor of honesty, and if so, the reasonable inference would be that the logs were rightfully in his possession when he stamped them, and that he stamped them with his mark because he owned them. The evidence was sufficient to make out a *prima facie* case of ownership without showing that he purchased the logs or that he was the owner of the land on which they were cut." *Weiler v. Coleman*, 71 Pa. St. 346.

A Question for the Jury. — "The question of the passage of title to the poles and of the surrender or discharge of the contract as to them were properly submitted to the jury. Whether title to the poles had passed depends upon the intent of the parties. The marking of the poles with the defendant's log mark was evi-

corded in accordance with a statutory provision.⁶⁵ This *prima facie* case may be rebutted by evidence which shows that the real ownership of the logs is in another person.⁶⁶

II. TIMBER TRESPASS.

1. On Government Land. — A. IN GENERAL. — Timber trespass on government land may be proceeded against by the government in both civil and criminal actions, and proof of a judgment obtained in the one action is no bar to the prosecution of the other.⁶⁷

B. TITLE. — The title of the government to the land upon which the trespass was committed may be shown by evidence that the land was originally part of the public domain and that no patent has been issued for it,⁶⁸ the records of the land office are admissi-

dence of ownership. 2 Compiled Laws § 5085." Watson v. Naugle Tie Co., 148 Mich. 675, 112 N. W. 752.

65. Weiler v. Coleman, 71 Pa. St. 346.

"Parol evidence was admitted as to a log mark, although it was not recorded, in order to identify the property and to show ownership upon the ground that the witness had personal knowledge that the log marks testified to by him had been and were in fact used by various parties doing a logging business upon the Mississippi river. No valid reason is presented impeaching the grounds of the ruling of the court, and rendering the evidence incompetent. The witness's knowledge upon the subject clearly showed that his evidence was material and competent to establish the ownership of the logs in question." St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259.

But see Stuart v. Morrison, 67 Me. 549, a lien case, holding that parol evidence was inadmissible to explain a mark.

66. "The fact that the log mark was recorded in defendant's name is not inconsistent with the Foxes owning the logs, for the record of a log mark in one person's name is only *prima facie* evidence that logs bearing that mark are the property of that person." Fox v. Ellison, 43 Minn. 41, 44 N. W. 671.

"Even though logs may be sold and transferred to one whose log

mark is not on the property, that does not affect the validity of the transaction between the parties." Lovejoy v. Itaska Lumb. Co., 46 Minn. 216, 48 N. W. 911.

67. Cotton v. United States, 11 How. (U. S.) 229.

"The government may proceed against trespassers on its land, civilly or criminally, or both, at its election, and judgment in one form of remedy is no bar to the prosecution of the other remedy. It sues in these cases civilly, as the proprietor of the trees or timber which have been unlawfully cut or removed from its lands, to recover the value thereof. And it prosecutes the trespassers criminally in its sovereign capacity for a violation of its criminal statute in that behalf." Bly v. United States, 4 Dill. (U. S.) 464.

68. "The United States proved that the land was originally part of the public domain and that no patent had been issued. This made out a *prima facie* case." United States v. Steenerson, 50 Fed. 504, 1 C. C. A. 552.

So where a claimant has perfected his homestead entry in the proper land office his homestead claim attaches to the land and takes it out of the public domain, so that a subsequent permit to cut timber on the public lands obtained by another would not cover such land. Nelson v. Big Blackfoot Mill Co., 17 Mont. 553, 44 Pac. 81.

ble upon this point.⁶⁹ A certificate issued by the land office is not a conveyance of title and may be withdrawn or attacked for fraud.⁷⁰ A homestead entry does not divest the title of the United States⁷¹ and the mere fact that a trespasser later acquires full title by pre-emption, does not of itself pass to him the title to trees previously cut.⁷² From the testimony of the United States Land Register that a preemptor has paid for land, a presumption arises that the legal title has passed to him.⁷³

C. THE CUTTING. — a. *Burden of Proof.* — In the first instance, the burden of proving the cutting of the timber upon land of the United States is upon the government, as plaintiff,⁷⁴ but having

69. *Galt v. Galloway*, 4 Pet. (U. S.) 332, 342.

"Official plats and books in the office of the Register of the United States Land Office, produced and explained by that officer, were admissible to establish, or as tending to establish, the fact that the lands in question had not been sold by the United States. These records in connection with the testimony of the Register showed that the *locus in quo* was vacant land which had never been disposed of by the United States, and were sufficient to establish that fact, *prima facie*." *Bly v. United States*, 4 Dill. (U. S.) 464.

70. In *United States v. Steener-son*, 50 Fed. 504, 1 C. C. A. 552, the government having established a *prima facie* case, the defendant then proved a pre-emption entry and complete payment and a land certificate issued to their grantor. The United States then wished to prove a cancellation by the Commissioner of the Land Office on the ground of fraud and the court held that this could be shown. The certificate was not a conveyance, though it sometimes was evidence of the equitable title.

In *Stone v. United States*, 64 Fed. 667, 12 C. C. A. 451, the court stated that all testimony tending to establish fraud or bad faith in settlers was admissible.

71. "A homestead entry, although it gives the party entering certain rights, does not so convey title or divest the United States of property in it as to change its character in this respect, and it is immaterial, therefore, whether the land had been entered by a third party for home-

stead or not." *United States v. Stores*, 14 Fed. 824.

Entry of Public Lands gives no title to timber cut and lying upon it. *Keetom v. Audsley*, 19 Mo. 362, 61 Am. Dec. 560.

72. "The subsequent issue of a patent to the applicant cannot change the title to the timber severed from the soil by his own act while the government had the title and payment had not been made." *United States v. Kelly*, 3 Wash. Ter. 421, 17 Pac. 878.

But compare *United States v. Mills*, 9 Fed. 684, where it was held that it was a good defense to an action for cutting timber on government land that the defendant afterwards purchased the land and paid the costs up to the time of entry.

73. "Where the receiver of the United States Land Office testifies that a pre-emptor has paid for the land as required by law, a presumption arises from the fact that officers are supposed to have performed their duty, that final proof was made as required by the regulations of the land department and also that final receipt was issued. This would vest legal title in them, and under the code section requiring an action to be brought by the real party in interest, the United States can no longer maintain an action for trover." *United States v. Saucier*, 5 N. M. 569, 25 Pac. 791.

74. *United States v. Routledge*, 8 N. M. 385, 45 Pac. 883.

United States v. Denver & R. G. R. Co., 191 U. S. 84. Here it was said that the government could rest upon proving its ownership, and cut-

established this fact, there is then a presumption that the cutting was unlawful,⁷⁵ and the burden of going forward with the evidence and proving that the cutting was lawful as coming within some exception recognized by the statute, falls upon the defendant,⁷⁶ for the reason that the facts upon which such a defense⁷⁷

ting and possession by the defendant, who then has the burden of proving that he is within some exception of the statute. "This burden however, which was simply to meet the *prima facie* case of the government, must not be confounded with the preponderance of evidence, the establishment of which rests with the plaintiff."

75. *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398; *United States v. Mock*, 149 U. S. 273.

"The right to cut is exceptional and quite narrow, and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal." *Northern Pacific R. Co. v. Lewis*, 162 U. S. 366. And see *United States v. Cook*, 19 Wall. (U. S.) 591.

Indian Lands.—"Indians have a right to occupancy only (*Johnson v. McIntosh*, 8 Wheaton 574), and therefore the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption and to maintain his title such purchaser must show that the timber was rightfully severed from the land, that is, with the view of improving the land for the benefit of the occupant and not with the primary purpose of selling the timber." *United States v. Cook*, 19 Wall. (U. S.) 591.

76. *United States v. Smith*, 11 Fed. 487; *United States v. United Verde Copper Co.*, 8 Ariz. 186, 71 Pac. 954; *United States v. Basic Co.*, 121 Fed. 504, 57 C. C. A. 624; *Stubbs v. United States*, 111 Fed. 366, 49 C. C. A. 392.

"The defendants are seeking to justify the taking of this timber.

The burden is on them to show that an act *prima facie* a wrongful invasion of plaintiff's right of property was in fact authorized by the statute in question. The means of proof were in their power." *United States v. Eccles*, 111 Fed. 490.

"Any rights or privileges which defendant may have had to appropriate the timber in question are simply matters in defense, which he must plead and which the government could omit in the indictment." *United States v. Stone*, 49 Fed. 848.

But Where the Complaint itself states the purposes for which, and the conditions under which, the cutting was done, it has been held that the defendant was thereby relieved from making proof of them, as they then become a part of the plaintiff's case. *United States v. United Verde Copper Co.*, 8 Ariz. 186, 71 Pac. 954.

Is Sufficient Proof.—In *United States v. Routledge*, 8 N. M. 385, 45 Pac. 883, the court held that when the defendant had established the fact that the timber was cut upon mineral lands, the presumption was that that cutting was for some authorized purpose, and that the burden of going forward with the evidence was then shifted upon the plaintiff who must prove the contrary beyond a reasonable doubt.

Bona Fide Purchasers.—"In an action by the United States to recover the value of timber cut from the public lands where defendant claims that he purchased the timber from settlers on such lands under the pre-emption and homestead laws, the burden is on him to show the good faith of such settlers and their right to cut and sell such timber." *Stone v. United States*, 64 Fed. 667, 12 C. C. A. 451.

77. *United States v. Denver & R. G. R. Co.*, 31 Fed. 886.

"The consent to cut timber granted by the Act of 1878 being upon the conditions and for the purposes

must be based are peculiarly within the defendant's knowledge, as well as on the further ground that it is an affirmative defense.⁷⁶ So a homesteader must show that timber cut was used for the purposes specified and allowed by the statute.⁷⁹ The final determination upon all the evidence is, of course, for the jury.⁸⁰

b. *Judicial Notice.*—The court will take judicial notice of the rules and regulations of the secretary of the interior and of the land department whenever their existence or import becomes material to the issue and will not require proof of them to be made.⁸¹

therein specified, whether the plaintiffs who did this cutting had complied with those conditions and had cut timber for the purposes mentioned, and were within the class of persons described in the statute, were facts which rested peculiarly within their own knowledge, the burden of showing which would naturally and rightfully be cast upon them. As the plaintiffs failed to show that they came within the conditions and exceptions specified in the Act of 1878, the presumption that they cut the timber illegally becomes conclusive." *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366.

78. "The burden of proof was upon the plaintiff to establish by a preponderance of evidence the cutting and conversion of timber by the defendants, or some of them, from the public lands; but the burden of proof was undoubtedly upon the defense to show the right to so cut and dispose of such timber. This right is designated a 'license' in this case. Having pleaded license to cut and dispose of such timber, the burden of proof was upon the party pleading license as a defense, to maintain the plea and thus excuse the act. It should be so for the further reason that some of the facts constituting this license are within the knowledge of the defense only and therefore the plea cannot be maintained without their disclosure by the defendants." *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398.

79. *Conway v. United States*, 95 Fed. 615, 37 C. C. A. 200; *Grubbs v. United States*, 105 Fed. 314, 44 C. C. A. 513.

Presumption.—In *The Timber Cases*, 11 Fed. 81, the court said: "A pre-emptor or homestead claim-

ant may cut timber needed for the improvements he contemplates; may sell a residue; but cannot go outside of improvements, though he fully intends to acquire title under his claim. The law presumes he acted in good faith."

Indian Lands.—Indians as prospective settlers have the right to cut timber and sell it for the purpose of improving and cultivating the land and where patent subsequently issues to the Indian, title being completed, relates back to its inception, and the government is thereby estopped from setting up title or any claim for waste committed in the meantime. *Thayer v. United States*, 20 Ct. Cl. 137.

80. *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398.

81. *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398.

The case of *United States v. Williams*, 6 Mont. 379, 12 Pac. 851, was a suit by the United States in the state court to recover the value of timber alleged to have been cut from public lands, and the court there held that the rules and regulations as to the cutting of timber upon the public lands of the United States prescribed by the Secretary of the Interior, under Laws of the United States, 45th Congress, c. 150, would be considered such an act of the executive department of the United States as the courts would take judicial notice of under Rev. St. Mont. Div. 1, § 625, and it was not necessary to set out such rules in a complaint seeking to recover for an infringement of them. "Under our statute 'courts take judicial notice of whatever is established by law, of public and private official acts of the legislative, executive, and judicial departments of this

c. *Character of Land*. — Where the character of the land upon which the trespass was committed becomes an issue, it may be proved by evidence showing the character of other land in the vicinity,⁸² the actual use to which it is put,⁸³ or by a geological map issued by the department of the interior⁸⁴ or by the surveyor-general of the state.⁸⁵ It is not a proper question upon which to receive expert

territory and of the United States.' Can the rules and regulations prescribed by the Secretary of the Interior for the protection of timber be classed as public or private acts of the executive department of the United States? . . . Many of the most important acts of the President are performed through heads of departments. In the very nature of the existing order of things, the extent of this country, the magnitude of the interests involved, and the immense mass of business required to be transacted by the executive department of the government, it would be impossible to dispose of it without confiding it in a great measure to the care of the cabinet officers; yet whatever the President does through these officers is to be regarded in law as an act of the executive department. Then may not the rules prescribed by the Secretary of the Interior be so considered? Nothing appears more reasonable. There could be no question in regard to the matter if the act of Congress required them to be approved by the President. But although his approval is not in express terms required by the law, is it not reasonably to be inferred that he is cognizant of them and that they meet with his approval? It would seem so. From the importance of the subject and the fact that the prescribing of these rules is the personal act of the secretary himself, we think that they may fairly be considered an act of the executive department of the United States. But as the Act of Congress of the 3rd of June, 1878, requires the Secretary of the Interior to prescribe the rules and regulations under which the persons permitted to do so may fell and remove timber, this fact certainly gives such rules and regulations sufficient force to allow the court to take judicial notice thereof in interpret-

ing and carrying into effect this very act of Congress. Another argument in favor of this view, is that *ab inconvenienti*, these rules and regulations make a large printed pamphlet and it would require great labor to set them out *in haec verba* in the complaint or even to plead them in substance. It seems to us that it was to meet just such cases as this that the statutes in regard to judicial notice were passed."

82. "To prove mineral character, evidence to show the character of other land in the vicinity was proper, by showing mining locations, etc., one mile and one mile and a half distant." *United States v. Rossi*, 133 Fed. 380, 66 C. C. A. 442.

83. *Lynch v. United States*, 138 Fed. 535, 71 C. C. A. 59.

84. In *United States v. Van Winkle*, 113 Fed. 903, 51 C. C. A. 533, the defendant to excuse the trespass claimed that the timber was cut upon mineral land, and the court allowed a geological map issued by the Interior Department to be admitted in evidence to prove the mineral character of the lands. It was used in connection with the testimony of several witnesses, and the court remarked: "We think it was admissible for that purpose as well as for the purpose of showing the general nature of the land described in the complaint, its elevation and surroundings and its situation in relation to lands which were proven to be mineral."

85. "The admission of a certified copy of the 'general description of the survey' of the township in which the lands are situated, made by the Surveyor General of Idaho, was proper, although it contained no reference to the particular land but refers in general terms to the township. Records of the land office may be *prima facie* evidence of the character of the land." *United States v.*

testimony.⁸⁶ Records and classifications of the land department are not conclusive evidence of the character of the land,⁸⁷ and the entry of land as agricultural does not preclude an inquiry into its character in an action against third parties.⁸⁸

d. *Agency and Estoppel*. — No presumption arises from the fact that the trespass was committed by an agent, that the agent, having authority to cut, acted within the scope of such authority;⁸⁹ neither is there any presumption that the government encouraged or consented to the cutting, from the fact that agents of the government had knowledge of the facts but did not interfere.⁹⁰ There is no estoppel against the government for the illegal acts of its agents in encouraging a timber trespass,⁹¹ but if the act be not entirely void,

Van Winkle, 113 Fed. 903, 51 C. C. A. 533.

86. "The character of the land is not a matter for expert opinion evidence. It is a question of fact which the jury itself is competent to determine." *Lynch v. United States*, 138 Fed. 535, 71 C. C. A. 59.

87. "Records and classifications by the land department are not conclusive and are rebuttable by evidence showing that part of the tract was treated differently." *Lynch v. United States*, 138 Fed. 535, 71 C. C. A. 59.

88. "The action of a pre-emptor in entering land at the land office as agricultural does not preclude an inquiry into its character against third persons for unlawfully cutting timber." *United States v. Saucier*, 5 N. M. 569, 25 Pac. 791.

89. "The only feature distinguishing the case under consideration from that of *Lewis* (162 U. S. 366) is that the timber was cut, not by the defendant corporation but by the New Mexico Lumber Company acting as its agent and was subsequently delivered to the defendant. It is insisted that there is a presumption that the agent, having authority to cut, acted within the scope of his authority and that this would of itself throw upon the plaintiff the burden of showing that it had not. Although a presumption of this kind may attach to the acts of public officers, we know of no case holding that a party sued for a conversion by his agent may shield himself under a presumption that the agent acted within the scope of his authority. If the burden of proof would

rest upon the defendant to show the cutting of timber for a proper purpose, evidently it could not shift the burden upon the plaintiff by employing an agent to do the work." *United States v. Denver & R. G. R. Co.*, 191 U. S. 84.

90. *United States v. Mock*, 149 U. S. 273.

91. *Pine River Logging & Imp. Co. v. United States*, 186 U. S. 279.

"The fact that agents of the government knew that applicants to purchase public lands under the timber acts were unlawfully cutting timber upon the land before proof and purchase, and did not interfere to prevent it, does not make such trespass lawful, nor does it estop the government from claiming its own." *United States v. Kelly*, 3 Wash. Ter. 421, 17 Pac. 878.

A Homesteader, before patent, can only cut and sell timber from such portion of his land as is being actually cleared for cultivation, and the fact that he was induced by representations of the government agent to think he could do more, will not estop the government. "If the defendant has really been misled to his prejudice by wrong representations, or information communicated to him through the Interior Department or its subordinate agents, that would present ground for executive clemency but would not constitute any legal defense for a wrongful act prohibited by law. There is no estoppel against the government in such cases." *United States v. Murphy*, 32 Fed. 376. And see *Teller v. United States*, 113 Fed. 273, 51 C. C. A. 230, 26.

the circumstances may raise an estoppel.⁹² Evidence of a local custom allowing the cutting of timber is inadmissible.⁹³ One partner is bound by the trespass of the other.⁹⁴ A compromise of an action brought for the cutting of timber is not conclusive evidence of guilt.⁹⁵

e. *Wilfulness in Civil Actions.* — Wilfulness is an element regulating the assessment of damages in a civil action for timber trespass,⁹⁶ and there is a presumption that such a trespass was wilful,⁹⁷ but evidence that the trespass occurred as the result of a mistake, and that it was not wilful, is admissible.⁹⁸

f. *The Amount of Timber Cut.* — The government having established the liability of the defendant, the burden of proving that a portion of the lot in the possession of the defendant was lawfully

92. "It is well known, as the counsel for the government suggests, that the United States are not bound by the acts and declarations of its agents beyond the scope of their lawful powers. It is well known too, that their unlawful acts or declarations cannot be ratified by their own subsequent acts or by other ministerial or executive officers of the government. But where an act is not wholly *ultra vires*, a sale is not entirely void, and the United States is estopped from attacking it in the hands of *bona fide* purchasers after it has allowed such a condition to exist for a considerable length of time." *United States v. Scott*, 38 Fed. 393.

93. "Evidence of a local custom in that vicinity to enter and cut while proceedings to patent were pending, was inadmissible, because a general custom to violate the law cannot, on any principles of morality or law, justify itself." *Teller v. United States*, 113 Fed. 273, 51 C. C. A. 230.

94. "Where such a trespass is committed by a firm, one member cannot show that as to him it was done through a mistake, though his partner may not have been mistaken, and ask that one judgment for damages be rendered against him and a different one against his partner, since his holding the fruits of the tort after being notified of the mistake is a ratification of his partner's act." *United States v. Baxter*, 46 Fed. 350. And see, *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398.

95. "A compromise of an action

for cutting timber on government land is not conclusive evidence of guilt, and it is doubtful if it is any evidence at all." *Cox v. Cameron Lumb. Co.*, 39 Wash. 562, 82 Pac. 116.

96. *Wooden Ware Co. v. United State*, 106 U. S. 432; *Bly v. United States*, 4 Dill. (U. S.) 464.

97. "Every man is presumed to have intended to do what he did do. This is a rule in criminal as well as civil actions. When the evidence shows that a man has committed an unlawful act, if it was done on account of a mistake, that is for him to show. . . . When the trespass was shown, the presumption was that it was intentional, wilful." *United States v. Baxter*, 46 Fed. 350.

98. "Evidence of honest intent and good faith is always admissible, since the measure of damages varies with the wilfulness or *bona fides* of the cutting. The defendant's acts and sayings in relation to it at about the time of the transaction generally constitute the best evidence of the fact and are always competent and material." *United States v. Gentry*, 119 Fed. 70, 55 C. C. A. 658.

So proof that a defendant consulted his attorney, (*United States v. Mullan Fuel Co.*, 118 Fed. 663), or that he received communications from United States officers which he construed as giving him the right to proceed (*United States v. Teller*, 116 Fed. 448), has been admitted, as tending to show that the cutting was not wilful, and in mitigation of damages.

acquired, rests upon the defendant as being a matter peculiarly within his own knowledge.⁹⁹

g. *Intent in Criminal Actions.* — A criminal intent must be shown to maintain a criminal action, but proof of the commission of the act raises a presumption that there was a guilty intent;¹ this may be rebutted by evidence of a mistake or good faith,² the existence of the intent being a question for the jury to determine.³

2. Statutory Trespass. — A. IN GENERAL. — In many states statutes of a penal nature exist under which treble damages are assessed for the cutting of trees and timber. Usually the plaintiff in

99. In an action to recover the value of logs cut on public land and obtained by the defendant from the trespasser, together with some not so cut, the court said: "I am of the opinion that in cases like the present the plaintiffs must make out a case of liability on the part of the defendant and then, if the exact extent of the liability depends upon evidence not within the plaintiff's power to produce but peculiarly within the defendant's, the putting of the burden on the defendant may be cautiously applied. In this case the plaintiffs show by a presumption fairly arising from the facts proved, that a part of their property came to the defendant's possession and was converted. They fail to show the exact extent of the possession and conversion, but they show that the defendant bought and paid for the whole amount in controversy. In this state of the proof, it seems as though the application of the rule would work very little, if any hardship upon the defendant." *Norris v. United States*, 44 Fed. 735.

1. *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234; *United States v. Murphy*, 32 Fed. 376; *Teller v. United States*, 113 Fed. 273, 51 C. C. A. 230.

"The rule of proof is fixed by the statute. The offense is cutting or removing timber from government lands, with the evil intent described. The fact, then, must be fully established by conclusive proof, that timber of the kind described was cut by the defendant, or by his procurement; and that the same was cut on the township, and section, and range, specially set forth. Cutting *other*

timber, than that charged, will not suffice. . . . And so also, if the cutting is on *other* lands, the proof will not do. . . . But, . . . if the specific act of cutting or removing is proved—the guilty—the unlawful intent will be presumed. From an unlawful act an unlawful intent will be inferred. The statute declares the act criminal. Proof of the commission of the act, raises the presumption of a guilty knowledge and a guilty intention. . . . But this presumption may be rebutted, by the evidence of circumstances, showing a lawful intention. . . . An unlawful act with a lawful intention, is not criminal. With this view, the law declares one intent which exculpates in express terms, viz.: the intent to appropriate the timber cut to the use of the Navy of the United States. Nevertheless this does not exclude a defense based upon circumstances, clearly showing that no trespass was designed by the defendant." *United States v. Darton*, 6 McLean (U. S.) 46.

2. "There must be an intention to violate the law and deprive the government of this timber; but the court calls your attention to the fact that all persons are presumed to intend the natural results of their acts. And if the defendants who entered under a license from the homesteader, knew that there was no *bona fide* intention on the part of the homesteader the law says they intended to take it unlawfully. *United States v. Niemeyer*, 94 Fed. 147; *United States v. Darton*, 6 McLean (U. S.) 46.

3. *State v. Herold*, 9 Kan. 194; *United States v. Niemeyer*, 94 Fed. 147.

actions under these statutes must prove that he is the owner in fee;⁴ actual possession with a claim of title raises a presumption of ownership,⁵ and in other cases, the best evidence obtainable in proof of title must be produced.⁶ A defective deed is admissible to show claim of right and color of title,⁷ and parol evidence (to which no objection is made) may establish a *prima facie* case.⁸ Verified receipts from the land office are admissible,⁹ and a formal admission of

4. *David v. Correll*, 68 Ill. App. 123; *Behymer v. Odell*, 31 Ill. App. 350; *Achey v. Hull*, 7 Mich. 423.

5. *Abney v. Austin*, 6 Ill. App. 49; *Mason v. Park*, 4 Ill. 532; *Brasher v. Shelby Iron Co.*, 144 Ala. 659, 40 So. 80.

"Plaintiffs' possession, claiming it as their own, was sufficient evidence of title to maintain their action. After this proof was made it was incumbent upon the defendant to show title either in himself or in some third person, to defeat the action." *Ware v. Collins*, 35 Miss. 223, 72 Am. Dec. 122.

Constructive Possession.—"Evidence that plaintiff claims under a deed to all and has possession of a part, is evidence of possession of all sufficient to justify an action against a trespasser." *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851.

Title May Be Tried.—"In an action for the statutory penalty, title may be tried; here defendant was in possession under a claim of title by adverse possession." *Miller v. Weson*, 58 Miss. 831.

6. *Mason v. Park*, 4 Ill. 532.

"In an action brought to recover the statutory penalty for cutting timber on plaintiff's land, it is necessary to prove the plaintiff's ownership of the land on which the cutting complained of was done. This proof may be made by showing a connected claim of title from the government, or by deed conveying to the plaintiff, and actual possession of the land by the plaintiff, or prior possession by his grantor." *Behymer v. Odell*, 45 Ill. App. 616.

7. "A deed though defective is admissible to show claim of right and color of title; illegal, parol evidence, may be considered, if admitted without objection and not afterwards excluded." *Higdon v. Kennemer*, 112 Ala. 351, 20 So. 470.

8. If the defendant does not ob-

ject at the trial to the admission of parol evidence he cannot afterwards complain. "If it clearly appeared from the bill of exceptions that the testimony actually given by the witnesses was incompetent, then the allegation was not made out, and the defendants were entitled to a new trial. This however does not affirmatively appear. The precise character of the evidence is not given. It may have been proper. We can readily perceive how the plaintiff may have shown title to the land by the oral statements of witnesses. Proof by them that he had actual possession of the premises under a claim of title would authorize the presumption that he was the owner. The witnesses may have stated from recollection the contents of documentary evidence of title. Such proof admitted without objection would not be improper, because in a certain contingency—the loss of the original—the recollection of witnesses might be the only evidence capable of being produced." *Clay v. Boyer*, 10 Ill. 506.

9. "The official certificate of the Register of the Land Office of the purchase by the plaintiff is sufficient and legal proof of ownership. This proves ownership before the patent was issued, which, when issued, becomes conclusive evidence of ownership since that time." *Whiteside v. Divers*, 5 Ill. 336.

In *Yellow River R. Co. v. Harris*, 35 Fla. 385, 17 So. 568, the plaintiff to prove ownership introduced in evidence the final receipt from the United States Land Office. *Held*: "While such receipts when properly identified and shown to be genuine, and the proper groundwork laid for their admission, were admissible in such cases as evidence of the holder's right to the possession and control of the land covered thereby, yet there is nothing in the law providing for their issuance that makes them

the plaintiff's ownership by the defendant dispenses with other proof.¹⁰ Actual possession by the plaintiff need not be proved;¹¹ an equitable owner who has previously held the legal title may recover in the action.¹²

B. THE CUTTING. — BURDEN OF PROOF. — The statutes, being penal, are strictly construed, and the burden of proof is on the plaintiff who must show, ordinarily, that the trespass was committed knowingly, wilfully, and without his consent.¹³

self-verifying or self-identifying, and where a party relies upon such a receipt in any cause as evidence of the fact of his entry of the land embraced therein, or as evidence for any purpose, the burden is on him to show by competent evidence that the paper he offers in evidence as being a receiver's receipt was in fact issued and signed by the officer purporting to have signed the same. Were the rule otherwise a forged receipt in proper form might be fraudulently made to answer the purpose of the genuine article. Although such proof of identification and of proper execution was demanded by the defendant in this case, the receipt here was admitted without it. This was error. The receipt should have been excluded from evidence until the plaintiff identified it by proper proof that it was in fact issued and signed by the receiver of the United States Land Office."

10. *Welsh v. State*, 11 Tex. 368.

"It is contended that the admission of the party who has the right to compel his antagonist thus to make out his case, dispenses with the necessity of producing the best evidence of title. Where the admission is made for the purposes of the trial, it is regarded as a stipulation of the party making it, that the fact about which it is made, exists, and he is estopped from denying it. But an admission made *in pais* is not conclusive, and is entitled to no higher consideration than parol testimony. It amounts but to oral testimony, and is liable to be rebutted by the party making it. It is regarded as the weakest and most uncertain kind of testimony, and ought to be received only in cases where parol evidence is properly admissible to show the same fact. . . . The propriety of the rule is

manifest. It is consistent with the well established principle, that the best evidence which the nature of the cause permits, shall be furnished. It imposes no hardship on the party who seeks to introduce the admission, for he can resort to the higher grade of evidence which is in his control, and more easily produced by him, than his adversary. A different rule would substitute for the most certain and conclusive testimony, the loose declarations and vague admissions of a party, not made under the sanction of an oath, or with reference to a decision by a judicial tribunal, of the matter concerning which they were made." *Mason v. Park*, 4 Ill. 532.

11. "Possession of the land is not a prerequisite to a right of recovery in an action like this, and the action may be maintained, although the parties committing the injury may be in actual possession of the property as tenants of the owner, provided such injuries are committed without color of authority." *Arn v. Matthews*, 39 Kan. 272, 18 Pac. 65.

12. In *Smith v. Forbes*, 89 Miss. 141, 42 So. 382, where a vendor took a trust deed, but was to remain in possession until crops were gathered, it was held that the vendor had no right to cut timber while in possession; the vendee could recover the statutory penalty.

13. *Alabama*. — *Shelby Iron Co. v. Ridley*, 135 Ala. 513, 33 So. 331; *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163.

California. — *Barnes v. Jones*, 51 Cal. 303.

Georgia. — *Gunn v. Harris*, 88 Ga. 439, 14 S. E. 593.

Iowa. — *Wilson v. Gunning*, 80 Iowa 331, 45 N. W. 920.

Illinois. — *Abney v. Austin*, 6 Ill.

Presumption. — But there is a presumption that the act was wilful if the defendant knew that the land on which the timber stood was not his own.¹⁴

Consent. — A clause in a lease prohibiting the cutting of timber is evidence tending to prove want of consent,¹⁵ but evidence that the plaintiff knew of and acquiesced in the cutting, is admissible to show an actual consent.¹⁶

Agent. — Where the trespass was committed by an agent of the

App. 49; *David v. Correll*, 74 Ill. App. 47.

Michigan. — *Clark v. Field*, 42 Mich. 342, 4 N. W. 19.

Mississippi. — *Keirn v. Warfield*, 60 Miss. 800.

"The burden of proof of want of consent is on the plaintiff; the statute is penal in its nature, and to make the defendants liable under it, all the essential ingredients of the wrong legislated against must appear." *Padman v. Rhodes*, 126 Mich. 434, 85 N. W. 1130.

The Rule Stated. — "To entitle the plaintiff to recover in the court below it devolved upon him to prove, first, that the trees were cut on land belonging to him without his consent and within twelve months of the institution of the suit; second, that the cutting was done by the defendant or his agents and employes, and if by them, that their acts were within the scope of their authority or were committed by the command or with the consent of their principal; third, that such cutting was done intentionally, wilfully, and knowingly, or recklessly, carelessly, and without taking due and proper precautions to prevent the commission of a trespass." *Therrell v. Ellis*, 83 Miss. 494, 35 So. 826.

14. *Givens v. Kendrick*, 15 Ala. 648; *Gates v. Comstock*, 113 Mich. 127, 71 N. W. 515; *Perkins v. Hackleman*, 4 Cushm. (Miss.) 41, 59 Am. Dec. 243.

"Where one cuts timber knowing it not to be on his own land or upon land upon which he has a license to cut, the law presumes that the trespass was wilful. Defendant need not know that the land belonged to the plaintiff." *Watkins v. Gale*, 13 Ill. 152.

In *Ward v. Rapp*, 79 Mich. 469,

44 N. W. 934, the defendant was not allowed to testify as to advice given to him by his attorney, when he had full knowledge of all the facts.

15. *Rogers v. Brooks*, 105 Ala. 549, 17 So. 97.

"It was necessary then, it seems, for the plaintiff to have made *prima facie* proof that the alleged depredation to the timber was done without her consent. She proved by a written lease which she read in evidence that the defendant had rented a large tract from her and bound himself not to cut timber on the premises. . . . She then proved by her witnesses that he had cut trees in large quantities.

This evidence we apprehend was sufficient *prima facie* proof in the absence of counter testimony, to afford ground for presuming that the allegations in the complaint that timbers were cut and destroyed without plaintiff's consent, were true, devolving on the defendant the burden of showing that he did it with her consent. To show this he introduced evidence tending to show that the plaintiff had seen the cutting going on and had raised no objections to it. Here there was evidence tending to show that the cutting was done with the plaintiff's consent and the question was one for the jury." *Matthews v. State* (Tex. Crim.), 42 S. W. 375.

16. *Farrow v. Nashville, C. & St. L. R.*, 109 Ala. 448, 20 So. 303; *Rogers v. Brooks*, 105 Ala. 549, 17 So. 97.

In *Robbins v. Farwell*, 193 Pa. St. 37, 44 Atl. 260, the court held that where the defendant claimed that he was not a trespasser on account of a parol sale to himself by a party now dead, he could not testify to that fact.

defendant the plaintiff has the burden of showing that the agent was acting within the scope of his authority.¹⁷

Mistake. — Evidence by the defendant is admissible to show that the trespass was committed by mistake or in good faith¹⁸ the final determination of the character of the act being for the jury.¹⁹

Criminal Intent. — Under a statute making the trespass a crime, the criminal intent may be presumed to exist from the commission of the act itself.²⁰

III. LOGGING LIENS.

1. What the Plaintiff Must Show. — A. **CONSENT OR ESTOPPEL OF OWNER.** — a. *In General.* — The claimant of a logging lien must prove that the services or materials for the furnishing of which a lien is claimed were furnished at the request of the owner or party right-

17. *Postal Tel. Cable Co. v. Lenoir*, 107 Ala. 640, 18 So. 266; *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Gates v. Comstock*, 113 Mich. 127, 71 N. W. 515; *Smith v. Saucier* (Miss.), 40 So. 328.

"There was no competent evidence showing that Farlow was the agent of the appellee and nothing tending to prove that he was authorized to cut any timber on any land. It is elementary law that agency cannot be established by the acts or declarations of the alleged agent. Appellee was not shown to have instructed, consented to or known of the cutting of the trees." *Therrell v. Ellis*, 83 Miss. 494, 35 So. 826.

Ratification. — "Where one employed to cut and haul timber on his employer's land also cuts logs from adjoining land and delivers them to his employer, the latter, if he refuse to deliver them to their owner will be held to have adopted the unlawful acts of his employee." *Lee v. Lord*, 76 Wis. 582, 45 N. W. 601.

Co-Principals. — See *McCloskey v. Powell*, 138 Pa. St. 383, 21 Atl. 148, holding that one who, claiming ownership of land, sells the timber trees upon the land thus claimed, which does not really belong to him, will be liable as a co-trespasser with his verdee who proceeds to cut and remove them. "It is the doctrine of the common law that every party to a trespass, whether contributing to the physical force employed or not, is liable to an action for trespass;

and the reason given is because there can be no accessory in trespass, and therefore all who aid, abet, counsel, direct or encourage are liable as principals. Not only accessories before the fact but accessories after the fact, who are benefited by or in whose interest the act has been done, are liable as principals."

18. *Postal Tel. Cable Co. v. Lenoir*, 107 Ala. 640, 18 So. 266; *Michigan Land & Iron Co. v. Deer Lake Co.*, 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; *Clark v. Field*, 42 Mich. 342, 4 N. W. 19; *Davis v. Cotey*, 70 Vt. 120, 39 Atl. 628.

19. *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Behymer v. Odell* 31 Ill. App. 350.

20. *State v. Kempf*, 11 Mo. App. 88.

"There was no evidence in this case to authorize the jury to find that the defendant was guilty of any criminal intent when he committed the alleged acts of trespass. While ordinarily this intent would be presumed from the act itself, where nothing more appeared, yet when it affirmatively appears that the defendant was a coterminous landowner who crossed over an obscure land line and cut down a few trees on the other side, a part of the trees cut at the same time being on his own land, and the prosecutor himself admits that he did not know where the true line was, and according to the statement of the defendant which was not denied by the prose-

fully in possession of the property²¹ or that they were furnished under circumstances from which his consent will be implied or an estoppel created against him.²² A wilful trespasser cannot obtain a lien.²³

b. *Exception.* — In a limited class of cases, by virtue of special statutes, liens may arise without the consent of the owner of the property. This occurs in cases such as the booming or driving of logs on a public waterway where the rule is made necessary by the fact that labor is sometimes necessarily and incidentally expended upon the logs of another person.²⁴

B. A LEGAL RIGHT TO LIEN. — The right to a lien under a stat-

cutor, the latter also crossed over the disputed line and posted certain notices on trees growing on the defendant's side, the presumption of criminal intent is rebutted and there can be no conviction." *Campbell v. State*, 127 Ga. 307, 56 S. E. 417.

21. *Bennett v. Gray*, 82 Ga. 592, 9 S. E. 469; *Oliver v. Woodman*, 66 Me. 54.

"A lien grows out of a contract express or implied, and without such contract there can be nothing to support the lien in favor of a party who has wrongfully obtained possession of the property." *Jacobs v. Knapp*, 50 N. H. 71.

In *Gross v. Eiden*, 53 Wis. 543, 11 N. W. 9, this principle was expressed as follows: "The statute seems to imply a privity or some contract relation between the laborer and the owner of the property, where the lien is given." And see *Dwinel v. Fiske*, 9 Me. 21.

22. "The statute as it now stands is silent as to whether the labor shall be done under a contract or not, but of course it was not intended that a mere trespasser should have a lien. The labor must be done either under a contract with the owner or under circumstances showing that the owner consented thereto, though a majority of us are of the opinion that it is unnecessary that the laborer should perform the work under a contract in direct privity with the owner of the property." *Klondike Lumb. Co. v. Williams*, 71 Ark. 334, 75 S. W. 854.

In *Duggan v. Washougal Co.*, 10 Wash. 84, 38 Pac. 856, the work for which a lien was claimed was done in cutting, driving, and booming the

logs. Three allied corporations had charge of the different parts of the job but the employes' contracts were with only one of them, they being ignorant of the existence of the others. The court held that the employes were entitled to liens for all the work done and that the unknown corporations were estopped from denying the existence of the lien.

23. *Oliver v. Woodman*, 66 Me. 54. *Dwinel v. Fiske*, 9 Me. 21. In this case the statute creating a lien was held not to apply to a wilful trespasser as against the owner of the land on which he had cut the logs, and the owner was allowed to recover in replevin against the person driving the logs to market without tendering the expenses. And see *Klondike Lumb. Co. v. Williams*, 71 Ark. 334, 75 S. W. 854.

24. *Doe v. Monson*, 33 Me. 430; *Chapman v. Keystone Mfg. Co.*, 20 Mich. 358; *Hall v. Tittabawassee Boom Co.*, 51 Mich. 377, 16 N. W. 770; *Osborne v. Nelson Lumb. Co.*, 33 Minn. 285, 22 N. W. 540; *East Hoquiam Boom Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Babka v. Eldred*, 47 Wis. 189, 2 N. W. 102, 559; *Gross v. Eiden*, 53 Wis. 543, 11 N. W. 9.

In *Duluth Lumb. Co. v. Boom Co.*, 17 Fed. 419, a statute of Minnesota which allowed a lien to arise in favor of a boom company which collected loose logs, even against the consent of the owners or without their request, was held to be constitutional. And see *Lord v. Woodward*, 42 Me. 497, where it was said that such a statute was in derogation of the common law and must be strictly construed.

ute must exist at the time the contract relied upon is made;²⁵ but it is a vested right, and a subsequent repeal of the statute will not affect it,²⁶ although the remedial features of the statute may properly be altered.²⁷ Where statutory liens exist, there is a presumption that the parties to all contracts coming within their scope intend to incorporate the statute as one of the terms of the contract.²⁸ The lien law of another state will be presumed to be the same as the law of the state in which the action is brought.²⁹ A statutory lien does

25. *Bourgette v. Williams*, 73 Mich. 208, 41 N. W. 229.

"The right to the lien must exist when the contract is made; a subsequent statute creating the right to a lien has no effect." *Shuffleton v. Hill*, 62 Cal. 483.

26. "A statutory right of lien given loggers for labor in getting out logs becomes such a part of the contract for such labor as to be unaffected by the repeal of the statute pending the enforcement of the lien." *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463.

27. *Palmer v. Tucker*, 45 Me. 316.

"The Act of 1860 did not create the lien; it merely provided a way of enforcing it. Indubitably it is competent for the legislature to pass remedial statutes of that character. They create no right, but only provide a way for enforcing an existing one." *Paine v. Gill*, 13 Wis. 561.

In *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56, it was held that changing the time within which lien actions were to be commenced was a question concerning the remedy only, and since the party had a reasonable time within which to commence his action after the passage of the new law, he could not complain. "The material inquiry is whether the provision as to the time of commencing suit to enforce the lien relates to the remedy or to the right. Any matter relating to the right of such liens could not be abridged; but anything relating to the method of enforcing such right or the remedy, might be abridged."

28. "After this statute came in force, the presumption is that in making contracts for cutting, hauling, driving, etc., logs, this statute entered into and became a part of the contract, so that the laborer was given a lien . . . and that the

log owner was fully cognizant of the fact that if the contractor failed to make payments, the lien of the laborer would attach if these statutory proceedings were had." *Appleman v. Myre*, 74 Mich. 359, 42 N. W. 48.

In *Bourgette v. Williams*, 73 Mich. 208, 41 N. W. 229, the defendant contracted with the owners of timber to manufacture shingles from it. At the time the contract was made, the existing statute did not give laborers a lien upon manufactured shingles for their wages. Subsequently, however, the statute was changed so as to make such work lienable, and it was claimed that the actual work having been performed after the change in the statute, the laborers were entitled to a lien upon the shingles. The court refused to sustain this claim upon the ground that it would throw an additional burden upon the owners, and one which, had they known of it, might have prevented their making the original contract; it thus would impair the obligation of the contract.

In *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463, the existing lien statute was repealed and a new one enacted, and the claim was made that the right to a lien of this kind was wholly statutory, that it was a remedy only, and that in the repeal of the statute, with no saving clause, it ceased to exist. The court refused to accept this view and held that the right to a lien was part of the laborer's contract.

29. "In the absence of any evidence, it will be presumed that the law of Michigan at a certain time was the same as our own in relation to liens for supplies furnished in logging operations." *Hyde v. German Nat. Bank*, 115 Wis. 170, 91 N. W. 230.

not abrogate an existing common law lien, but merely affords an additional remedy.³⁰ A lien may arise by express contract,³¹ and in favor of a principal through the acts of an agent.³²

C. PERFORMANCE OF CONTRACT.—A lien claimant must prove the performance of the contract under which he claims,³³ unless the other party has accepted part performance,³⁴ that demand for payment has been made and payment refused,³⁵ and that there is a debt still owing,³⁶ and there must be evidence which clearly and definitely

30. "A statutory lien merely affords an additional remedy and does not abrogate an existing common law lien, but bringing proceedings under the statute amounts to a waiver of the common law lien." *Phillips v. Freyer*, 80 Mich. 254, 45 N. W. 81. And see *Arians v. Brickley*, 65 Wis. 26, 26 N. W. 188, 56 Am. Rep. 611.

31. In *Haughton v. Busch*, 101 Mich. 267, 59 N. W. 621, it was held that a party entitled by contract to retain possession of logs until paid for services, has, by virtue of his contract, a lien on the logs. And see *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379.

A Parol Contract for a lien is valid and binding between the parties and purchasers with notice. *Hel-frech Lumb. Co. v. Honaker*, 25 Ky. L. Rep. 717, 76 S. W. 342.

Where Delivery is by the contract required to be made before payment, no lien arises. *Stillings v. Gibson*, 63 N. H. 1.

32. "It was as competent for the defendant to employ Scott to perform the whole labor for a specified sum as it was to do it all through numerous men employed by the day or month; and the defendant would be principal and entitled to the lien in the one case as much as in the other." *Hall v. Tittabawassee Boom Co.*, 51 Mich. 377, 16 N. W. 770.

33. *Moody v. Travis*, 76 Ga. 832; *McMullin v. McMullin*, 92 Me. 336, 42 Atl. 500, 69 Am. St. Rep. 510; *Kelley v. Kelley*, 77 Me. 135; *Minton v. Underwood Lumb. Co.*, 79 Wis. 646, 48 N. W. 857.

"A lien for the price of labor and services performed is in the nature of an implied contract that the party who has performed the labor shall hold the goods until he receives the pay for doing what he has undertaken to perform about them at the

request of the owner. But if he has not fully performed what he undertook to do, such a contract cannot be fairly inferred." *Hodgdon v. Waldron*, 9 N. H. 66.

Substantial Compliance.—"The remedy afforded by the common law to one who is given a lien for services performed is a harsh one, and cannot be maintained where he has failed to comply substantially with the terms of his contract." *Haughton v. Busch*, 101 Mich. 267, 59 N. W. 621.

34. "Where the owner of timber who has contracted for its cutting sees fit to accept what has been done as full performance of the contract, a subsequent purchaser of the logs cannot set up its non-performance to defeat the claim of the contractor to a lien under the statute." *Kansas v. Boulton*, 127 Mich. 539, 86 N. W. 1043.

35. *Moody v. Travis*, 76 Ga. 832; *Aiken v. Peck*, 72 Ga. 434; *Gilbert v. Marshall*, 56 Ga. 148.

"It must be averred in the plaintiff's affidavit that a demand for payment of the debt after it became due, has been made upon the owner, his agent, or lessee, and that he has refused to pay." *Milam v. Solomon*, 66 Ga. 55.

36. *Mason v. McGee*, 15 Wash. 272, 46 Pac. 237; *Milam v. Solomon*, 66 Ga. 55.

In *Carver v. Bagley*, 79 Minn. 114, 81 N. W. 757, it was held that a lien could not be allowed for an indebtedness which was not mentioned in the lien statement.

Non-Payment.—A judgment roll in another action which shows that a claim has been reduced to judgment, is *prima facie* evidence of non-payment. *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599.

Time Checks.—In an action to

shows the amount of the debt for which the lien is claimed³⁷

D. LIENABLE CHARACTER OF WORK.—*a. Burden of Proof.* The burden of proving the lienable character of the work is on the claimant.³⁸ Supplies and materials must be shown to have been furnished for use for the purposes contemplated by the statute and to have been actually so used.³⁹ Services must be proved to have been rendered in connection with, and as part of, that labor for which the statute gives a lien.⁴⁰ The lien will extend to services rendered by

foreclose a logger's lien, time checks given by the employer are competent as *prima facie* evidence against a third party impleaded as a defendant on account of some interest in the logs. *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463.

Taking a Note.—"The receipt of a note by one holding a lien does not discharge the lien unless the note was given and received as absolute discharge and payment of the debt; but an actual negotiation and transfer of the note would destroy the lien, this rule being founded upon the theory that the lien-creditor by transferring the note receives payment in full of his claim, but if he afterwards regain possession of the note before commencing proceedings to foreclose, he is in the same position as if the note had never been transferred at all." *Balkcom v. Empire Lumb. Co.*, 91 Ga. 651, 17 S. E. 1020.

37. "The decree must be reversed in so far as it establishes a lien in favor of the respondent Terrien as we are unable to find in the record any proof whatever of the amount due him, even any evidence that anything whatever was due him from Taylor, either at the time of trial or at the time of filing his notice of claim of lien."

And see *Glover v. Hynes Lumb. Co.*, 94 Wis. 457, 69 N. W. 62, where it was held that where the claimant alleged a lien for the superintendence of a mill and making repairs and also for rebuilding the mill and making permanent improvements, for the latter work he was not entitled to a lien and he must introduce evidence to show how much of his claim pertained to lienable work. "The statute gives a lien only for the labor and services performed in manufacturing the lumber. It is plainly the plaintiff's duty to show

the amount of such services and labor. Until he does so he cannot leave it to the jury to speculate on, without evidence." *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067.

38. *Villeneuve v. Sines*, 92 Mich. 556, 52 N. W. 1007; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006.

39. "It is admitted that the respondent sold the supplies in question to the said Craig for the purpose of being used in putting in said logs, and that they were in fact so used by him." *Patten v. Northwestern Lumb. Co.*, 73 Wis. 233, 41 N. W. 82.

In *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67, the plaintiff claimed a lien for furnishing supplies to the employes of the defendant, who were engaged in getting out ties and the court held that he was entitled to a lien under the statute and that the term "supplies" included food necessarily furnished the men, although not delivered at the camp.

What Is Use.—"If the goods were sold by the plaintiff for the purpose of being used in the logging camp, and were in fact used in such camp by the vendees, the respondent would be entitled to his lien, although the vendees may have placed them in their store for sale before they were so used." *Stacy v. Bryant*, 73 Wis. 14, 40 N. W. 632.

40. *Horton v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Babka v. Eldred*, 47 Wis. 189, 2 N. W. 102, 559; *Engi v. Hardell*, 123 Wis. 407, 100 N. W. 1046; *Kendall v. Hynes Lumb. Co.*, 96 Wis. 659, 71 N. W. 1039; *Winslow v. Urquhart*, 39 Wis. 260.

The Rule Stated.—"The general rule of demarcation which fairly results from the cases thus far decided and which will effectuate the legisla-

the employe's team or machinery;⁴¹ but it does not extend to the owner of a team or machinery who has hired it to the employe for use in the work.⁴² Under statutes which give the lien for "personal services", a contractor has no lien for the services rendered by his employe,⁴³ though he has a lien for his own individual and personal labor.⁴⁴

b. *A Question of Law for the Court.* — Where the facts are undisputed, the question whether the services rendered or the supplies

tive intent, liberally construed, may be stated to be that services of almost any character, which are performed as a part of and as mere incidents in the work for which a lien is expressly given, should be protected, although the same kind of services, performed independently of the lienable work, are not entitled to the lien." *Carpenter v. McCord Lumb. Co.*, 107 Wis. 617, 83 N. W. 764.

Necessary Labor. — In applying the log-lien statute, the courts endeavor to allow the lien in all those cases in which the labor performed was necessary labor. The lien law is "a remedial statute, to be liberally construed, to advance the remedy. So construing it, we are of the opinion that such necessary persons in a logging crew as a camp cook, an assistant, if assistance be required, and a blacksmith, whose services are needed and performed in the manner alleged in the complaint, are entitled to the benefits of the log lien law." *Breault v. Archambault*, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

A Scaler employed by the month by the vendor of logs, or by his vendee, or by them jointly, may also be employed by the vendor to assist in loading the logs, and may have a lien for the latter services as well as for the scaling, as against the vendee, provided the services rendered in loading did not interfere with his duties as scaler." *Kline v. Comstock*, 67 Wis. 473, 30 N. W. 920.

41. In *Martin v. Wakefield*, 42 Minn. 176, 43 N. W. 966, the statute gave a lien for "manual labor" and the court interpreted it as including the use of all implements and machinery actually used and necessary for the proper execution of the work by the employe and also the use of his team. *Breault v. Archambault*,

64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

42. *Mabie v. Sines*, 92 Mich. 545, 52 N. W. 1007; *Kelley v. Kelley*, 77 Me. 135; *Lohman v. Peterson*, 87 Wis. 227, 58 N. W. 407.

"One who lets his horse to another by the month to work in hauling lumber is not entitled to any lien on the lumber hauled, the horse, by virtue of the letting, becoming the horse of the lessee for the time being, and he is the one entitled to the lien." *McMullin v. McMullin*, 92 Me. 336, 42 Atl. 500, 69 Am. St. Rep. 510.

Basis of the Rule. — "'Who acts through another, acts himself.' This maxim however is limited to acts done through another person, and cannot justify the idea that one can confer agency upon animals or machinery so that work effected by them shall be deemed labor or services done by him, where such animals or machinery are not used and operated by the claimant or by some person as his agent or servant." *Edwards v. Waite Lumb. Co.*, 108 Wis. 164, 84 N. W. 150, 81 Am. St. Rep. 884. And see *Richardson v. Hoxie*, 90 Me. 227, 38 Atl. 142.

43. *Littlefield v. Morrill*, 97 Me. 505, 54 Atl. 1109; *Meands v. Park*, 95 Me. 527, 50 Atl. 706; *McCrillis v. Wilson*, 34 Me. 286, 56 Am. Dec. 655; *Hale v. Brown*, 59 N. H. 551, 47 Am. Rep. 224. But see, *Carver v. Bagley*, 79 Minn. 114, 81 N. W. 757.

In *Hogan v. Cushing*, 49 Wis. 169, 5 N. W. 490, the court interpreted the particular statute in question as giving a lien to an independent contractor.

44. In *Klondike Lumb. Co. v. Williams*, 71 Ark. 334, 75 S. W. 854, it was held that a contractor as such had no lien, but if he personally and individually performed services, he was entitled to a lien to that extent.

furnished come within the statute, is a question of law for the court to determine.⁴⁵

2. Proceedings to Perfect Lien. — A. BURDEN OF PROOF. — The claimant has the burden of proving that there has been a full compliance with the provisions of the statute relative to perfecting the lien.⁴⁶ So notice to the owner cannot be dispensed with in any case,⁴⁷ and it must affirmatively appear that the lien was perfected within the time limited by the statute.⁴⁸ The lien can attach only to property mentioned in the lien notice,⁴⁹ and such property must be described with a reasonable degree of certainty.⁵⁰ The notice should

45. *United States.* — *In re Gosch*, 121 Fed. 604.

Arkansas. — *Klondike Lumb. Co. v. Williams*, 71 Ark. 334, 75 S. W. 854.

Georgia. — *Giles v. Gano*, 102 Ga. 593, 27 S. E. 730; *Dart v. Mayhew*, 60 Ga. 104; *Loud v. Pritchett*, 104 Ga. 648, 30 S. E. 870; *Balkcom v. Empire Lumb. Co.*, 91 Ga. 651, 17 S. E. 1020.

Maine. — *Bondur v. Le Bourne*, 79 Me. 21, 7 Atl. 814; *McCrillis v. Wilson*, 34 Me. 286, 56 Am. Dec. 655; *Richardson v. Hoxie*, 90 Me. 227, 38 Atl. 142; *Littlefield v. Morrill*, 97 Me. 505, 54 Atl. 1109.

Michigan. — *Villeneuve v. Sines*, 92 Mich. 556, 52 N. W. 1007; *Bourgette v. Williams*, 73 Mich. 208, 41 N. W. 229.

New Hampshire. — *Hale v. Brown*, 59 N. H. 551, 47 Am. Rep. 224.

Washington. — *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *East Hoquiam Boom Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Duggan v. Washougal Lumb. Co.*, 10 Wash. 84, 38 Pac. 856.

Wisconsin. — *Kendall v. Hynes Lumb. Co.*, 96 Wis. 659, 71 N. W. 1039; *Kennedy v. South Shore Lumb. Co.*, 102 Wis. 284, 78 N. W. 567; *Minton v. Underwood Lumb. Co.*, 79 Wis. 646, 48 N. W. 857; *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67; *Bradford v. Underwood Lumb. Co.*, 80 Wis. 50, 48 N. W. 1105.

46. "The provisions for securing and enforcing these liens, though simple, are explicit, and in all essential particulars must be complied with." *Griffin v. Chadbourne*, 32 Minn. 126, 19 N. W. 647.

47. "Under all the practical diffi-

culties which inevitably attend the enforcement of liens upon one man's property for the debt of the other, we do not think it sound policy to dispense with any of the statutory requirements," holding that the lien notice cannot be dispensed with even though the adverse party appear. *Sheridan v. Ireland*, 61 Me. 486.

Evidence of Notice. — In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, the return of the sheriff was held to be evidence of service of notice on the party named therein.

48. *Kendall v. Hynes Lumb. Co.*, 96 Wis. 659, 71 N. W. 1039.

"It does not affirmatively appear, however, that the Standard Oil Company either by affidavit or intervention, commenced proceedings to enforce its lien for the oil furnished within twelve months after the debt became due. . . . We therefore hold that the master did not err in disallowing the alleged lien." *Balkcom v. Empire Lumb. Co.*, 91 Ga. 651, 17 S. E. 1020.

If Part of the Contract was performed within the time limited prior to the action, the lien will attach for the whole contract claim. *Hale v. Brown*, 59 N. H. 551, 47 Am. Rep. 224.

49. *Horton v. Sparkman*, 2 Wash. 165, 25 Pac. 1070.

In *Appleman v. Myre*, 74 Mich. 359, 42 N. W. 48, the court declared that there was no authority for finding a lien upon logs not described in the writ or declaration in the log lien suit.

50. As long as the adverse party has not been misled to his prejudice, the courts will endeavor to uphold description which is not entirely

be verified⁵¹ and filed,⁵² though it is not necessary for the

clear, or where necessary will allow an amendment of it. The character and definiteness of the description will of course vary with the facts of each case. See *Horton v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Stacy v. Bryant*, 73 Wis. 14, 40 N. W. 632; *Carver v. Bagley*, 79 Minn. 114, 81 Pac. 757; *Casey v. Ault*, 4 Wash. 167, 29 Pac. 1048.

Statute.—In Washington a statute declares: "No mistake or error in the statement of the demand or of the amount of the credits and offsets allowed, or of the balance asserted to be due to the claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the demand was made with intent to defraud, or an innocent third party has since the claim was filed become a *bona fide* holder. See *Marlette v. Crawford*, 17 Wash. 603, 50 Pac. 495; *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599.

Mistake in the Debt Claimed.

"It is claimed by the appellants that the fact that the court below found that there was due the respondents, or some of them, for their services, a less amount than was claimed in their lien notices, defeats the liens. . . . We do not think that the liens should for that reason alone, be declared invalid. We are not willing to concede that innocent mistakes as to the exact amount due laborers for their hire deprive them of the benefit of a statute specially enacted in their interest." *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067.

51. "The objection to the verification of the lien notice is overruled. It was made in the state of Oregon, before a notary public who certified the jurat with his official seal. It is true that the propriety of admitting affidavits taken before notaries in a foreign jurisdiction has been denied by courts whose decisions are entitled to great weight, on the ground that while the authority of notaries to certify protests of commercial paper is found in the common law,

their right to administer oaths springs entirely from statute. . . . But on the other hand, courts of equal weight hold that by reason of the now universal custom in this country and England to permit these officers to take and certify affidavits, the same verity should be accorded to a jurat attested by a notarial seal as is given to a certificate in a matter pertaining to the law merchant." *Duggan v. Washougal Lumb. Co.*, 10 Wash. 84, 38 Pac. 856.

Verification by a Third Person.

A claim of lien may be verified by a person other than the claimant, and in that case a verification to the effect that he believes the facts stated to be true will be sufficient. *Horton v. Sparkman*, 2 Wash. 165, 25 Pac. 1070.

52. *Bunn v. Valley Lumb. Co.*, 51 Wis. 376, 8 N. W. 232; *Cadle v. McLean*, 48 Wis. 630, 4 N. W. 755; *McCutchin v. Platt*, 22 Wis. 534.

The law requires that the lien notice should be filed in the county where the logs were cut, and this was a matter that should not have been left to inference and presumption upon the trial. But this omission, which was doubtless a mere inadvertence, will not be permitted to defeat the action." *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463.

Proof of Filing.—In *Jewett v. Darlington*, 1 Wash. Ter. 601, evidence of the claim being handed to the auditor after business hours was held to be competent but insufficient to prove the filing of the claim.

In *Minton v. Underwood Lumb. Co.*, 79 Wis. 646, 48 N. W. 857, "the petition for the lien was handed to the clerk of the court on that day, when he was away from his office, and he endorsed the filing of the same thereon on that day. The deputy clerk testified that he received it so endorsed and that according to his best knowledge the entries were made on the day the petition for a lien was received by him in the office. The indorsement is certainly *prima facie* evidence that the petition was filed on the twenty-second of

claimant to show that the notice was indexed in the record.⁵³

B. THE NOTICE AS EVIDENCE. — The original lien notice, properly certified, is admissible as evidence to prove that a proper lien claim has been verified and filed for record in the proper office, but it is not evidence upon the facts of which it contains the statement.⁵⁴ A certified copy of the notice has the same probative force as the original notice.⁵⁵

3. Against Owner for Work Done for Contractor. — If the work for which a lien claim is made was done under a contractor who has a contract with the owner of the property, this contract sufficiently evidences the consent of the owner, and the employes of the contractor are entitled to a lien to the extent of the debt created by the contract,⁵⁶ provided the owner has been notified of the lien before

June, and there was no evidence whatever that it was not."

In *Harris v. Doyle*, 130 Mich. 470, 90 N. W. 293, where a statement of a laborer's lien upon logs, filed with the county clerk was not endorsed by him, oral proof was admitted to show that there had been a delivery of the lien claim to him.

^{53.} See *McPherson v. Smith*, 14 Wash. 226, 44 Pac. 255, holding that affirmative proof that the notice of a logging lien was properly indexed in the records of the auditor's office was not essential to a recovery upon the lien.

^{54.} "The original lien notice which has been filed for record and contains the endorsement of that fact together with the volume and page of the record, certified under the seal of the county auditor, is admissible in evidence for the purpose of proving that a proper claim of lien had been verified and had been filed for record in the proper office." *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463. And see *Mason v. McGee*, 15 Wash. 272, 46 Pac. 237. Compare *Jewett v. Darlington*, 1 Wash. Ter. 601.

^{55.} *McPherson v. Smith*, 14 Wash. 226, 44 Pac. 255; *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463.

^{56.} "If work is done under a contractor who has a contract with the owner for the performance of the work, then it sufficiently shows the consent of the owner, though in such a case the lien could not exceed the amount agreed to be paid by the

owner to the contractor for the performance of the work. It might even be limited to the amount due the contractor at the time the action to enforce the lien is commenced.

The laborers who cut and hauled the timber to the mill are not debarred from claiming a lien by the mere fact that they were not directly employed by the owner of the timber. It is sufficient that they worked under one who had a contract with the owner to do the work and that the owner has paid neither the contractor nor the laborer." *Klondike Lumb. Co. v. Williams*, 71 Ark. 334, 75 S. W. 854.

The cases upon this proposition are not entirely in accord. See *Wright v. Terry*, 23 Fla. 160, 2 So. 6; *Kendall v. Davis*, 52 Ga. 9; *Gross v. Eiden*, 53 Wis. 543, 11 N. W. 9; *Jacobs v. Knapp*, 50 N. H. 71, and the cases cited in the succeeding notes.

In *National Bank v. Williams*, 38 Fla. 305, 20 So. 931, the court said: "Without deciding whether the owner of the absolute interest in property can under any circumstances be estopped from setting up his ownership of the property against a lien thereon arising from a contract of a party in possession having less than the absolute interest, we hold, that such estoppel *in pais* cannot be invoked by laborers upon a saw-mill against an owner who is not interested in the operation of the mill, or in its output, is guilty of no fraud or deceit upon the lien claimant, and who knew nothing of their

payment to the contractor.⁵⁷ Under the Wisconsin statute of 1862, it was held that the laborer's lien, creating a right *in rem*, attached to the timber, irrespective of whether the contractor had executed his contract with the owner.⁵⁸ The owner may, in every case, attack the validity of the lien claimed by the laborer under his contract with the contractor.⁵⁹ Payment of his employees by the contractor does not work an assignment of their lien to him.⁶⁰

4. Property Subject to Lien. — A logging lien is a "specific" lien and the claimant has the burden of proof that his services were rendered upon the particular logs upon which he claims a lien;⁶¹ but

employment or that any labor had been performed by them, and such labor in no way increases the value of the property upon which the lien is claimed."

Parties. — In *Oliver v. Woodman*, 66 Me. 54, it was expressly declared that the action must be brought against the employer who hired the plaintiff and not against the owner, when not the employer, and with whom there was no contract.

57. "Where the owner has notice of the work being done by a laborer working under a contractor and that he had not been paid, it was his duty to have held back enough of the contract price to have paid the laborer, if enough was due." *Allen v. Roper*, 75 Ark. 104, 86 S. W. 836.

"In an action to enforce a logger's lien . . . the complaint must allege that something was due from the defendants to the original contractor when the lien of the plaintiff was filed or that the defendant was notified or had knowledge of the claim of the plaintiff prior to the payment in full of the amount due to the original contractor under the contract." *Wilson v. Barnard*, 67 Cal. 422, 7 Pac. 845.

58. "A laborer hired by a contractor, has a lien upon logs for the amount due him, as well as when he is employed by the owner, and even though the contractor has not performed his contract with the owner." *Munger v. Lenroot*, 32 Wis. 541.

59. "The principal may bring an action against the officer levying and may show collusion between the other parties, or that no labor was performed, or that the amount claimed was not in fact due." *Munger v. Lenroot*, 32 Wis. 541. And

see, *Wilson v. Barnard*, 67 Cal. 422, 7 Pac. 845; *Doe v. Monson*, 33 Me. 430; *Babka v. Eldred*, 47 Wis. 189, 2 N. W. 102, 559.

On Appeal. — "The question whether Brooks was entitled to a lien upon the logs is to be determined upon the record of the proceedings before the justice; for by that record only is the validity of the lien judgment attacked. It may here be observed that such judgment is *prima facie* regular and correct and must be held a valid judgment unless it appears affirmatively that it is not. To uphold it resort will be had to all reasonable presumptions consistent with the record. This rule is elementary." *Winslow v. Urquhart*, 39 Wis. 260.

60. *Valley Pine Lumb. Co. v. Hodgins*, 80 Ark. 516, 97 S. W. 682.

61. *Carver v. Bagley*, 79 Minn. 114, 81 N. W. 757.

Where the owners of different quantities of logs severally employed sufficient laborers to drive their respective logs, the lien of each laborer is confined to the logs he is employed to drive, notwithstanding all the logs become intermingled in driving and were collectively driven by all the laborers. (*Doe v. Monson*, 33 Me. 430.) And where they separately employed the same persons to drive their respective logs, the laborers' lien is not upon the whole mass collectively, but it is to be apportioned upon the logs of each owner *pro rata*. *Oliver v. Woodman*, 66 Me. 54.

In *Martin v. Wakefield*, 42 Minn. 176, 43 N. W. 966, it was held that where labor was performed under one contract, getting out logs which were marked with different marks according to grade, the plaintiff could

the entire claim may be satisfied by levying upon a portion of the property.⁶² Whether the services were actually performed upon the logs, or what proportion of them was so rendered, is a question for the jury,⁶³ as is also the determination of the actual amount of

enforce his lien for his whole labor against any portion of them, and such labor would be deemed "wholly performed" upon such logs within the meaning of the statute; the fact that different portions were differently marked to distinguish grade or quality did not prevent his enforcing his lien for his entire services exclusively upon that part of the logs bearing one of the two marks.

The Property on which a lien is claimed must be in existence and capable of identification to enable a judgment of foreclosure to be given upon the lien. *Grays Harbor Boom Co. v. Lytle Log Co.*, 36 Wash. 151, 78 Pac. 795.

62. *Palmer v. Tucker*, 45 Me. 316; *Kangas v. Boulton*, 127 Mich. 539, 86 N. W. 1043; *International Boom Co. v. Rainy Lake Boom Co.*, 97 Minn. 513, 107 N. W. 735.

"While it is undoubtedly true that in the enforcement of these liens the laborer may take only a part of the property upon which he has expended labor, and may collect from such part the value of the labor expended upon the whole, yet this must be limited to the labor done upon one owner's logs. He cannot be permitted to seize and subject to his lien the property of one owner to pay for the labor expended upon the logs of another owner. The plaintiff has the burden of showing how much or what proportion of his labor has been expended upon the logs of each owner." *Appleman v. Myre*, 74 Mich. 359, 42 N. W. 48.

The Rule Stated.—"In other words their contention is that it should have been alleged and proved that all of the labor for which a lien is claimed was performed upon these identical logs, and that no lien can attach for services, any part of which was rendered in securing other logs, although all the labor was performed for the same party, in the same logging camp, and under one continuing contract. We do not so construe the law. . . . In cases

where a portion of the logs have been lost or disposed of by the owner in the course of the general business of logging, it would certainly be a harsh rule that imposed upon one who rendered necessary services in securing all the logs produced during the eight months time limit or during the time of his employment, the necessity of ascertaining the exact amount due for labor performed upon the remainder and then permit him to foreclose his lien only for that amount, although the value of the logs remaining may be amply sufficient to secure the amount due for his entire services. And such we think was not the intention of the legislature. These lien statutes are remedial in their nature and ought to be construed liberally in the interests of labor, and courts do almost uniformly so construe them.

. . . It has been held that a laborer might enforce his lien against a part of the property upon which he has expended labor for all the labor performed upon the whole, provided the property upon which he expended the labor belonged to one owner and the labor was performed under one continuous contract. Under such circumstances the labor is deemed, in legal contemplation, performed wholly upon such part of the logs. . . . We are unable to see why the rule should be otherwise. No hardship can result from its application unless to the laborer himself. It can certainly work no injury to the owner to compel him to pay his debt out of the proceeds of part of his property rather than the whole thereof; and persons who purchase property subject to a lien do so at their peril, in any event." *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067.

63. "There is nothing more clearly certain than that the lien for labor attaches and can be enforced only on the logs on which it was performed, whether it be for cutting, hauling, running, driving, or rafting.

work performed⁶⁴ for which a lien may properly be claimed.

5. Loss or Waiver of Lien. — A lien having once attached to logs, is presumed to continue, and the burden of proving that it has been waived or lost is upon the party alleging the loss.⁶⁵ It is a question for the jury to determine.⁶⁶ Merely joining lienable with non-lienable claims in an action is not evidence of a waiver of the lien, unless a complete intermingling results.⁶⁷

It is a specific lien on the identical thing on which the labor is performed. The refusal to give the instruction asked: 'If you find that a part of the labor for which this action was brought was actually done on other logs than the defendant's, then you should determine from the evidence how much of such labor was done on such other logs, and only charge defendant's logs with the amount of labor done on them,' was not only erroneous, but prevented the jury from determining what part of the labor was performed upon the defendant's logs." *Minton v. Underwood Lumb. Co.*, 79 Wis. 646, 48 N. W. 857.

64. Where a lien is claimed for the amount due for labor, part of which is lienable and a part not lienable, and there is no proof produced so that the jury can separate the one from the other with reasonable certainty, the entire claim for a lien will be denied. *McGeorge v. Stanton Lumb. Co. (Wis.)*, 110 N. W. 788. And see *Glover v. Hynes Lumb. Co.*, 94 Wis. 457, 69 N. W. 62; *Vanslyck v. Arseneau*, 140 Mich. 154, 103 N. W. 571.

65. "The court charged the jury that the plaintiff (purchaser) made a *prima facie* case by showing that he bought the lumber of Howry & Sons, and that he made a demand upon the defendant for its possession before bringing suit. In this the

court was in error. The defendant was in possession of the logs for the purpose of sawing them into lumber. When the lumber was manufactured the defendant had a lien upon it for his saw bill. The burden was upon the plaintiff to show that this lien had been terminated." *Germain v. Central Lumb. Co.*, 116 Mich. 245, 74 N. W. 644.

66. *Palmer v. Tucker*, 45 Me. 316; *Houghton v. Busch*, 101 Me. 267, 59 N. W. 621; *Germain v. Central Lumb. Co.*, 116 Mich. 245, 74 N. W. 644; *McKinnon v. Gates*, 102 Mich. 618, 61 N. W. 74.

In *Craddock v. Dwight*, 85 Mich. 587, 48 N. W. 644, the question whether a promissory note was taken in payment and was waiver of the lien, was held to be for the jury to determine.

67. *Duggan v. Washougal Lumb. Co.*, 10 Wash. 84, 38 Pac. 856, holds that the mere fact that lienable claims were mixed with non-lienable ones does not waive the liens of the proper claims where no confusion appears upon the face of the lien claims and the evidence offered segregates the non-lienable claims completely, there being no apparent intention upon the part of the claimant to perpetrate a fraud. But see *Horton v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *McCrillis v. Wilson*, 34 Me. 286, 56 Am. Dec. 655; *Bicknell v. Trickey*, 34 Me. 273.

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I. PRESUMPTIONS.

1. From Possession. — In the absence of evidence to the contrary, the mere possession by a person of property, either real¹ or per-

¹ *England*. — *Asher v. Whitlock*, L. R. 1 Q. B. 1, 11 Jur. N. S. 925, 35 L. J. Q. B. 17, 14 Wkly. Rep. 26, 13 L. T. 254; *Jayne v. Price*, 1 Marsh. 68, 5 Taunt. 326, 15 R. R. 518, 1 E. C. L. 121, 15 R. R. 518.

United States. — *Bradshaw v. Ashley*, 180 U. S. 59; *Doe v. Waterloo Min. Co.*, 54 Fed. 935.

Alabama. — *Finch v. Alston*, 2

Stew. & P. 83; *Glass v. Memphis & C. R. Co.*, 94 Ala. 581, 10 So. 215; *Higdon v. Kennemer*, 120 Ala. 193, 24 So. 439; *Phillips v. Poindexter*, 18 Ala. 579.

Arkansas. — *Oxley Stave Co. v. Staggs*, 59 Ark. 370, 27 S. W. 241.

Colorado. — *Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283.

sonal,² raises a presumption of title in the party so in possession.

Georgia.—Tillman *v.* Fontaine, 98 Ga. 672, 27 S. E. 149.

Iowa.—Shelley *v.* Smith, 97 Iowa 259, 66 N. W. 172 (possession for sixteen years).

Missouri.—Rafferty *v.* Missouri Pac. R. Co., 91 Mo. 33, 3 S. W. 393.

Nebraska.—Filley *v.* Duncan, 1 Neb. 134.

New York.—Jackson *v.* Waltermire, 5 Cow. 299.

North Dakota.—McTavish *v.* Great Northern R. Co., 8 N. D. 94, 76 N. W. 985.

Ohio.—Ward *v.* McIntosh, 12 Ohio St. 231.

Texas.—Burroughs *v.* Farmer (Tex. Civ. App.), 45 S. W. 846; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478; Western Union Tel. Co. *v.* Wofford (Tex. Civ. App.), 42 S. W. 119.

Virginia.—Baring *v.* Reeder, 1 Hen. & M. 154, 171.

The possession of real property raises a presumption of title to the products thereof, including annual crops. Ellestad *v.* Northwestern Elevator Co., 6 N. D. 88, 69 N. W. 44.

Actual possession of a part of a tract of land, the whole of which is claimed under a deed, is *prima facie* evidence of title in the party in such possession to the whole tract. Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560.

Possession of a certificate of sale of land for taxes, endorsed with the name of the purchaser at the tax sale, is *prima facie* evidence of title to the land in such purchaser. American Exch. Nat. Bank *v.* Crooks, 97 Iowa 244, 66 N. W. 168.

2. *United States.*—Belford *v.* Scribner, 144 U. S. 488; Carlos F. Roses, 177 U. S. 655; Murphy *v.* United States, 14 Ct. Cl. 537.

Alabama.—Hobbs *v.* Bibb, 2 Stew. 54 (personal property remaining in vendor's possession).

California.—Kidder *v.* Stevens, 60 Cal. 414; Goodwin *v.* Carr, 8 Cal. 616.

Colorado.—Reed *v.* First Nat. Bank, 23 Colo. 380, 48 Pac. 507 (promissory note).

Delaware.—Drummond *v.* Hopper, 4 Harr. 327; State *v.* Patton, 1 Marv. 552, 41 Atl. 193.

Illinois.—Roberts *v.* Haskell, 20 Ill. 59; Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22; Amick *v.* Young, 69 Ill. 542.

Indiana.—Wiseman *v.* Lynn, 39 Ind. 250; McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957.

Iowa.—Courtright *v.* Deeds, 37 Iowa 503.

Louisiana.—Alexander's Succession, 18 La. Ann. 337; Lee *v.* Palmer, 18 La. 405; Robinson *v.* Taylor, 6 La. 393.

Maine.—Vining *v.* Baker, 53 Me. 544; Millay *v.* Butts, 35 Me. 139.

Michigan.—Trevorrow *v.* Trevorrow, 65 Mich. 234, 31 N. W. 908.

Minnesota.—Ames & Frost Co. *v.* Smith, 65 Minn. 304, 67 N. W. 999 (promissory note).

Missouri.—Miller *v.* Marks, 20 Mo. App. 369; Vogel *v.* St. Louis, 13 Mo. App. 116; Crow *v.* Marshall, 15 Mo. 499.

Nebraska.—Booknau *v.* Clark, 58 Neb. 610, 79 N. W. 159.

New Hampshire.—Eames *v.* Eames, 41 N. H. 177.

New York.—Rawley *v.* Brown, 71 N. Y. 85; Eyre *v.* Higbee, 35 Barb. 502 (autograph letters of historic value); Fish *v.* Skut, 21 Barb. 333.

Oregon.—Spreckels & Bros. Co. *v.* Bender, 30 Or. 577, 48 Pac. 418.

Pennsylvania.—Entriken *v.* Brown, 32 Pa. St. 364.

Texas.—Andrews *v.* Beck, 23 Tex. 455; Clifton *v.* Lilley, 12 Tex. 130; Herndon *v.* Casiano, 7 Tex. 322.

West Virginia.—Tefft *v.* Marsh, 1 W. Va. 38 (letters addressed to and in the possession of a party).

Wisconsin.—Wausau Boom Co. *v.* Plumer, 35 Wis. 274.

Where seed is sold in sacks it will be presumed that the vendee acquired title to the sacks as well as the seed. Texas Standard Oil Co. *v.* National Cotton Oil Co. (Tex. Civ. App.), 40 S. W. 159.

Stock.—A person whose name appears upon the stock-books of a corporation as in possession of stock

This presumption, however, is rebuttable,³ and is regarded as of slight evidentiary weight.⁴ Where several persons are in apparent possession of the property, the presumption of title is in favor of the one whose acts of control, management and dominion predominate.⁵ It is presumed that a person to whom goods are consigned is the owner thereof.⁶

2. From Dominion and Control.—A presumption of title arises from the fact that a party exercises dominion or control over property, treating it in a way which he would be unlikely to do were it

therein is presumed to be the owner of the stock. *Holland v. Duluth Iron, Min. & D. Co.*, 65 Minn. 324, 68 N. W. 50.

Possession of personal property with the consent of the true owner raises no presumption of title as against such owner. *Magee v. Scott*, 9 Cush. (Mass.) 148.

In *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936, it is held that the possession of an open account in favor of another does not raise a presumption that the account is owned by the person in whose possession it is found.

The possession of a church building purchased at a judicial sale raises no presumption of title to an organ standing in the building but not a fixture. *Caraher v. Royal Ins. Co.*, 63 Hun 82, 17 N. Y. Supp. 858.

Possession of the fixtures and outfit of a tobacco manufacturing establishment raises no presumption in Virginia that the title to them is in the person using them.

In *re Binford*, 3 Hughes 295, 3 Fed. Cas. No. 1,411, reversed in 3 Fed. Cas. No. 1,411a.

3. Alabama.—*Hobbs v. Bibb*, 2 Stew. 54.

Illinois.—*Amick v. Young*, 69 Ill. 542; *Roberts v. Haskell*, 20 Ill. 59.

Iowa.—*American Exchange Nat. Bank v. Crooks*, 97 Iowa 244, 66 N. W. 168.

Maine.—*Linscott v. Trask*, 35 Me. 150.

Massachusetts.—*Magee v. Scott*, 9 Cush. 148.

Michigan.—*Trevorrow v. Trevorrow*, 65 Mich. 234, 31 N. W. 908; *Matteson v. Morris*, 40 Mich. 52; *Lull v. Davis*, 1 Mich. 77.

Nebraska.—*Booknau v. Clark*, 58 Neb. 610, 79 N. W. 159.

New York.—*New York v. Lent*, 51 Barb. 19.

North Carolina.—*Threadgill v. Anson County*, 116 N. C. 616, 21 S. E. 425.

Pennsylvania.—*Philadelphia Trust Co. v. Philadelphia R. Co.*, 177 Pa. St. 38, 35 Atl. 688.

Tennessee.—*Park v. Harrison*, 8 Humph. 412.

Texas.—*Burroughs v. Farmer* (Tex. Civ. App.), 45 S. W. 846; *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478.

Virginia.—*Baring v. Reeder*, 1 Hen. & M. 154, 171.

Wisconsin.—*Wausau Boom Co. v. Plumer*, 35 Wis. 274.

4. In *re Binford*, 3 Hughes 295, 3 Fed. Cas. No. 1,411, reversed in 3 Fed. Cas. No. 1,411a; *Martin v. Martin*, 68 Ill. App. 169; *Rawley v. Brown*, 71 N. Y. 85 (*per Allen, J.*).

5. *Lenoir v. Rainey*, 15 Ala. 667; *Reid v. Butt*, 25 Ga. 28; *Curran v. McGrath*, 67 Ill. App. 566.

Contra.—In *Foster v. Jordan*, 2 Swan (Tenn.) 476, it was held that where several persons lived together as one family, the presumption is that slaves in the concurrent possession of all the parties are held jointly, even though the head of the family exercised the greatest dominion over such slaves.

6. *Frank v. Central R. Co.*, 9 Pa. Super. Ct. 129, 133, holding that where boxes of merchandise are directed to a certain party, without any other indicia of ownership, it will be presumed that such consignee is the owner of the goods.

the property of another,⁷ such as executing mortgages thereon,⁸ paying taxes assessed against it,⁹ or insuring it.¹⁰ It will be presumed, in the absence of evidence to the contrary, that the title to a vehicle is in the person whose name is painted thereon,¹¹ and that cattle belong to the person whose brand they bear.¹² All of these presumptions are, however, generally regarded by the courts as of light weight and are easily rebutted.¹³

3. From Lapse of Time.—After the lapse of a long period of time from the execution and delivery of the instrument, or the rendition of the judgment under which title is claimed, the courts will indulge every reasonable presumption to support the title.¹⁴

4. Miscellaneous.—The presumption of seisin of the owner of the legal title to real property continues until it is shown that he has been disseised and dispossessed of the premises.¹⁵ It has been held that recognition of personal property raises a presumption of ownership.¹⁶ It is presumed that whatever statements derogatory to his own title may be made by a party in possession of real estate are true.¹⁷ No presumption of ownership of land prior to the rendition of a judgment settling his title thereto, arises in favor of the successful party to a suit to quiet title.¹⁸

7. *Booknau v. Clark*, 58 Neb. 610, 79 N. W. 159; *Amick v. Young*, 69 Ill. 542.

8. *Stanley v. Gaylord*, 10 Metc. (Mass.) 82; *Beringer v. Lutz*, 188 Pa. St. 364, 41 Atl. 643; *Downey v. Arnold*, 97 Ill. App. 91; *Shum v. Claghorn*, 69 Vt. 45, 37 Atl. 236.

9. *Little v. Downing*, 37 N. H. 355; *Carr v. Dodge*, 40 N. H. 403; *Hodgdon v. Shannon*, 44 N. H. 572; *Hunt v. Haven*, 56 N. H. 87; *Ellen v. Ellen*, 16 S. C. 132.

10. *Bettes v. Magoon*, 85 Mo. 580; *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289; *Hodgdon v. Shannon*, 44 N. H. 572.

11. *Chicago General St. R. Co. v. Capek*, 68 Ill. App. 500, 509; *Ferguson v. Ehret*, 14 Misc. 454, 35 N. Y. Supp. 1020; *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940.

The presumption arising from the appearance of a name on a vehicle to the effect that it is the property of the party whose name so appears, may be rebutted by the positive testimony of the driver and his helper that they were employed by another party. *United Breweries Co. v. Bass*, 121 Ill. App. 299.

12. *Debord v. Johnson*, 11 Colo. App. 402, 53 Pac. 255.

But the fact that cattle are branded

with the mark and brand of a married woman, which mark and brand have been duly recorded in her own name, raises no presumption that they belong to her as her separate property. *Rhodes v. Alexander*, 19 Tex. Civ. App. 552, 47 S. W. 754.

13. *Beringer v. Lutz*, 188 Pa. St. 364, 41 Atl. 643; *United Breweries Co. v. Bass*, 121 Ill. App. 299; *Debord v. Johnson*, 11 Colo. App. 402, 53 Pac. 255; *Booknau v. Clark*, 58 Neb. 610, 79 N. W. 159.

14. *Santana Live Stock etc. Co. v. Pendleton*, 81 Fed. 784 (fifty years after administrator's sale).

See article on "ADVERSE POSSESSION," Vol. I.

15. *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95; *United States v. Arredondo*, 6 Pet. (U. S.) 743; *Lund v. Parker*, 3 N. H. 49.

16. In *Mohr v. Langan*, 77 Mo. App. 481, it was held that the recognition, by a person claiming ownership of certain personal property, of a description of her goods when the defendant's book-keeper read the same from a list sent to an auction house, raised a presumption in her favor.

17. *Smith v. Martin*, 17 Conn. 399.

18. *Sigler v. Murphy*, 107 Iowa 128, 77 N. W. 577.

II. BEST AND SECONDARY EVIDENCE.

1. Title to Real Property. — A. WHEN TITLE IS DIRECTLY IN ISSUE. — The best evidence of title to real property when the same is in issue consists in such muniments of title as deeds, mortgages, patents, wills, etc.,¹⁹ and unless the absence of such evidence is satisfactorily explained, parol evidence will not be received to prove

19. *Alabama*. — *Ricketts v. Birmingham S. R. Co.*, 85 Ala. 600, 5 So. 353 (title to a street railway); *Hussey v. Roquemore*, 27 Ala. 281.

Arkansas. — *Hershy v. Berman*, 45 Ark. 309.

Colorado. — *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189.

Georgia. — *Cain v. Busby*, 30 Ga. 714; *Phillips v. O'Neal*, 87 Ga. 727, 13 S. E. 819.

Illinois. — *Reich v. Berdel*, 120 Ill. 499, 11 N. E. 912; *Albertson v. Town of Cicero*, 129 Ill. 226, 21 N. E. 815.

Iowa. — *Boddy v. Henry*, 113 Iowa 462, 85 N. W. 771.

Louisiana. — *Gaudet v. Dumoulin*, 49 La. Ann. 984, 22 So. 622; *Lard v. Strother*, 4 Rob. 95; *Rosine v. Bonnabel*, 5 Rob. 163; *George v. Campbell*, 26 La. Ann. 445; *French v. Bach*, 26 La. Ann. 731; *Halsey v. Sandidge*, 27 La. Ann. 198; *McKenzie v. Bacon*, 40 La. Ann. 157, 4 So. 65; *Bailey v. Ward*, 32 La. Ann. 839; *Barataria & L. Canal Co. v. Field*, 17 La. 421; *Breed v. Guay*, 10 Rob. 35; *White v. Holsten*, 4 Mart. (O. S.) 471; *Freret v. Meux*, 9 Rob. 414; *Union Bank v. Ellis*, 3 La. Ann. 188.

Maryland. — *Hammond v. Norris*, 2 Har. & J. 130.

Massachusetts. — *Hall v. Gardner*, 1 Mass. 172; *Noyes v. Morrill*, 108 Mass. 396.

Michigan. — *Thompson v. Richards*, 14 Mich. 172; *Jennison v. Haire*, 29 Mich. 207.

Minnesota. — *Moe v. Chesrown*, 54 Minn. 118, 55 N. W. 832.

New Hampshire. — *Morrill v. Foster*, 32 N. H. 358.

New York. — *Jackson v. Vosburgh*, 7 Johns. 186; *Jackson v. Miller*, 6 Wend. 228, affirming s. c. 6 Cow. 752; *Carter v. Pitcher*, 87 Hun 580, 34 N. Y. Supp. 549.

North Carolina. — *Cox v. Ward*, 107 N. C. 507, 12 S. E. 379.

Pennsylvania. — *Goodright v. Miller*, 1 Yeates, 305; *Deppen v. Bogar*, 7 Pa. Super. Ct. 434; *Arnold v. Cessna*, 25 Pa. St. 34.

South Carolina. — *Eubanks v. Harris*, 1 Spears 183; *Spence v. Spence*, 2 Brev. 466.

While the parol admissions of a party made in *pais* are competent evidence against him upon a question of title, yet such admissions are insufficient to prove the title of the adverse party, not being the best evidence, unless it be shown that it is not possible to produce the deeds or other muniments of title which constitute the best evidence." *Bivins v. McElroy*, 11 Ark. 23.

In *Bostwick v. Mahoney*, 73 Cal. 238, 14 Pac. 832, the court held that a witness cannot be allowed to testify that on a specified day he "held the legal title," not only because that would be giving his opinion on a matter of law, but because the best evidence of title is the deed under which the property is held.

The rule stated in the text was applied to proof of the ownership of land in another state, in *Wright v. Roberts*, 116 Ga. 194, 42 S. E. 369.

The rule stated in the text applies proof of the title to standing timber. *Asher Lumber Co. v. French*, 18 Ky. L. Rep. 682, 37 S. W. 149.

Recitals in a lien claim are not competent to prove title in an action to recover a statutory penalty awarded to an owner for the failure of a lien claimant to acknowledge satisfaction of a lien after payment thereof. *Lavery v. Brooke*, 37 Ill. App. 51.

Where questions as to title arise in actions for damages, the rule is the same, and parol evidence is not admissible to establish title if the muniments can be produced. *Bradford v. Cook*, 4 La. Ann. 229.

Prescriptive Title may be shown by

title.²⁰ Where evidence as to the location and boundaries of land is material on the issue of title therein, parol evidence as to the contents of maps and surveys will not be received if the maps and surveys themselves can be produced,²¹ but the testimony of a witness who has actual personal knowledge as to the lines, corners and marks of a tract of land is primary evidence as to the boundaries thereof and is not secondary to field notes of surveyors, or to the testimony of eye-witnesses of the survey.²²

B. WHEN QUESTION OF TITLE IS COLLATERAL. — When the title to real property is not directly in issue, or where only a *prima facie* showing of title is necessary, the rule as to best evidence does not apply,²³ although if it appears that the knowledge of a witness as

parol evidence. *Stretch v. Schenck*, 23 Ind. 77.

Mining Records. — *Campbell v. Rankin*, 99 U. S. 261.

A party seeking to connect himself with the title to a mining claim should produce the original conveyance, the existence of which has been proved, and parol evidence of the transfer from the original locator to him is inadmissible. *Crary v. Campbell*, 24 Cal. 634.

A book in which mining claims are recorded, according to the mining rules of the district, containing an entry of a transfer, is not primary evidence of the fact of such transfer. *Attwood v. Fricot*, 17 Cal. 37.

20. *Robb v. Robb* (Tex. Civ. App.), 41 S. W. 92; *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72; *Addis v. Graham*, 88 Mo. 197.

One who has lost his muniments of title cannot prove his title by parol, without first showing such loss. *Robertson v. Lucas*, 1 Mart. N. S. (La.) 187; *Allard v. Lobau*, 3 Mart. N. S. (La.) 293; *Coleman v. Breaud*, 6 Mart. N. S. (La.) 207; *Davis' Heirs v. Prevost*, 6 Mart. N. S. (La.) 265; *Lewis v. Beatty*, 8 Mart. N. S. (La.) 287; *Jackson v. Livingston*, 7 Wend. (N. Y.) 136.

Title Under Sheriff's Deeds. — A party claiming title under a sheriff's sale upon execution must produce the sheriff's deed or must satisfactorily explain his failure to do so in order to render secondary evidence admissible. *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443; *Morgan v. Thames' Bank*, 14 Conn. 99; *Harlan v. Harris*, 17 Ind. 328; *Dufour v.*

Camfranc, 11 Mart. O. S. (La.) 675; *Smith v. Phillips*, 25 Mo. 555.

To Prove Title by Prescription.

But in states where title may be acquired by adverse possession a prescriptive title may always be shown by parol testimony. See note 29 under II, 1, A.

21. *Pool v. Myers*, 13 Smed. & M. (Miss.) 466; *Surget v. Little*, 5 Smed. & M. (Miss.) 319; *State v. Atherton*, 16 N. H. 203; *Ross v. Pleasants*, 3 Pa. St. 408; *Dawson v. Laughlin*, 2 Yeates (Pa.) 446 (*holding* that a copy of the survey is the best evidence to prove the time it was made); *Coleman v. Smith*, 55 Tex. 254.

22. *Surget v. Little*, 5 Smed. & M. (Miss.) 319; *Weaver v. Robinett*, 17 Mo. 459; *Perry v. Block*, 1 Mo. 404.

23. *United States*. — *Chicago*, St. P., M. & O. R. Co. v. Gilbert, 52 Fed. 711, 3 C. C. A. 264.

Alabama. — *Alabama G. S. R. Co. v. Johnston*, 128 Ala. 283, 29 So. 771; *Arnold v. Cofer*, 135 Ala. 364, 33 So. 539.

Delaware. — *Robinson v. Tunnell*, 2 Houst. 387.

Georgia. — *Wright v. Roberts*, 116 Ga. 194, 42 S. E. 369.

Kentucky. — *Helen v. Spencer*, 1 Ky. L. Rep. 56.

Louisiana. — *Grevenberg v. Borel*, 25 La. Ann. 530.

Michigan. — *Babcock v. Beaver Creek Tp.*, 65 Mich. 479, 32 N. W. 653.

Minnesota. — *Cooper v. Breckenridge*, 11 Minn. 341.

to the title is derived from some written instrument relating to the title, his testimony will not be received unless such instrument is produced, or its absence accounted for satisfactorily.²⁴

2. Title to Personal Property. — A. WHEN TITLE IS DIRECTLY IN ISSUE. — Where title has been transferred by bill of sale, or other written instrument, it is usually held that such instrument is the best evidence of title;²⁵ but it seems that in Illinois,²⁶ Massachusetts,²⁷

Oregon. — *Siglin v. Coos Bay R. Co.*, 35 Or. 79, 56 Pac. 1011.

South Carolina. — *Pelzer Mfg. Co. v. American Fire Ins. Co.*, 36 S. C. 213, 15 S. E. 562.

Texas. — *Bexar County v. Terrell*, 14 S. W. 62; *Oaks v. West* (Tex. Civ. App.), 64 S. W. 1033.

West Virginia. — *Phillips v. Huntington*, 35 W. Va. 406, 14 S. E. 17.

A plaintiff in an action against a city for damages for injuries from a defective sidewalk may prove the title to the contiguous lots by parol, without showing the deeds or other record evidence. *Phillips v. Huntington*, 35 W. Va. 406, 14 S. E. 17.

In a criminal prosecution for cutting a fence, parol proof of the ownership thereof is admissible. *Joy v. State*, 41 Tex. Crim. 46, 51 S. W. 933.

24. *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 5 So. 353; *Bell v. Denson*, 56 Ala. 444; *Hart v. Vinsant*, 6 Heisk. (Tenn.) 616.

25. *Canada.* — *Caldwell v. Green*, 8 U. C. Q. B. 327; *Bratt v. Lee*, 7 U. C. C. P. 280.

Alabama. — *Street v. Nelson*, 67 Ala. 507.

Arkansas. — *Stone v. Waggoner*, 8 Ark. 204.

Georgia. — *Morgan v. Jones*, 24 Ga. 155 (under Georgia Code §§ 3760-3762); *Epping v. Mockler*, 55 Ga. 376.

Iowa. — *Citizens' Bank v. Rhutasel*, 67 Iowa 316, 25 N. W. 261; *Bray v. Flickinger*, 69 Iowa 167, 28 N. W. 492.

Louisiana. — *Lucile v. Toustin*, 5 Mart. O. S. 611; *Clark v. Slidell*, 5 Rob. 330.

Mississippi. — *Baldwin v. McKay*, 41 Miss. 363.

North Carolina. — *Graham v. Hamilton*, 25 N. C. (3 Ired. L.) 381.

Ohio. — *Strauss v. Payne*, 1 Ohio Dec. 61, 1 West L. J. 410.

South Carolina. — *Foster v. Cherry*, 2 Nott. & McC. 367.

When a party refuses to produce a written agreement under which he claims the title to personal property, he cannot introduce oral testimony to prove his title thereto. *Mullens v. Bullock*, 12 Ky. L. Rep. 95.

26. "The general rule of the common law is that parol evidence is admissible to prove the sale, delivery and ownership of personalty. Exceptions to it, introduced by statute, such as the registering of ships, recording bills of sale under the statute of frauds, and the like, grow out of the policy of the law in relation to particular kinds of personalty." *Williams v. Jarrot*, 6 Ill. 120, 129.

27. *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Mason v. Bowles*, 117 Mass. 86.

In *Wait v. Gibbs*, 4 Pick. (Mass.) 298, which was an action against the alleged owners of a fishing vessel, by a member of the crew, for his share of the proceeds of fish, taken on the voyage, it was held that the shipping articles do not determine conclusively who are the owners of the vessel, and that the plaintiff might establish such ownership by other evidence than the ship's papers. And in *Vinal v. Burrill*, 16 Pick. (Mass.) 401, it was held that parol evidence was admissible to prove the ownership of a vessel, although she was registered in the name of a certain party.

In *Olmstead v. Mansir*, 10 Allen (Mass.) 424, it was contended on appeal that the trial court had erred in permitting the introduction of parol evidence to prove title to personal property, it appearing that there was a bill of sale to such prop-

Minnesota,²⁸ Nebraska,²⁹ New Mexico,³⁰ and Pennsylvania,³¹ the rule is to the contrary, and title to personal property may be proved by oral testimony notwithstanding the existence of a written instrument relating thereto.

B. WHEN QUESTION OF TITLE IS COLLATERAL. — When title to personal property is only collaterally involved, as where it is merely necessary to make a *prima facie* showing of title, the best evidence rule does not apply.³² But if one seeks to prove his own title by a written instrument, it must be produced or its non-production satisfactorily explained in order to render parol evidence of its contents admissible.³³

III. ABSTRACTS.

Abstracts of title to real property are sometimes made admissible by statute as evidence of title.³⁴

IV. DEEDS.

1. In General. — Deeds to real property are always the best evidence of the title thereto,³⁵ and of course are always admissible as evidence thereof, and even the fact that a deed has been wrongfully procured, or is invalid as a conveyance, does not destroy its admissibility, although it may affect its weight as evidence.³⁶

2. Office Copies. — It has been held that an office copy of a recorded deed to which the person offering it is not a party,³⁷ but

erty. But the supreme court held that a "bill of parcels" was not such a written contract as would exclude parol evidence of the title.

28. *Fay v. Davidson*, 13 Minn. 491 (title to a steamboat).

When it does not affirmatively appear that written proof of the ownership of a boat can be had, parol testimony will be admitted to prove title thereto. *McMahon v. Davidson*, 12 Minn. 357.

29. *Knights v. State*, 58 Neb. 225, 78 N. W. 508.

30. *Chavez v. Territory*, 6 N. M. 455, 30 Pac. 903. Any competent evidence is admissible to prove the title to animals. *Gale v. Salas*, 11 N. M. 211, 66 Pac. 520.

31. *Conrad v. Farrow*, 5 Watts (Pa.) 536; *Gallagher v. London Assur. Corp.*, 149 Pa. St. 25, 24 Atl. 115.

32. *Patterson v. Kicker*, 72 Ala. 406; *Sleep v. Heymann*, 57 Wis. 495, 16 N. W. 17; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 5 So. 353; *Street v. Nelson*, 67 Ala. 507;

Oaks v. West (Tex. Civ. App.), 64 S. W. 1033.

33. *Mullens v. Bullock*, 12 Ky. L. Rep. 95; *Patterson v. Kicker*, 72 Ala. 408.

34. *Chicago & A. R. Co. v. Keegan* (Ill.), 31 N. E. 505, under Rev. Stat. 1874, c. 116, § 29; *Evans v. Foster*, 79 Tex. 48, 15 S. W. 170; *Chicago & Alton R. Co. v. Keegan*, 152 Ill. 413, 39 N. E. 53; *Wichita Land & Cattle Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. 128; *Cooney v. Booth Packing Co.*, 169 Ill. 370, 48 N. E. 406; *Robins v. Ginocchio* (Tex. Civ. App.), 33 S. W. 747. See article "ABSTRACTS OF TITLE," Vol. I.

35. See note 29 under II, 1, A, *ante*.

36. *Taylor v. Corley*, 113 Ala. 580, 21 So. 404; *Gale v. Eckhart*, 107 Mich. 465, 65 N. W. 274.

37. *Stockwell v. Silloway*, 105 Mass. 517; *Ward v. Fuller*, 15 Pick. (Mass.) 185; *Williams v. Wetherbee*, 2 Ark. 329; *Hutchinson v. Chadbourne*, 35 Me. 192; *Loomis v.*

which constitutes a link in his chain of title,³⁸ is not only admissible,³⁹ but constitutes original evidence of title⁴⁰ either in support or defense of a title to real estate or in an action where the party seeking to introduce it derives his claim under the deed, a copy of which he seeks to use. But as a prerequisite to the admission of such copy, many decisions hold that the party offering it in evidence must satisfactorily account for the absence of the original if he is the person who would naturally be presumed to be entitled to the custody of such original.⁴¹

Bedel, 11 N. H. 74; Pollard v. Melvin, 10 N. H. 554; Andrews v. Davison, 17 N. H. 413.

38. Baring v. Harmon, 13 Me. 361; Lyford v. Thurston, 16 N. H. 399; Andrews v. Davison, 17 N. H. 413; Stokes v. Dawes, 4 Mason 268, 23 Fed. Cas. No. 13,477.

In Smith v. Cushman, 59 N. H. 27, it was held that office copies of deeds constituting a link in the chain of title to a way, may be used in evidence by either party claiming title thereto.

In Pollard v. Melvin, 10 N. H. 554, it was held that an office copy of a deed to one under whom neither party claimed, was inadmissible.

39. Hutchinson v. Chadbourne, 35 Me. 189 (under a rule of court); Forsaith v. Clark, 21 N. H. 409.

But in Kent v. Weld, 11 Me. 459, it was held that such office copies could be admitted only in actions touching the realty, and that in all other actions the general principle of the law of evidence would prevail, to wit: that a party offering to prove a fact by deed must produce it and prove its execution.

Contra.—Jackson v. Nason, 38 Me. 85, holding that office copies of deeds, offered by an execution creditor to show that title to land was in the judgment debtor, were inadmissible.

40. Pierson v. Turner's Lessee, 2 Ind. 123 (under Rev. St. pp. 422, 728); Hood v. Mathers, 2 A. K. Marsh. (Ky.) 553 (under a statute); Hutchinson v. Chadbourne, 35 Me. 189; Lyford v. Thurston, 16 N. H. 399.

In Andrews v. Davison, 17 N. H. 413, it was held that an office copy of a recorded deed constituted *prima facie* evidence of title.

41. *Alabama*.—Sommerville v. Stephenson, 3 Stew. 271; Fryer v. Dennis, 2 Ala. 144; Smith v. Armisteads' Exr's, 7 Ala. 698; Thompson v. Ives, 11 Ala. 239; Hines v. Chancey, 47 Ala. 637.

California.—Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Macy v. Goodwin, 6 Cal. 579.

Georgia.—Williams v. Moore, 68 Ga. 585.

Illinois.—Fabbri v. Cunio, 1 Ill. App. 240; Phenix Ins. Co. v. Mechanic's & Traders S. L. & B. Assn., 51 Ill. App. 479.

Maine.—Doe v. Scribner, 36 Me. 168.

Maryland.—Gittings v. Hall, 1 Har. & J. 14.

Mississippi.—Harmon v. James, 7 Smed. & M. 111.

Missouri.—Hoskinson v. Adkins, 77 Mo. 537; Russell v. Glasser, 93 Mo. 353, 6 S. W. 362; Pierce v. Georger, 103 Mo. 540, 15 S. W. 848.

New Hampshire.—Smyth v. Carlisle, 16 N. H. 464.

North Carolina.—Smith v. Wilson, 18 N. C. (1 Dev. & B. L.) 40.

Tennessee.—Anderson v. Walker, Mart. & Y. 201.

Texas.—Gamage v. Trawick, 19 Tex. 58; Ury v. Houston, 36 Tex. 260.

One of the earliest American decisions on this point is Park v. Cochran, 2 N. C. 410, decided in 1796, in which the rule is thus tersely stated: "The copy cannot be read unless the plaintiff will swear he has not the original nor can produce it."

It was said by Chief Justice Marshall in Brooks v. Marbury, 11 Wheat. (U. S.) 99, that it was error to admit a copy of a deed in evidence without any testimony that the orig-

3. Certified Copies.—If the party offering it is not the person entitled to the custody of the original, the office copy is admissible without proof of the loss of, or inability to produce the original.⁴² It is generally held that a properly certified copy of a duly recorded deed is evidence of title to the same extent as the original deed.⁴³ As to whether or not the party offering such certified copy as evidence of title must account for his failure to produce the original, the decisions are not uniform; it is held in some decisions that it is not necessary to account for the absence of the original,⁴⁴ while in others it is held that the certified copy is merely secondary evidence

inal was not in the power of the party offering the copy.

It must be shown that the original is not under the control of the party unless the proof of that fact be waived by the adverse party. *Mayo v. Mazeaux*, 38 Cal. 442.

42. *United States*.—*Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. 542.

Connecticut.—*Bolton v. Cummings*, 25 Conn. 410.

Indiana.—*Foresman v. Marsh*, 6 Blackf. 285; *Daniels v. Stone*, 6 Blackf. 450; *Bowser v. Warren*, 4 Blackf. 522.

Iowa.—*Kenosha Stove Co. v. Shedd*, 82 Iowa 540, 48 N. W. 933; *Bridge v. Shedd*, 82 Iowa 540, 48 N. W. 933; *Burdett v. Shedd*, 82 Iowa 540, 48 N. W. 933.

Kentucky.—*Wells v. Wilson*, 3 Bibb. 264.

Massachusetts.—*Ward v. Fuller*, 15 Pick. 185; *Stockwell v. Silloway*, 105 Mass. 517; *Draper v. Hatfield*, 124 Mass. 53.

Missouri.—*Bosworth v. Bryan*, 14 Mo. 575.

New Hampshire.—*Farrar v. Fesenden*, 39 N. H. 268.

43. *United States*.—*Barger v. Miller*, 4 Wash. C. C. 280, 2 Fed. Cas. No. 979.

Alabama.—*Smoot v. Fitzhugh*, 9 Port. 72; *March v. England*, 65 Ala. 275.

California.—*Mayo v. Mazeaux*, 38 Cal. 442; *Hicks v. Coleman*, 25 Cal. 122; *Hurlbutt v. Butenop*, 27 Cal. 50; *McMinn v. O'Connor*, 27 Cal. 238.

Illinois.—*Dugger v. Oglesby*, 3 Ill. App. 94.

Louisiana.—*Thomas v. Turnley*, 3 Rob. 206.

Missouri.—*Crispen v. Hannavan*, 72 Mo. 548.

New York.—*Van Cortlandt v. Tozer*, 17 Wend. 338.

North Carolina.—*Mitchell v. Bridges*, 113 N. C. 63, 18 S. E. 91.

Pennsylvania.—*Carkhuff v. Anderson*, 3 Bin. 4.

Texas.—*Dikes v. Miller*, 25 Tex. Supp. 281, 78 Am. Dec. 571; *Folts v. Ferguson* (Tex. Civ. App.), 24 S. W. 657; *Hill v. Templeton* (Tex. Civ. App.), 29 S. W. 535.

Vermont.—*Pratt v. Battles*, 34 Vt. 391.

Virginia.—*Baker v. Preston*, Gilm. 235; *Pollard v. Lively*, 4 Gratt. 73.

Contra.—*Russell v. Kearney*, 27 Ga. 96.

In an action for damages for allowing ice to accumulate on a building, which ice, in falling, injured the plaintiff, a certified copy of a deed to the defendant is relevant evidence to show his ownership of the building. *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583.

Defective Acknowledgment.—The record of a deed, the acknowledgment of which was void, is not admissible as evidence of title. *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535.

The record of a deed from several grantors which showed it to have been witnessed in the manner required by law to enable it to be legally recorded as to one grantor only, is not evidence of the grantee's title, except as to the title derived from such one grantor. *Harrass v. Edwards*, 94 Wis. 459, 69 N. W. 69.

44. *California*.—*Canfield v. Thompson*, 49 Cal. 210; *Gethin v. Walker*, 59 Cal. 502.

and that the non-production of the original must be accounted for before the certified copy can be received,⁴⁵ and there are cases which hold that where a party who is not the grantee named in a deed,⁴⁶ or one presumed by law to have it in his control or possession,⁴⁷ offers a certified copy thereof as evidence of title, he need not account for the absence of the original, while if he be a party to the deed, or one presumed to have possession of it, he must account for his failure to produce such original.

V. TAX DEEDS.

1. In General.—The question of the weight and value of deeds executed by a state or municipality for lands sold for taxes delinquent thereon as evidence of title to such lands is one largely governed by statutory enactments, and hence in reviewing the decisions it is necessary to examine into the statutes of the particular state

Kentucky.—Tebbs v. White, 4 Bibb 42.

Maryland.—Hurn v. Soper, 6 Har. & J. 276; Preston v. Evans, 56 Md. 476.

Massachusetts.—Thacher v. Phinney, 7 Allen 146.

Missouri.—Tully v. Canfield, 60 Mo. 99; Boogher v. Neece, 75 Mo. 383; Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83; Hammond v. Horton, 6 S. W. 94.

Montana.—Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153.

New York.—Clark v. Clark, 47 N. Y. 664.

North Carolina.—Bohannon v. Shelton, 46 N. C. (1 Jones L.) 370.

Texas.—Greenwood v. Fontaine (Tex. Civ. App.), 34 S. W. 826.

Virginia.—Rowletts v. Daniel, 4 Munf. 473.

45. *Alabama.*—Arthur v. Gayle, 38 Ala. 259.

California.—Mayo v. Mazeaux, 38 Cal. 442; Hurlbutt v. Butenop, 27 Cal. 50; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861; Skinker v. Flohr, 13 Cal. 638.

Connecticut.—Cunningham v. Tracy, 1 Conn. 252.

Florida.—Johnson v. Drew, 34 Fla. 130, 15 So. 780.

Georgia.—Williams v. Moore, 68 Ga. 585.

Illinois.—Phenix Ins. Co. v. Mechanics & T. Sav. L. & B. Assn., 51

Ill. App. 479; Fabbri v. Cunio, 1 Ill. App. 240.

Maine.—Doe v. Scribner, 36 Me. 168.

Missouri.—Hoskinson v. Adkins, 77 Mo. 537.

New Hampshire.—Homer v. Cileley, 14 N. H. 85.

North Carolina.—Smith v. Wilson, 18 N. C. (1 Dev. & B.) 40.

South Carolina.—Dingle v. Bowman, 1 McCord 177.

Tennessee.—Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67.

Texas.—Peck v. Clark, 18 Tex. 239; Hines v. Thorn, 57 Tex. 98; Ury v. Houston, 36 Tex. 260; Golin v. State, 38 S. W. 794; Nye v. Gribble, 70 Tex. 458, 8 S. W. 608.

46. *Kelsey v. Hammer*, 18 Conn. 311; *Jewett v. Persons Unknown*, 61 Me. 408.

47. *Alabama.*—Allison v. Little, 85 Ala. 512, 5 So. 221; *Florence Land M. & M. Co. v. Warren*, 91 Ala. 533, 9 So. 384.

Connecticut.—Parker v. Smedly, 2 Root 286; *Bolton v. Cummings*, 25 Conn. 410.

Florida.—Bell v. Kendrick, 25 Fla. 778, 6 So. 868.

Illinois.—Bowman v. Wettig, 39 Ill. 416.

Iowa.—McNichols v. Wilson, 42 Iowa 385.

Kansas.—West v. Cameron, 39 Kan. 736, 18 Pac. 894; *Bergman v. Bullitt*, 43 Kan. 709, 23 Pac. 938.

as they existed at the time the deed in question was executed,⁴⁸ bearing in mind also the fact that the decisions of the federal courts on such matters follow the statutes of the states wherein the question arises, as construed by the courts thereof. This will explain many seemingly conflicting decisions by the same courts.

True Rule. — The true rule probably is that, unless the statute provides that the recitals in a tax deed shall be in themselves evidence of a compliance with the statute as to all necessary preliminaries and as to making the sale, a tax deed is not admissible as evidence of title without proof being first made as to the regularity of the proceedings leading up to its execution,⁴⁹ such as the levy

Utah. — *Wilson v. Wright*, 8 Utah 215, 30 Pac. 754.

⁴⁸. *Keane v. Cannovan*, 21 Cal. 291.

After the repeal of an act making a tax deed *prima facie* evidence of title, such a deed, although executed upon a sale which took place prior to the repeal, is inadmissible to prove title without proof of the preliminary steps necessary to vest the power of sale. *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356.

⁴⁹. *United States*. — *Games v. Stiles*, 14 Pet. 322; *Boardman v. Reed*, 6 Pet. 328; *Gage v. Kaufman*, 133 U. S. 471; *Moore v. Brown*, 11 How. 414; *Early v. Doe*, 16 How. 610; *Mayhew v. Davis*, 4 McLean 213; *Little v. Herndon*, 10 Wall. 26; *Williams v. Peyton*, 17 U. S. 77; *Miner v. McLean*, 4 McLean 138, 17 Fed. Cas. No. 9,630; *Lamb v. Gillett*, 6 McLean 365, 14 Fed. Cas. No. 8,016; *Arrowsmith v. Burlingen*, 4 McLean 489, 1 Fed. Cas. No. 563; *Rule v. Parker*, 20 Fed. Cas. No. 12,125, *affirmed Parker v. Rule*, 9 Cranch. 64; *Dunn v. Games*, 1 McLean 321, 8 Fed. Cas. No. 4,176; *Overman v. Parker*, *Hempst.* 692, 18 Fed. Cas. No. 10,623, *affirmed*, *Parker v. Overman*, 18 How. 137; *Shearer v. Corbin*, 3 Fed. 705 (Minnesota); *Bradford v. Hall*, 36 Fed. 808.

Alabama. — *Pope v. Headen*, 5 Ala. 433; *Lyon v. Hunt*, 11 Ala. 295; *Collins v. Doe*, 33 Ala. 91.

Arkansas. — *Bonnell v. Roane*, 20 Ark. 114 (under *Gould's Digest*, c. 170, § 5); *Hogins v. Brashears*, 13 Ark. 242. *But see Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69,

which holds that a tax deed, regular on its face, is admissible, without preliminary proof to show title.

California. — *Lachman v. Clark*, 14 Cal. 131; *Russell v. Mann*, 22 Cal. 132; *Norris v. Russell*, 5 Cal. 249. *But see O'Grady v. Barnhisel*, 23 Cal. 287; *Wetherbee v. Dunn*, 32 Cal. 106.

District of Columbia. — *Beale v. Brown*, 6 Mackey 574.

Georgia. — *Verdery v. Dotterer*, 69 Ga. 194; *Johnson v. Phillips*, 89 Ga. 286, 15 S. E. 368. *But see Livingston v. Hudson*, 85 Ga. 835, 12 S. E. 17.

Illinois. — *Hinman v. Pope*, 6 Ill. 131; *Garrett v. Wiggins*, 2 Ill. 335; *Lane v. Bommelmann*, 21 Ill. 143; *Hill v. Leonard*, 5 Ill. 140; *Wiley v. Bean*, 6 Ill. 302; *Goewey v. Urig*, 18 Ill. 238; *Lusk v. Harber*, 8 Ill. 158; *Irving v. Brownell*, 11 Ill. 402; *Dukes v. Rowley*, 24 Ill. 210; *Baily v. Doolittle*, 24 Ill. 577; *Skinner v. Fulton*, 39 Ill. 484; *Elston v. Kennicott*, 46 Ill. 187; *Wilding v. Horner*, 50 Ill. 50; *Cottingham v. Springer*, 88 Ill. 90; *Gage v. Lightburn*, 93 Ill. 248; *Smith v. Hutchinson*, 108 Ill. 662; *Bell v. Johnson*, 111 Ill. 374 (under *Rev. Stat.*, c. 120, § 194); *Sawyer v. Campbell*, 2 N. E. 660 (under *Rev. Stat.* 1884, c. 120, § 216); *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777 (under *Rev. Stat.* 1845, c. 89, § 73); *Perry v. Burton*, 126 Ill. 599, 18 N. E. 653 (under *Act of Feb. 26, 1839*); *Anderson v. McCormick*, 129 Ill. 308, 21 N. E. 803; *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572. *But see Vance v. Schuyler*, 6 Ill. 160; *Messinger v. Germain*, 6 Ill. 631; *Graves v. Bruen*, 6 Ill. 167, *s. c.* 11 Ill. 431.

These earlier cases held that a tax deed was evidence of title without preliminary proof.

Indiana.—*Morris v. Himelick*, 4 Blackf. 494; *Gavin v. Sherman*, 23 Ind. 32; *Steeple v. Downing*, 60 Ind. 478; *Johnson v. Briscoe*, 92 Ind. 367; *O'Brien v. Coulter*, 2 Blackf. 421; *Ellis v. Kenyon*, 23 Ind. 134; *Milliken v. Patterson*, 91 Ind. 515; *Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725.

Iowa.—*Scott v. Babcock*, 3 G. Gr. 133; *Rayburn v. Kuhl*, 10 Iowa 92; *Laraby v. Reid*, 3 G. Gr. 419; *Gaylord v. Scarff*, 6 Iowa 179; *McGahan v. Carr*, 6 Iowa 331. *But see* *Allen v. Armstrong*, 16 Iowa 508 (holding that under Revision of 1860, § 784, preliminary proof is not essential to render a tax deed admissible to prove title).

Kentucky.—*Terry v. Bleight*, 3 T. B. Mon. 270; *Craig v. Johnson's Heirs*, 3 T. B. Mon. 323; *Griffin v. Sparks*, 24 Ky. L. Rep. 849, 70 S. W. 30; *Carlisle v. Cassady*, 20 Ky. L. Rep. 562, 46 S. W. 490; *Taylor v. Whiting*, 2 B. Mon. 268; *Bishop v. Lovan*, 4 B. Mon. 116; *Jones v. Miracle*, 93 Ky. 639, 21 S. W. 241; *Whipple v. Earich*, 93 Ky. 121, 19 S. W. 237; *Pryor v. Hardwick*, 15 Ky. L. Rep. 166, 22 S. W. 545. *But see* *Allen v. Robinson*, 3 Bibb 326.

Louisiana.—*Rapp v. Lowry*, 30 La. Ann. 1272; *Reeves v. Towles*, 10 La. 276; *Nancarrow v. Weathersbee*, 6 Mart (N. S.) 347; *Smith v. Corcoran*, 7 La. 46; *State ex rel. Fix v. Herron*, 20 La. Ann. 848. *But see* *O'Hern v. Hibernia Ins. Co.*, 30 La. Ann. 959; *Prescott v. Payne*, 44 La. Ann. 650, 11 So. 140; *Tucker v. Payne*, 44 La. Ann. 650, 11 So. 140.

Maine.—*Brown v. Veazie*, 25 Me. 359; *Matthews v. Light*, 32 Me. 305; *Smith v. Bodfish*, 27 Me. 289 (unless the defendant is a mere stranger without semblance of title); *Ladd v. Dickey*, 84 Me. 190, 24 Atl. 813; *Worthing v. Webster*, 45 Me. 270; *Libby v. Mayberry*, 80 Me. 137, 13 Atl. 577; *Phillips v. Sherman*, 61 Me. 548; *Wescott v. McDonald*, 22 Me. 402; *Howe v. Russell*, 36 Me. 115; *Phillips v. Phillips*, 40 Me. 160; *Rackliff v. Look*, 69 Me. 516.

Maryland.—*Polk v. Rose*, 25 Md.

153; *Dyer v. Boswell*, 39 Md. 465; *Alexander v. Walter*, 8 Gill. 239.

Massachusetts.—*Blossom v. Cannon*, 14 Mass. 177; *Burke v. Burke*, 170 Mass. 499, 49 N. E. 753; *Alvord v. Collin*, 20 Pick. 418.

Michigan.—*Scott v. Detroit Y. M. S.*, 1 Dougl. 119; *Latimer v. Lovett*, 2 Dougl. 204; *Ives v. Kimball*, 1 Mich. 308; *Farmers' & Merchants' Bank v. Bronson*, 14 Mich. 361; *Upton v. Kennedy*, 36 Mich. 215; *Taylor v. Deveau*, 100 Mich. 581, 59 N. W. 250; *McKinnon v. Meston*, 104 Mich. 642, 62 N. W. 1014; *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832. *But see* *Sibley v. Smith*, 2 Mich. 486, decided under Act of 1843 which provided that a tax deed executed under said act should be *prima facie* evidence of the regularity of all proceedings up to the date of the deed.

Minnesota.—*Greve v. Coffin*, 14 Minn. 263; *Bonham v. Weymouth*, 39 Minn. 92, 38 N. W. 805 (under Gen. Stats. 1866, c. 11, §§ 138, 156). *But see* *Broughton v. Sherman*, 21 Minn. 431.

Mississippi.—*Allen v. Poole*, 54 Miss. 323; *Ferrill v. Dickerson*, 63 Miss. 210; *French v. Ladd*, 57 Miss. 678; *Clymer v. Cameron*, 55 Miss. 593; *Dejarnett v. Haynes*, 1 Cushm. 600; *Vaughan v. Swayzie*, 56 Miss. 704; *Weathersby v. Thoma*, 57 Miss. 296; *Bennett v. Chaffe*, 69 Miss. 279, 13 So. 731.

Missouri.—*Bosworth v. Bryan*, 14 Mo. 575; *Morton v. Reeds*, 6 Mo. 64; *Reeds v. Morton*, 9 Mo. 878; *Moreau v. Detchemendy*, 41 Mo. 431.

New Hampshire.—*Waldron v. Tuttle*, 3 N. H. 340; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *Harvey v. Mitchell*, 31 N. H. 575.

New Jersey.—*Hopper v. Malleon*, 16 N. J. Eq. 382.

New York.—*Sharp v. Speir*, 4 Hill 76; *Leggett v. Rogers*, 9 Barb. 406; *Jackson v. Esty*, 7 Wend. 148; *Hubbell v. Weldon*, 141 Supp. 139; *Varick v. Tallman*, 2 Barb. 113; *Hoyt v. Dillon*, 19 Barb. 644; *Brown v. Goodwin*, 75 N. Y. 409; *Beekman v. Bigham*, 5 N. Y. 366; *Jackson v. Roberts*, 11 Wend. 422; *Hill v. Draper*, 10 Barb. 454; *Jackson v. Shepard*, 7 Cow. 88. *But see* *Curtiss*

v. Follett, 15 Barb. 337; *Brown v. Allen*, 10 N. Y. Supp. 714; *White v. Wheeler*, 4 N. Y. Supp. 405; *Finlay v. Cook*, 54 Barb. 9 (under Laws of 1855, p. 79, § 55 as amended by Laws of 1860, c. 209).

North Carolina. — *Martin v. Lucy*, 5 N. C. 311; *Love v. Gates*, 20 N. C. (4 Dev. & B.) 363; *Pentland v. Stewart*, 20 N. C. (4 Dev. & B.) 386; *Garrett v. White*, 38 N. C. (3 Ired. Eq.) 131; *Fox v. Stafford*, 90 N. C. 296; *Worth v. Simmons*, 121 N. C. 357, 28 S. E. 528; *Jordan v. Rouse*, 46 N. C. (1 Jones L.) 119; *Eastern Land, L. & Mfg. Co. v. State Board of Education*, 101 N. C. 35, 7 S. E. 573. *But see Peebles v. Taylor*, 118 N. C. 165, 24 S. E. 797; *Moore v. Byrd*, 118 N. C. 688, 23 S. E. 968.

Ohio. — *Jones v. Devore*, 8 Ohio St. 430; *Lessee of Thompson's Heirs v. Gotham*, 9 Ohio 170 (proof of notice and other preliminary steps must be made first); *Clark v. Southard*, 2 Ohio Dec. 612; *Holt's Lessee v. Hemphill*, 3 Ohio 232; *Carlisle's Lessee v. Longworth*, 5 Ohio 368. *But see Turney v. Yeoman*, 14 Ohio 207 (*holding* that an auditor's deed of land sold for taxes under the act of March 14, 1831, is *prima facie* proof of title and may be introduced as such without preliminary proof); *Garretson's Lessee v. Hart*, 1 Ohio Dec. 265; *Stanbery v. Sillon*, 13 Ohio St. 571 (*holding* that a county auditor's deed for land sold for taxes under Act of Feb. 23, 1824, is *prima facie* evidence of title); *Woodward v. Sloan*, 27 Ohio St. 592 (under Act of March 14, 1831).

Oregon. — *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26.

Pennsylvania. — *Blair's Lessee v. Caldwell*, 3 Yeates 284, (*holding* proof of assessment and advertisement must be made); *Blair v. Waggoner*, 2 Serg. & R. 472; *Stark v. Shupp*, 112 Pa. St. 395, 3 Atl. 864; *Birch v. Fisher*, 13 Serg. & R. 208; *Rockland & V. Coal & O. Co. v. McCalmont*, 72 Pa. St. 221; *Dikeman v. Parrish*, 6 Pa. St. 210 (except as against a mere intruder); *Johnston v. Jackson*, 70 Pa. St. 164; *Emery v. Harrison*, 13 Pa. St. 317; *Wheeler v. Winn*, 53 Pa. St. 122; *Troutman v. May*, 33 Pa. St. 455; *Crum v. Burke*, 25 Pa. St. 377; *Foust v. Ross*,

1 Watts & S. 501; *Huston v. Foster*, 1 Watts 477; *Foster v. McDivitt*, 9 Watts 341; *Shearer v. Woodburn*, 10 Pa. St. 511. *But see Huston v. Foster*, 1 Watts 477; *Hubley v. Keyser*, 2 Pen. & W. 496; *Coxe v. Derringer*, 82 Pa. St. 236 (*holding* that where the deed recites the performance of the steps required by the statute, no preliminary proof is necessary).

South Carolina. — *State v. Thompson*, 18 S. C. 538.

Tennessee. — *Johnson's Lessee v. Mills*, 3 Hayw. 38. *But see Brien v. O'Shaughnessy*, 3 Lea 724.

Texas. — *Kelly v. Medlin*, 26 Tex. 48; *Hadley v. Tankersley*, 8 Tex. 12; *Calder v. Ramsey*, 66 Tex. 218, 18 S. W. 502; *Pratt v. Jones*, 64 Tex. 694; *Bartley v. Harris*, 70 Tex. 181, 7 S. W. 797; *Yenda v. Wheeler*, 9 Tex. 408; *Robson v. Osborn*, 13 Tex. 298; *Hubbard v. Arnold*, 2 Posey 327; *Clayton v. Rehm*, 67 Tex. 52, 2 S. W. 45; *Fant v. Brannin*, 2 Posey 323; *Boyd v. Miller*, 22 Tex. Civ. App. 165, 54 S. W. 411.

Utah. — *Asper v. Moon*, 24 Utah 241, 67 Pac. 409; *Olsen v. Bagley*, 10 Utah 492, 37 Pac. 739.

Vermont. — *Hall v. Collins*, 4 Vt. 316; *Richardson v. Dorr*, 5 Vt. 9; *Judevine v. Jackson*, 18 Vt. 470; *Wing v. Hall*, 47 Vt. 182; *Downer v. Tarbell*, 61 Vt. 530, 17 Atl. 482; *Townsend v. Downer*, 32 Vt. 183; *May v. Wright*, 17 Vt. 97; *Reed v. Field*, 15 Vt. 672; *Bellows v. Elliot*, 12 Vt. 569.

Virginia. — *Chapman v. Bennett*, 2 Leigh 329; *Walton v. Hale*, 9 Gratt. 194; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Nalle v. Fenwick*, 4 Rand. 585; *Robinett v. Preston*, 4 Gratt. 141; *Christy v. Minor*, 4 Munf. 431. *But see Smith v. Chapman*, 10 Gratt. 445.

Wisconsin. — *Bridge v. Bracken*, 3 Pin. 73.

Where the Defendant Relies Upon the Deed. — The general rule is not applicable to one defending a title under a tax deed. *Garrick v. Chamberlain*, 97 Ill. 620.

A defendant claiming title under a tax deed not regular on its face, but not absolutely void, must show compliance with all the statutory requirements before it will be received in evidence. *Taylor v. Winona & St.*

and the assessment of the tax,⁵⁰ the notice,⁵¹ judgment and precept,⁵²

P. R. Co., 45 Minn. 66, 47 N. W. 453. *But see* Jones v. Miracle, 93 Ky. 639, 21 S. W. 241, which holds that the rule is equally applicable to a defendant in an action by the original owner to recover the land, since he is always in a position to be reimbursed and placed in *statu quo*, while the owner is liable to lose his property through the fraudulent or irregular conduct of the officer or purchaser.

50. *California*.—Pearson v. Creed, 69 Cal. 538, 11 Pac. 56.

Indiana.—Parker v. Smith, 4 Blackf. 70 (as to tax deeds under Statute of 1824; Mason v. Roe, 5 Blackf. 98; Doe v. M'Quilkin, 8 Blackf. 335; McEntire v. Brown, 28 Ind. 347; Earle v. Simons, 94 Ind. 573).

Louisiana.—Nancarrow v. Weathersbee, 6 Mart. N. S. 347; Smith v. Corcoran, 7 La. 46; Brady v. Offutt, 19 La. Ann. 184; Sutton v. Calhoun, 14 La. Ann. 209; Reeves v. Towles, 10 La. 276; Bonvous v. Brown, 11 La. Ann. 214.

Maine.—Phillips v. Phillips, 40 Me. 160.

Massachusetts.—Blossom v. Cannon, 14 Mass. 176.

Michigan.—Scott v. Detroit Y. M. S., 1 Dougl. 119; Taylor v. Devaux, 100 Mich. 581, 59 N. W. 250; McKinnon v. Meston, 104 Mich. 642, 62 N. W. 1014.

Minnesota.—Greve v. Coffin, 14 Minn. 345.

New York.—Rathbone v. Hooney, 58 N. Y. 468; Turner v. Boyce, 11 Misc. 502, 33 N. Y. Supp. 433.

North Carolina.—Jordan v. Rouse, 46 N. C. (1 Jones L.) 119.

Pennsylvania.—Blair's Lessee v. Caldwell, 3 Yeates 284; McDermott v. Hoffman, 70 Pa. St. 31; Stark v. Shupp, 112 Pa. St. 395, 3 Atl. 864.

Vermont.—Mix v. Whitelock, 1 Tyler 30.

But in Whitney v. Marshall, 17 Wis. 182, it was held that in an action by the original owner of land sold for delinquent taxes to recover possession from the holder of the tax deed, where such original owner had not had possession for three years after the tax deed was recorded, the

defendant may read the tax deed in evidence without proof that the proceedings in assessing and levying the taxes for which the land was sold were regular.

51. Johnson v. Harper, 107 Ala. 706, 18 So. 198; Gilbreath v. Dilday, 152 Ill. 207, 38 N. E. 572; Lessee of Thompson's Heirs v. Gotham, 9 Ohio 170; Blair's Lessee v. Caldwell, 3 Yeates (Pa.) 284 (advertisement must be shown); Blair v. Waggoner, 2 Serg. & R. (Pa.) 472.

52. *United States*.—Little v. Hernden, 10 Wall. 26.

Arkansas.—Bettison v. Budd, 17 Ark. 546.

California.—People v. Doe, 31 Cal. 220.

Georgia.—Shackleford v. Hooper, 65 Ga. 366.

Illinois.—Perry v. Burton, 126 Ill. 599, 18 N. E. 653; Gage v. Caraher, 125 Ill. 447, 17 N. E. 777; Eagan v. Connelly, 107 Ill. 458; Gilbreath v. Dilday, 152 Ill. 207, 38 N. E. 572; Gage v. Lightburn, 93 Ill. 248; Cottingham v. Springer, 88 Ill. 90; Williams v. Underhill, 58 Ill. 137; Buck v. Delafield, 55 Ill. 31; Wilding v. Horner, 50 Ill. 50; Elston v. Kennicott, 46 Ill. 187; Holbrook v. Dickinson, 46 Ill. 285; Baily v. Doolittle, 24 Ill. 577; Spellman v. Curtenius, 12 Ill. 409; Atkins v. Hinman, 7 Ill. 437; Hinman v. Pope, 6 Ill. 131; Smith v. Hutchinson, 108 Ill. 662.

Indiana.—Burt v. Hasselman, 139 Ind. 196, 38 N. E. 598; Parker v. Smith, 4 Blackf. 70; Morris v. Himle, 4 Blackf. 494.

Kentucky.—Terry v. Bleight, 3 T. B. Mon. 270.

Tennessee.—Johnson's Lessee v. Mills, 3 Hayw. 38.

Texas.—Houssels v. Taylor, 24 Tex. Civ. App. 72, 58 S. W. 190.

Virginia.—Miller v. Williams, 15 Gratt. 213.

The judgment recited in the deed must correspond to that introduced in evidence. Pitkin v. Yaw, 13 Ill. 251.

Even though the statute provides that a tax deed shall be conclusive evidence of title, the judgment on which the sale is based must be

the sale⁵³ and the authority of the officer who executed such deed.⁵⁴

Notice of Redemption Period.—It has also been held that before a tax deed can be received in evidence it must be shown that after the tax sale notice of the period provided by law for redemption was given to the party assessed⁵⁵ and that no redemption was made within such period.⁵⁶

Notice Presumed.—Other decisions hold that it will be presumed that proper notice was given, and that the burden is upon the party seeking to combat the deed as evidence of title to show lack of notice.⁵⁷ There are also decisions holding that tax deeds are in themselves and without other proof, evidence only of the facts which are therein recited,⁵⁸ or which the law requires to be recited therein,

shown in evidence before the deed is admissible to prove title. *Bolan v. Bolan*, 4 Nev. 150.

53. *Bradford v. Hall*, 36 Fed. 801; *Atkins v. Hinman*, 7 Ill. 437; *Phillips v. Phillips*, 40 Me. 160; *Bennett v. Chaffe*, 69 Miss. 279, 13 So. 731; *Inhabitants of Woodbridge v. State*, 43 N. J. L. 262; *Bolan v. Bolan*, 4 Nev. 150.

54. *United States*.—*Shearer v. Corbin*, 3 Fed. 705 (in Minnesota the authority of the county auditor to make the deed must first be shown); *Stead v. Course*, 4 Cranch 403.

Georgia.—*Shackleford v. Hooper*, 65 Ga. 366.

Illinois.—*Dukes v. Rowley*, 24 Ill. 210, 221.

Louisiana.—*Delaroderie v. Hillen*, 28 La. Ann. 537.

Minnesota.—*Madland v. Benland*, 24 Minn. 372; *Bonham v. Weymouth*, 39 Minn. 92, 38 N. W. 805.

New Hampshire.—*Harvey v. Mitchell*, 31 N. H. 575.

New York.—*Leggett v. Rogers*, 9 Barb. 406.

North Carolina.—*Jordan v. Rouse*, 46 N. C. (1 Jones L.) 119; *Love v. Gates*, 20 N. C. (4 Dev. & B.) 363; *Pentland v. Stewart*, 20 N. C. (4 Dev. & B.) 386.

Ohio.—*Carlisle v. Longworth*, 5 Ohio 368; *Jones v. Devore*, 8 Ohio St. 430.

Texas.—*Houston v. Washington*, 16 Tex. Civ. App. 504, 41 S. W. 135; *Earle v. Henrietta*, 91 Tex. 301, 43 S. W. 15; *Bartley v. Harris*, 70 Tex. 181, 7 S. W. 797; *Devine v. McCulloch*, 15 Tex. 488.

Virginia.—*Hobbs v. Shumates*, 11 Gratt. 516; *Flanagan v. Grimmet*, 10

Gratt. 421; *Rockbold v. Barnes*, 3 Rand. 473.

55. *United States*.—*Coulter v. Stafford*, 56 Fed. 564.

California.—*Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Miller v. Miller*, 96 Cal. 376, 31 Pac. 247.

Illinois.—*Holbrook v. Fellows*, 38 Ill. 440; *Wilson v. McKenna*, 52 Ill. 43; *Williams v. Underhill*, 58 Ill. 137.

Iowa.—*Wilson v. Crafts*, 56 Iowa 450, 9 N. W. 333; *Reed v. Thompson*, 56 Iowa 455, 9 N. W. 331.

Minnesota.—*Mueller v. Jackson*, 39 Minn. 431, 40 N. W. 565; *Nelson v. Central Land Co.*, 35 Minn. 408; *State v. Smith*, 36 Minn. 456.

New York.—*Westbrook v. Willey*, 47 N. Y. 457; *Hennessey v. Volkening*, 22 N. Y. Supp. 528.

Washington.—*Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414.

56. *Miller v. Miller*, 96 Cal. 376, 31 Pac. 247; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *Greve v. Coffin*, 14 Minn. 345; *Westbrook v. Willey*, 47 N. Y. 457; *Jackson v. Esty*, 7 Wend. (N. Y.) 148; *Beekman v. Bigham*, 5 N. Y. 366; *Doughty v. Hope*, 3 Denio (N. Y.) 594.

57. *Garmoe v. Sturgeon*, 65 Iowa 147, 21 N. W. 493; *Soukup v. Union Inv. Co.*, 84 Iowa 448, 51 N. W. 167; *Ostrander v. Darling*, 127 N. Y. 70, 27 N. E. 353, *affirming s. c.* 53 Hun 190, 6 N. Y. Supp. 718, 25 N. Y. St. 72 (two years after expiration of redemption).

58. *Gavin v. Shuman*, 23 Ind. 32; *Millikan v. Patterson*, 91 Ind. 515; *Bonnell v. Roane*, 20 Ark. 114.

and hence that before they can be received as evidence of title, all the essential preliminary steps leading up to a valid sale and which are not recited therein must be proved.⁵⁹

Tax Deeds Evidence in Themselves.—There are many decisions holding (generally under the provisions of some statute) that a deed of land sold by the state or a municipal corporation therein for taxes delinquent on such lands, when regular on its face,⁶⁰ executed by the proper officers,⁶¹ in compliance with the statute as to form and contents,⁶² and properly witnessed and acknowledged,⁶³ is in itself evidence of the title of the person named therein as grantee without proof of any of the preliminary proceedings essential to the valid execution of such deed.⁶⁴

59. *White v. Flynn*, 23 Ind. 46; *Latimer v. Lovett*, 2 Dougl. (Mich.) 204.

60. *Roberts v. Pillow*, 20 Fed. Cas. No. 11,909, *s. c. reversed* *Pillow v. Roberts*, 13 How. (U. S.) 472 (following the statutes of Arkansas); *O'Grady v. Barnhisel*, 23 Cal. 287 (under a statutory provision); *Hurley v. Woodruff*, 30 Iowa 260; *Taylor v. Winona & St. P. R. Co.*, 45 Minn. 66, 47 N. W. 453; *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69; *Bowman v. Cockrill*, 6 Kan. 311.

A tax deed regular on its face shows *prima facie* title in the purchaser. *Boehm v. Porter*, 54 Ark. 665, 17 S. W. 1.

A tax deed showing on the face that the sale was void is not evidence of title. *Allen v. Morse*, 72 Me. 502; *Cogel v. Raph*, 24 Minn. 194.

61. *Bolling v. Smith*, 79 Ala. 535 (under the code § 460; *Hickman v. Skinner*, 3 T. B. Mon. (Ky.) 210; *Sprague v. Pitt*, 1 Kan. 610, *McCahon* 212, 22 Fed. Cas. No. 13,254.

62. *Bolling v. Smith*, 79 Ala. 535; *Riddle v. Messer*, 84 Ala. 236, 4 So. 185; *Boehm v. Porter*, 54 Ark. 665, 17 S. W. 1; *O'Grady v. Barnhisel*, 23 Cal. 287; *Hurley v. Woodruff*, 30 Iowa 260; *Curtiss v. Follett*, 15 Barb. (N. Y.) 337; *Parker v. Bixby*, 2 Tyler (Vt.) 466.

63. *United States*.—*Sprague v. Pitt*, 1 Kan. 610, *McCahon*, 212, 22 Fed. Cas. No. 13,254.

Alabama.—*Riddle v. Messer*, 84 Ala. 236, 4 So. 185.

California.—*Wetherbee v. Dunn*, 32 Cal. 106.

Florida.—*Mundee v. Freeman*, 23 Fla. 529, 3 So. 153.

Illinois.—*Winstanley v. Meacham*, 58 Ill. 97.

Indiana.—*Wines v. Woods*, 109 Ind. 291, 10 N. E. 399; *Gabe v. Root*, 93 Ind. 256.

Maine.—*Dunn v. Snell*, 74 Me. 22.

Minnesota.—*Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781.

Mississippi.—*Day v. Day*, 59 Miss. 318.

Missouri.—*Dalton v. Fenn*, 40 Mo. 109; *Stierlin v. Daley*, 37 Mo. 483.

Nebraska.—*Sutton v. Stone*, 4 Neb. 319.

Vermont.—*Richardson v. Dorr*, 5 Vt. 9.

Wisconsin.—*Putney v. Cutler*, 54 Wis. 66, 11 N. W. 437.

64. *United States*.—*Ronkendorff v. Taylor*, 4 Pet. 349; *McQuain v. Meline*, 16 Fed. Cas. No. 8,923 (under the laws of Virginia); *Roberts v. Pillow*, *Hempst.* 624, 20 Fed. Cas. No. 11,909 (*reversed*, *Pillow v. Roberts*, 13 How. 472), (*Arkansas*); *Sprague v. Pitt*, 1 Kan. 610, *McCahon* 212, 22 Fed. Cas. No. 13,254.

Alabama.—*Bolling v. Smith*, 79 Ala. 535 (under § 460, Code); *Riddle v. Messer*, 84 Ala. 236, 4 So. 185 (under §§ 593 and 594 of the code).
Arkansas.—*Steadman v. Planters' Bank*, 7 Ark. 424 (in accordance with *Rev. Stat. c. 128*); *Boehm v. Porter*, 54 Ark. 665, 17 S. W. 1.

California.—*O'Grady v. Barnhisel*, 23 Cal. 287. *But see* *Keane v. Cannovan*, 21 Cal. 291; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356.

Illinois.—*Spellman v. Curtenius*,

12 Ill. 409; *Ransom v. Henderson*, 114 Ill. 528, 4 N. E. 141 under § 224. Revenue Law, 2 Starr. & C. Stats. 2101. (These cases have not been followed in most of the later Illinois decisions. See cases under VII, 1, notes 59, 62, 65.)

Indiana.—*Wines v. Woods*, 109 Ind. 291, 10 N. E. 399 (under the laws of Wisconsin).

Iowa.—*Hurley v. Woodruff*, 30 Iowa 260; *Allen v. Armstrong*, 16 Iowa 508 (under revision of 1860, § 784); *Mallory v. French*, 44 Iowa 133. *But see* *Scott v. Babcock*, 3 G. Gr. 133; *Rayburn v. Kuhl*, 10 Iowa 92, *holding* preliminary proof of the regularity of the proceedings necessary to render a tax deed admissible to prove title.

Kansas.—*Bowman v. Cockrill*, 6 Kan. 311; *Ide v. Finneran*, 29 Kan. 569; *Smith v. Hobbs*, 49 Kan. 800, 31 Pac. 687 (under Gen. Stat. 1889).

Kentucky.—*Bodley v. Hord*, 2 A. K. Marsh. 244; *Worthing v. Webster*, 45 Me. 270. *But see* *Taylor's Heirs v. Whiting's Heirs*, 2 B. Mon. 268 (*holding* that deeds made by United States Marshals for lands sold to satisfy the direct taxes due to the United States in 1873 are not evidence of title).

Michigan.—*Wright v. Dunham*, 13 Mich. 414 (under Rev. Stat. of 1846, § 109).

Minnesota.—*Baker v. Kelley*, 11 Minn. 480; *Ball v. Busch*, 64 Mich. 336, 31 N. W. 565 (unless the deed shows evidence of the invalidity upon its face). *But see* *Greve v. Coffin*, 14 Minn. 345 (*holding* that under the general statutes of 1866, c. 11, § 143, a party relying upon a tax deed as *prima facie* evidence of title must show, in case the land was assessed in the name of a person other than the rightful owner, that the taxes were not paid); *Bonham v. Weymouth*, 39 Minn. 92, 38 N. W. 805.

Mississippi.—*Virden v. Bowers*, 55 Miss. 1, *Hardie v. Chrisman*, 60 Miss. 671; *Chrisman v. Currie*, 60 Miss. 858; *Lochte v. Austin*, 69 Miss. 271, 13 So. 838. *But see* *Chamberlain v. Lawrence County Supervisors*, 71 Miss. 949, 15 So. 40, (*holding* that one seeking to introduce a tax deed to land sold under the Abatement

Act of March, 1875, must first show that the land was sold for taxes delinquent prior to 1874); *National Bank of the Republic v. Louisville, N. O. & T. R.*, 72 Miss. 447, 17 So. 7.

Missouri.—*Abbott v. Lindembower*, 46 Mo. 291 (under Gen. Stat. 1865, p. 127, §§ 111 and 112); *Raley v. Guinn*, 76 Mo. 263. *But see* *Moreau v. Detchemendy*, 41 Mo. 431 (*holding* that a tax deed from the state auditor, taken by itself, is insufficient to establish title).

New York.—*Curtiss v. Follett*, 15 Barb. 337; *Brown v. Allen*, 57 Hun 219, 10 N. Y. Supp. 714; *Finlay v. Cook*, 54 Barb. 9 (under laws of 1855, p. 79).

North Carolina.—*Peebles v. Taylor*, 118 N. C. 165, 24 S. E. 797; *Moore v. Byrd*, 118 N. C. 688, 23 S. E. 968.

Ohio.—*Turney v. Yeoman*, 14 Ohio 207 (under Act of March 14, 1831); *Garettson's Lessee v. Hart*, 1 Ohio Dec. 265; *Stanbery v. Sillon*, 13 Ohio St. 571 (under Act of Feb. 23, 1824); *Woodward v. Sloan*, 27 Ohio St. 592.

Pennsylvania.—*Hubley v. Keyser*, 2 Pen. & W. 496; *Cox v. Deringer*, 82 Pa. St. 236. *But see* *Blair's Lessee v. Caldwell*, 3 Yeates 284; *Blair v. Waggoner*, 2 Serg. & R. 472; *Stark v. Shupp*, 112 Pa. St. 395, 3 Atl. 864 (all *holding* such deed inadmissible to prove title without preliminary proof of the regularity of the proceedings).

South Carolina.—*State v. Thompson*, 18 S. C. 538 (under Act of March, 1874, § 116); *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330.

Tennessee.—*Brien v. O'Shaughnessy*, 3 Lea 724.

Virginia.—*Smith v. Chapman*, 10 Gratt. 445. *But see* *Chapman v. Bennett*, 2 Leigh. 329; *Walton v. Hale*, 9 Gratt. 194; *Reusons v. Lawson*, 91 Va. 226, 21 S. E. 347.

Vermont.—*Brown v. Wright*, 17 Vt. 97.

Washington.—*Ward v. Huggins*, 7 Wash. 617, 36 Pac. 285, 32 Pac. 740, 1015 (under Laws of 1875, p. 72, § 41).

A tax deed regular on its face is competent evidence of title without any preliminary proof. *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69.

Prima Facie Evidence Only.—Generally where tax deeds are held to be evidence of title they are held to be only *prima facie* evidence thereof⁶⁵ which may be rebutted by showing that the statutory re-

But see Bonnell v. Roane, 20 Ark. 114 holding that, under Gould's Digest, c. 170, § 5, a tax-deed being made evidence only of the facts therein recited, all other necessary preliminary facts must be shown to exist before the deed can be received as evidence of title.

A tax deed properly acknowledged is admissible as evidence of title without further proof. Wetherbee v. Dunn, 32 Cal. 106.

Such a deed is admissible in the courts of another state to prove title. Watson v. Atwood, 25 Conn. 313.

The legislature has the power to make a tax deed *prima facie* evidence of title. Sams v. King, 18 Fla. 557.

A deed executed by the auditor under the Revenue Act of 1829 is admissible as evidence of title without further proof. Vance v. Schuyler, 6 Ill. 160; Grave v. Bruen, 6 Ill. 167, and Messinger v. Germain, 6 Ill. 631.

Under Minnesota Gen. Stat. of 1886, c. 11, §§ 139 and 140, a tax deed is sufficient to establish a *prima facie* title. Broughton v. Sherman, 21 Minn. 431.

The deed must show on its face that the tax sale was made by one having authority at law. Cogel v. Rapp, 24 Minn. 194.

It is only necessary to show that the tax sale was directed by the state auditor. Madland v. Benland, 24 Minn. 372.

The production of the tax deed, without showing non-payment of the tax by the owner, is sufficient to prove title. White v. Wheeler, 51 Hun 573, 4 N. Y. Supp. 405.

As against a mere intruder, a tax deed is admissible as evidence of title without any preliminary proof. Dikeman v. Parrish, 6 Pa. St. 210; Troutman v. May, 33 Pa. St. 455; Crum v. Burke, 25 Pa. St. 377.

A tax deed is evidence of title where the statute of limitations has run in its favor. Whitney v. Marshall, 17 Wis. 174.

Under the tax law of Ohio (laws of 1829-31, p. 288) no proof of the

preliminary proceedings is required. Lamb v. Gillett, 6 McLean 365, 14 Fed. Cas. No. 8,016.

65. *United States.*—Roberts v. Pillow, Hempst. 624, 20 Fed. Cas. No. 11,909 (*s. c.* 13 How 472); Sprague v. Pitt, 1 Kan. 610, McCahon 212, 22 Fed. Cas. No. 13,254.

Alabama.—Bolling v. Smith, 79 Ala. 535; Riddle v. Messer, 84 Ala. 236, 4 So. 185.

Arkansas.—Boehm v. Porter, 54 Ark. 665, 17 S. W. 1.

California.—O'Grady v. Barnhisel, 23 Cal. 287.

Illinois.—Spellman v. Curtenius, 12 Ill. 409; Ransom v. Henderson, 114 Ill. 528, 4 N. E. 141.

Kansas.—Bowman v. Cockrill, 6 Kan. 311; Ide v. Finneran, 29 Kan. 569; Smith v. Hobbs, 49 Kan. 800, 31 Pac. 687.

Kentucky.—Bodley v. Hord, 2 A. K. Marsh. 244.

Michigan.—Wright v. Dunham, 13 Mich. 414.

Minnesota.—Baker v. Kelley, 11 Minn. 480; Flint v. Webb, 25 Minn. 93; Broughton v. Sherman, 21 Minn. 431.

Mississippi.—Virden v. Bowers, 55 Miss. 1; Hardie v. Chrisman, 60 Miss. 671; Lochte v. Austin, 69 Miss. 271, 13 So. 838.

Missouri.—Abbott v. Lindembower, 46 Mo. 291.

New York.—Curtiss v. Follett, 15 Barb. 337; Brown v. Allen, 57 Hun 219, 10 N. Y. Supp. 714.

Ohio.—Garettson's Lessees v. Hart, 1 Ohio Dec. 265; Turney v. Yeoman, 14 Ohio 207; Stanbery v. Sillon, 13 Ohio St. 571; Woodward v. Sloan, 27 Ohio St. 592.

South Carolina.—State v. Thompson, 18 S. C. 538; Bull v. Kirk, 37 S. C. 395, 16 S. E. 151.

Vermont.—Parker v. Bixby, 2 Tyler, 466.

Wisconsin.—Whitney v. Marshall, 17 Wis. 174.

Where a statute making such deed conclusive evidence has been declared to be unconstitutional, it is *prima*

quirements for valid sales for delinquent taxes have not been complied with,⁶⁶ and this is the general rule even where a statute makes tax deeds conclusive evidence of title, it being held that the legislature has no power to deprive a party of the right to show any invalidity in the proceedings, whereby he may have been deprived of property without notice or due process.⁶⁷

Tax Deeds as Conclusive Evidence.—Some of the decisions, however, have upheld laws making tax deeds conclusive evidence of

facie evidence. *Hurley v. Woodruff*, 30 Iowa 260.

Conclusive Evidence.—A tax deed to land in Wisconsin, in accordance with the statutes of that state, is conclusive evidence of title in the grantee after the lapse of the period of limitation, the land being in the constructive possession of the grantee named in such tax deed. *Bronson v. St. Croix Lumb. Co.*, 44 Minn. 348, 46 N. W. 570.

66. *United States.*—*Williams v. Kirtland*, 13 Wall. 306; *Martin v. Barbour*, 140 U. S. 634, *affirming s. c.*, 34 Fed. 701.

Mississippi.—*Virden v. Bowers*, 55 Miss. 1; *Greene v. Williams*, 58 Miss. 752.

New York.—*Joslyn v. Rockwell*, 13 N. Y. Supp. 311, 35 N. Y. St. 888 (*s. c. affirmed* in 128 N. Y. 334, 28 N. E. 604).

Ohio.—*Woodward v. Sloan*, 27 Ohio St. 592.

South Carolina.—*Bull v. Kirk*, 37 S. C. 395, 16 S. E. 151.

Texas.—*McPhail v. Burris*, 42 Tex. 142.

67. *United States.*—*Bannon v. Burns*, 39 Fed. 892; *Marx v. Hanthorn*, 148 U. S. 172, *affirming s. c.* 30 Fed. 579; *Lamb v. Farrell*, 21 Fed. 5; *Daniels v. Case*, 45 Fed. 843.

Alabama.—*Doe ex dem. Davis v. Minge*, 56 Ala. 121; *Stoudenmire v. Brown*, 48 Ala. 699.

California.—*Cooper v. Shepardson*, 51 Cal. 298; *People v. Doe*, 31 Cal. 220.

Illinois.—*Curry v. Hinman*, 11 Ill. 420.

Indiana.—*Gavin v. Shuman*, 23 Ind. 32.

Iowa.—*Gardner v. Early*, 69 Iowa 42, 28 N. W. 427; *Martin v. Cole*, 38 Iowa 141; *Immegart v. Gorgas*, 41 Iowa 439; *McCready v. Sexton*, 29

Iowa 356; *Powers v. Fuller*, 30 Iowa 476; *Allen v. Armstrong*, 16 Iowa 508; *Butler v. Delano*, 42 Iowa 350.

Louisiana.—*In re Lake*, 40 La. Ann. 142, 3 So. 479.

Mississippi.—*Dingey v. Paxton*, 60 Miss. 1038; *Powers v. Penny*, 59 Miss. 5; *Davis v. Vanarsdale*, 59 Miss. 367; *Vaughan v. Swayzie*, 56 Miss. 704; *Harkreader v. Clayton*, 56 Miss. 383; *Stovall v. Connor*, 58 Miss. 138; *Smith v. Nelson*, 57 Miss. 138; *McLeod v. Burkhalter*, 57 Miss. 65; *Mead v. Day*, 54 Miss. 58; *McGehee v. Martin*, 53 Miss. 519; *Griffin v. Ellis*, 63 Miss. 348.

Missouri.—*Cook v. Hacklemann*, 45 Mo. 317; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528; *Abbott v. Lindenbower*, 42 Mo. 162, *s. c.* 46 Mo. 291.

Nevada.—*Bolan v. Bolan*, 4 Nev. 150.

New York.—*Jackson v. Morse*, 18 Johns. 441; *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604; *Wallace v. International Paper Co.*, 53 App. Div. 41, 65 N. Y. Supp. 543.

North Dakota.—*Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049.

Oklahoma.—*Wilson v. Wood*, 10 Okla. 279, 61 Pac. 1045.

Oregon.—*Harris v. Harsch*, 29 Or. 562, 46 Pac. 141; *Strode v. Washer*, 17 Or. 50, 16 Pac. 926.

Texas.—*Eustis v. Henrietta*, 91 Tex. 325, 43 S. W. 259; *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340.

The provisions of 3 How. Ann. Stat. of Michigan, § 1170, g6, that tax deeds shall be conclusive evidence of title, apply only when the right to execute the tax deed is shown by proof of a valid decree. *Taylor v. Deveaux*, 100 Mich. 581, 59 N. W. 250; *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 997 and *McKin-*

title,⁶⁸ and the constitutionality of statutes making tax deeds *prima facie* evidence of title has been uniformly upheld.⁶⁹

2. As Against Mere Intruders.—As against a mere intruder or trespasser without color of title, a tax deed valid upon its face is always sufficient evidence of title.⁷⁰

non v. Meston, 104 Mich. 642, 62 N. W. 1014.

The invalidity of an assessment against the owner, as a non-resident, of land actually occupied, and a sale for taxes, part of which were assessed against another parcel of land, may be shown as against a tax deed, in spite of a statutory provision that such deeds shall be conclusive evidence of title after two years from their record. *Turner v. Boyce*, 11 Misc. 502, 33 N. Y. Supp. 433.

68. *Lord v. Milwaukee & M. R. Co.*, 17 Wis. 588, 15 Fed. Cas. No. 8,507; *People v. Turner*, 145 N. Y. 451, 40 N. E. 400; *Supervisors v. Betts*, 53 Hun 638, 6 N. Y. Supp. 934; *Allen v. Armstrong*, 16 Iowa 508; *Bronson v. St. Croix Lumb. Co.*, 44 Minn. 348, 16 N. W. 570.

In *Smith v. Cleveland*, 17 Wis. 556, where the law provided that a tax deed should not be executed until after the expiration of three years from the date of the sale, a law making the tax deed conclusive evidence of title was upheld upon the ground that such a statute was in effect a statute of limitations, and that pending the three-year period all questions as to validity of the proceedings were open to investigation.

The legislature may constitutionally make a tax deed conclusive evidence of title. *Rima v. Cowan*, 31 Iowa 125.

69. *United States v. Pillow v. Roberts*, 13 How. 476 (Arkansas statute); *Marx v. Hanthorn*, 148 U. S. 182.

Alabama.—*Stoudenmire v. Brown*, 48 Ala. 699.

California.—*Clarke v. Mead*, 102 Cal. 516, 36 Pac. 862; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71.

Florida.—*Sams v. King*, 18 Fla. 557.

Iowa.—*Allen v. Armstrong*, 16 Iowa 508.

Michigan.—*Groesbeck v. Seeley*, 13 Mich. 329, 340.

Mississippi.—*Cowan v. McCutchen*, 43 Miss. 207; *Belcher v. Mhoon*, 47 Miss. 613.

Missouri.—*Cook v. Hacklemann*, 45 Mo. 317; *Abbott v. Lindenbower*, 42 Mo. 162.

New York.—*Hand v. Ballou*, 12 N. Y. 541; *Board of Supervisors v. Betts*, 53 Hun 638, 6 N. Y. Supp. 934; *Hickox v. Tallman*, 38 Barb. 608; *White v. Wheeler*, 51 Hun 573, 4 N. Y. Supp. 405.

North Carolina.—*Kelly v. Craig*, 27 N. C. (5 Ired. L.) 129.

Pennsylvania.—*M'Call v. Lorimer*, 4 Watts 351.

Virginia.—*Nalle v. Fenwick*, 4 Rand. 585.

Washington.—*State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119.

Wisconsin.—*Smith v. Cleveland*, 17 Wis. 556; *Delaplaine v. Cook*, 7 Wis. 44; *Lumsden v. Cross*, 10 Wis. 282.

70. *Louisiana*.—*Stille v. Shull*, 41 La. Ann. 816, 6 So. 634.

Maine.—*Smith v. Bodfish*, 27 Me. 289.

Mississippi.—*Dejarnett v. Haynes*, 1 Cushm. 600.

New York.—*Thompson v. Burhans*, 61 Barb. 260.

Pennsylvania.—*Dikeman v. Parrish*, 6 Pa. St. 210; *Troutman v. May*, 33 Pa. St. 455; *Crum v. Burke*, 25 Pa. St. 377; *Foust v. Ross*, 1 Watts & S. 501; *Foster v. McDavit*, 9 Watts 341.

But in *McLeod v. Brooks Lumb. Co.*, 98 Ga. 253, 26 S. E. 745, it was held that a tax deed in pursuance of a sale under a tax execution *in personam* is not sufficient evidence of title in the grantee named therein to warrant an injunction against even a trespasser, without evidence of title in the execution defendant, or at

3. Incomplete or Invalid Tax Deeds.—A tax deed which fails to comply with the requirements of the statute, as by omitting proper recitals showing the authority of the officer to execute it, or which for any other reason appears to be void on its face, is of course not admissible as evidence of title,⁷¹ nor will parol evidence be admitted for the purpose of explaining or accounting for its apparent invalidity and thus rendering it admissible.⁷² But if the defect in the deed is not one making it appear void, but merely voidable, it is not, by reason of such defect, inadmissible,⁷³ but it must be accompanied by supplemental evidence of the facts which it omits to recite.⁷⁴

VI. JUDGMENTS.

1. Res Inter Alios.—A judgment rendered in another action, to which neither the adverse party in the present action nor the persons through whom he claims were parties is not in itself evidence of the title of the party seeking to introduce it, as such evidence is

least such possession by him as would raise an inference of title.

71. United States.—Johnston v. Sutton, 45 Fed. 296.

Alabama.—Reddick v. Long, 124 Ala. 260, 27 So. 402.

Arkansas.—Hogins v. Brashears, 13 Ark. 242; Merrick v. Hutt, 15 Ark. 331; Twombly v. Kimbrough, 24 Ark. 459.

California.—Ferris v. Coover, 10 Cal. 589; Kelsey v. Abbott, 13 Cal. 609; O'Grady v. Barnhisel, 23 Cal. 287; Hubbell v. Campbell, 56 Cal. 527.

Florida.—Mundee v. Freeman, 23 Fla. 529, 3 So. 153.

Georgia.—Bedgood v. McLain, 89 Ga. 793, 15 S. E. 670.

Louisiana.—Reeves v. Towles, 10 La. 276.

Maine.—Wiggin v. Temple, 73 Me. 380; Allen v. Morse, 72 Me. 502; Orono v. Veazie, 57 Me. 517.

Michigan.—Ball v. Busch, 64 Mich. 336, 31 N. W. 565.

Minnesota.—Cogel v. Raph, 24 Minn. 194; Taylor v. Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453; Sheehy v. Hinds, 27 Minn. 259, 6 N. W. 781; Farnham v. Jones, 32 Minn. 7, 19 N. W. 83.

Missouri.—Loring v. Groomer, 142 Mo. 1, 43 S. W. 647; Burden v. Taylor, 124 Mo. 12, 27 S. W. 349; Duff v. Neilson, 90 Mo. 93, 2 S. W. 222; State v. Mantz, 62 Mo. 258.

Nebraska.—Merriam v. Dovey, 25 Neb. 618, 41 N. W. 550; Haller v. Blaco, 10 Neb. 36, 4 N. W. 362.

Ohio.—Woodward v. Sloan, 27 Ohio St. 592.

Tennessee.—Hightower v. Freedle, 5 Sneed 312.

Texas.—Kelly v. Medlin, 26 Tex. 48; Kilpatrick v. Sisneros, 23 Tex. 113.

72. Burden v. Taylor, 124 Mo. 12, 27 S. W. 349.

73. Clark v. Ellithorp, 9 Kan. App. 503, 59 Pac. 286.

74. Alabama.—Riddle v. Messer, 84 Ala. 236, 4 So. 185.

Arizona.—Hereford v. O'Connor, Ariz. 258, 52 Pac. 471.

Arkansas.—Lawrence v. Zimpleman, 37 Ark. 643; Jacks v. Chaffin, 34 Ark. 534; Gossett v. Kent, 19 Ark. 602; Bonnell v. Roane, 20 Ark. 114; Bettison v. Budd, 17 Ark. 546; Budd v. Bettison, 21 Ark. 582.

California.—Pierce v. Low, 51 Cal. 580; Wetherbee v. Dunn, 32 Cal. 106; Moss v. Shear, 25 Cal. 38.

Indiana.—Ward v. Montgomery, 57 Ind. 276; Steeple v. Downing, 60 Ind. 478; Keepfer v. Force, 86 Ind. 81; Farrar v. Clark, 85 Ind. 449; Woolen v. Rockafeller, 81 Ind. 208, 213; Langohr v. Smith, 81 Ind. 495; Bender v. Stewart, 75 Ind. 88; Smith v. Kyler, 74 Ind. 575.

Maine.—Nason v. Ricker, 63 Me. 381.

regarded as *res inter alios*,⁷⁵ nor is a judgment in favor of one through whom a party does not claim title, admissible as evidence of title in rebuttal, although the adverse party was a party defendant in the action in which such judgment was rendered.⁷⁶

Minnesota.—Taylor v. Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453.

Missouri.—State v. Mantz, 62 Mo. 258.

New Jersey.—Woodbridge v. State, 43 N. J. L. 262.

⁷⁵ *Alabama*.—Johnson v. Marshall, 34 Ala. 522, Steele v. Tutwiler, 57 Ala. 113.

California.—Bracia v. Nelson, 42 Cal. 107; Enos v. Cook, 65 Cal. 175, 3 Pac. 632.

Georgia.—Bond v. Whitfield, 32 Ga. 215.

Illinois.—Whitaker v. Wheeler, 44 Ill. 440; Woodward v. Woodward, 14 Ill. 370 (award of arbitrators).

Iowa.—Corbin v. Minchen, 81 Iowa 682, 47 N. W. 879.

Kentucky.—McClary v. Bowmar, 3 Litt. 248.

Louisiana.—Levy v. Landry, 46 La. Ann. 1360, 16 So. 188; Sophie v. Duplessis, 2 La. Ann. 724; Chamberlain v. New Orleans, 48 La. Ann. 1055, 20 So. 169.

Maine.—Sheldon v. White, 35 Me. 233.

Minnesota.—Morin v. St. Paul M. & M. R., 33 Minn. 176, 22 N. W. 251.

Missouri.—Cravens v. Jameson, 59 Mo. 68.

New York.—Dingley v. Bon, 130 N. Y. 607, 29 N. E. 1023, *affirming* s. c. 55 Hun 610; 8 N. Y. Supp. 935. *But see* Railroad Equit. Co. v. Blair, 145 N. Y. 607, 39 N. E. 962, (*holding* that a judgment in a former action which invested the plaintiff with all the right, title and interest of the defendant therein is admissible to prove title as against a defendant not a party to such action).

Oregon.—Lattie-Morrison v. Holladay, 27 Or. 175, 39 Pac. 1100.

South Carolina.—Warren v. Simon, 16 S. C. 362; Gist v. McJunkin, 1 Speers, 157; Wardlaw v. Hammond, 9 Rich. L. 454.

Texas.—Ellis v. Le Bow, 96 Tex.

532, 74 S. W. 528; Pratt v. Jones, 64 Tex. 694; Colman v. Reavis (Tex. Civ. App.), 34 S. W. 645. *But see* Thornton v. Murray, 50 Tex. 161, (*holding* that a divorce decree, awarding to the wife a homestead in another county is admissible as evidence of title in defense of a suit by a party in possession seeking an injunction against the execution of a writ of possession under such decree).

Vermont.—Tarbell v. Tarbell, 57 Vt. 452.

Virginia.—Duncan v. Helms, 8 Gratt. 68, (not even *prima facie* evidence); Lovell v. Arnold, 2 Munf. 167; Hunter v. Jones, 6 Rand. 541.

Wisconsin.—Bailey v. O'Donnell, 77 Wis. 677, 46 N. W. 876.

A judgment establishing priorities under the irrigation acts of 1879 and 1881 is not *res adjudicata* as to a party on whom service was not had in the proceedings, and hence is not evidence of title in an action against him. Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

Where the plaintiff in an ejectment suit claims title as the grantee of certain parties alleged to be the sole heirs of the original patentee of the land, and the defendant claims under another person as heir of such patentee, the judgment in a suit in which such alleged sole heirs recovered other land as the sole heirs of such patentee as against a third person, is not admissible against the defendant who was not a party to that action. Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364.

The record and judgment in a former action in ejectment is not admissible as evidence of title in a subsequent action of ejectment by the same plaintiff against different defendants not privies of the defendants in the first action. Bradford v. Knowles, 78 Tex. 109, 14 S. W. 307.

⁷⁶ Fogg v. Plummer, 17 N. H. 112.

2. As a Link of Title. — A judgment, however, which is merely offered as a document connected with the title to be proved, or as a link in the chain of title, is admissible as such even as against one who was not a party to the action in which it was rendered.⁷⁷ This

^{77.} *England*. — *Davies v. Lowndes*, 1 Bing. N. C. 597, 4 L. G. C. P. 214, 2 Scott 90, 27 E. C. L. 504.

United States. — *Webb v. Weatherhead*, 17 How. 576.

Alabama. — *Steele v. Tutwiler*, 57 Ala. 113; *Bumpass v. Webb*, 3 Ala. 109.

Connecticut. — *Fowler v. Savage*, 3 Conn. 90.

Georgia. — *Bussey v. Dodge*, 94 Ga. 584, 21 S. E. 151; *Clayton v. Roe*, 36 Ga. 321.

Illinois. — *Delano v. Bennett*, 90 Ill. 533; *Hill v. Reitz*, 24 Ill. App. 391.

Maryland. — *House v. Wiles*, 12 Gill & J. 338.

Massachusetts. — *Chamberlain v. Bradley*, 101 Mass. 188.

New York. — *Railroad Equip. Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962; *Bowe v. McNab*, 11 App. Div. 386, 42 N. Y. Supp. 938; *Skelly v. Jones*, 33 Misc. 304, 68 N. Y. Supp. 422.

North Carolina. — *Finch v. Finch*, 131 N. C. 271, 42 S. E. 615.

Ohio. — *Little v. Eureka Ins. Co.*, 5 Ohio Dec. 285.

Pennsylvania. — *Hartman v. Stahl*, 2 Pen. & W. 223.

Rhode Island. — *Glezen v. Haskins*, 23 R. I. 601, 51 Atl. 219.

South Carolina. — *Hall v. Carruth*, 1 McCord 507; *Wardlaw v. Hammond*, 9 Rich. L. 454; *Turfin v. Brannon*, 3 McCord 261.

Texas. — *Thornton v. Murray*, 50 Tex. 161; *Ellis v. Le Bow*, 96 Tex. 532, 74 S. W. 528. *But see* *Colman v. Reavis* (Tex. Civ. App.), 34 S. W. 645, and *House v. Reavis*, (Tex. Civ. App.), 34 S. W. 646, which hold that the plaintiff in an action of trespass to try title cannot supply a hiatus in his chain of title by introducing a judgment rendered in an action to which neither the defendant nor the grantor under whom he claims was a party and which did not involve the question at issue between the plaintiff and the defendant.

Virginia. — *Building L. & W. Co.*

v. Fray, 95 Va. 559, 32 S. E. 58; *Masters v. Varner*, 5 Gratt. 168; *Hunter v. Jones*, 6 Rand. 541.

The rule that judgments are not evidence of title except in actions between parties and privies, does not apply where a judgment is offered not as binding *per se* but only as a document connected with the chain of title of the party offering it. *Barney v. Patterson's Lessee*, 6 Har. & J. (Md.) 182; *Barr v. Gratz Heirs*, 4 Wheat. (U. S.) 213.

Where the defendant to an action to recover a mining claim pleads abandonment of said claim by plaintiff by way of defense, a judgment recovered by the plaintiff in an action by him against a third party for recovery of the same claim is admissible in rebuttal as evidence of his title as tending to show his non-abandonment of the claim. *Richardson v. McNulty*, 24 Cal. 339.

A decree in partition is admissible as against a person not a party to the action in which it was rendered as a link in the chain of title of the party claiming thereunder. *Gage v. Goudy* (Ill.), 29 N. E. 896, *s. c.* 141 Ill. 215, 30 N. E. 320.

A judgment changing the ownership of property is admissible to prove title in the same manner as a private writing, although the parties in the two actions were not the same. *Snapp v. Courtfield*, 14 La. Ann. 405.

A judgment of a probate court relating to the title of land is as much a link in the chain of title as a conveyance. *Kurtz v. St. Paul & D. R. Co.*, 61 Minn. 18, 63 N. W. 1.

In an action to try the title to personal property in which the defendant claims under an execution, the judgment upon which such execution was issued is admissible as the foundation of his title. *Martin v. Rutt*, 127 Pa. St. 380, 17 Atl. 993.

The record in a suit in chancery is admissible to prove a link in the chain of title although the adverse party was not a party to such suit.

latter rule has particular application to judgments in partition, or of foreclosure of mortgage, probate decrees, and generally to such judgments as operate to transfer title; and it does not apply to judgments in ordinary actions to determine adverse claims of other natures.⁷⁸

VII. ADMISSIONS.

1. By Claimants. — Admissions made by a party asserting a title in himself or attacking the title of another to either real⁷⁹ or personal⁸⁰ property, amounting to a disclaimer of his own or a ratification of another's claim of title, are admissible as evidence in an attack upon his claim of title, provided there is a claim of title shown in the party in whose favor such admissions were made.⁸¹ Evidence

Baylor's Lessee v. Dejarnette, 13 Gratt. (Va.) 152.

78. *Colorado.* — *Nichols v. McIntosh* 19 Colo. 22, 34 Pac. 278 (adjudication of priorities under the irrigation acts of 1879 and 1881).

Georgia. — *Bond v. Whitefield*, 32 Ga. 215 (decree establishing a copy of a lost instrument).

Illinois. — *Woodward v. Woodward*, 14 Ill. 370 (award of arbitrators). *Whitaker v. Wheeler*, 44 Ill. 440.

Louisiana. — *Sophie v. Duplessis*, 2 La. Ann. 724 (decree of a probate court ordering a will to be executed); *Snapp v. Porterfield*, 14 La. Ann. 405; *Levy v. Landry*, 46 La. Ann. 1360, 16 So. 188 (judgment reinstating a record); *Chamberlain v. New Orleans*, 48 La. Ann. 1055, 20 So. 169 (an order of the probate court recognizing certain persons as heirs of a decedent).

Maine. — *Sheldon v. White*, 35 Me. 233.

The rule applies as to such judgments as operate to transfer title or to render valid a link in the chain of title which without such judgment would be invalid. *Minnesota Debiture Co. v. Johnson*, 94 Minn. 150, 102 N. W. 381.

79. *Alabama.* — *Arthur v. Gayle*, 38 Ala. 259.

Arizona. — *Costello v. Graham*, 80 Pac. 336.

Kentucky. — *Graves v. Graves*, 3 Metc. 167; *Parker v. Hill*, 8 Metc. 447.

New Hampshire. — *Perkins v. Towle*, 59 N. H. 583.

North Carolina. — *Curlee v. Smith*, 91 N. C. 172.

Pennsylvania. — *Vankirk v. Clark*, 16 Serg. & R. 286.

Texas. — *Ellis v. Stone*, 4 Tex. Civ. App. 157, 23 S. W. 405; *Flores v. Maverick* (Tex. Civ. App.), 26 S. W. 316.

Contra. — The confession of a party to a real action that he had previously conveyed his right in the property is not admissible. *Barnard v. Pope*, 14 Mass. 434.

80. *Arkansas.* — *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425.

California. — *Burlingame v. Rowland*, 77 Cal. 315, 19 Pac. 526.

Georgia. — *Reeves v. Matthews*, 17 Ga. 449; *Roberts v. Neal*, 62 Ga. 163; *Munnerlyn v. Augusta Sav. Bank*, 94 Ga. 356, 21 S. E. 575.

Illinois. — *Waggoner v. Cooley*, 17 Ill. 239.

Minnesota. — *Olson v. Swensen*, 53 Minn. 516, 55 N. W. 596.

Missouri. — *Cavin v. Smith*, 24 Mo. 221.

New Jersey. — *Glenn v. Garrison*, 17 N. J. L. 1.

New York. — *Kimball v. Huntington*, 10 Wend. 675.

Pennsylvania. — *Schwartz v. Hersker*, 140 Pa. St. 550, 21 Atl. 401.

South Carolina. — *Renwick v. Renwick*, 9 Rich. L. 50.

Texas. — *Extence v. Stewart* (Tex. Civ. App.), 26 S. W. 896.

Virginia. — *Smith v. Towne*, 4 Munf. 191; *Fowler v. Lee*, 4 Munf. 373.

81. Such admissions are not admissible to divest a party of his legal title where there is no title shown in the party in whose favor such admissions were made, independent of such

of a person's tacit admission of ownership of personal property is competent as tending to prove his title thereto in an action against him, or where such evidence is not sought to be introduced by him to establish his own title.⁸²

2. By Vendors. — Generally speaking, a party setting up title to real property is bound by the admissions of those under whom he claims,⁸³ when such admissions were made while the party making them was in possession of the property in question⁸⁴ or in the presence of the vendee, before the latter parted with the consideration.⁸⁵

Admissions of Third Party. — Where a defendant in an action involving title to real property relies upon a paramount title in a third party, admissions of such third party disclaiming title are competent evidence in behalf of the plaintiff;⁸⁶ but where the action is one wherein it is sought to establish title as against a third party, ad-

missions. *Jackson v. Anderson*, 4 Wend. (N. Y.) 474.

82. *Poullain v. Poullain*, 76 Ga. 420; *Hoellerer v. Kaplan*, 19 Misc. 539, 43 N. Y. Supp. 1035; *Fort Worth City Nat. Bank v. Martin* (Tex.), 8 S. W. 507 (a promissory note).

83. *Alabama.* — *Fralick v. Presley*, 29 Ala. 457.

California. — *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.

Connecticut. — *Smith v. Martin*, 17 Conn. 399; *Rogers v. Moore*, 10 Conn. 13.

Georgia. — *Meek v. Holton*, 22 Ga. 491; *Wood v. McGuire*, 15 Ga. 202; *Maxwell v. Harrison*, 8 Ga. 61.

Illinois. — *Mueller v. Rebhan*, 94 Ill. 142.

Louisiana. — *Leefe v. Walker*, 18 La. 1.

Maryland. — *Dorsey v. Dorsey*, 3 Har. & J. 410; *Keener v. Kauffman*, 16 Md. 296; *Richards v. Swan*, 7 Gill. 366.

Massachusetts. — *Hyde v. Middlesex*, 68 Mass. 267.

Nebraska. — *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836.

New Hampshire. — *Adams v. French*, 2 N. H. 387.

New Jersey. — *Homer v. Stillwell*, 35 N. J. L. 307.

New York. — *Jackson v. Bard*, 4 Johns. 230; *Padgett v. Lawrence*, 10 Paige 170; *Keator v. Dimmick*, 46 Barb. 158.

North Carolina. — *Guy v. Hall*, 7 N. C. (3 Murphy's L.) 150.

Oregon. — *Besser v. Joyce*, 9 Or. 310.

Pennsylvania. — *Andrew's Lessee v. Fleming*, 2 Dall. 93; *Stein v. Railway Co.*, 10 Phila. 440; *Bennett v. Biddle*, 150 Pa. St. 420, 24 Atl. 738 (as to a right of way); *Reed v. Dickey*, 1 Watts 152; *Stuart v. Line*, 11 Pa. Super. Ct. 345.

Vermont. — *Bennett v. Camp*, 54 Vt. 36.

Admissions made by a former owner since deceased, are admissible against those who claim under him. *Norton v. Pettibone*, 7 Conn. 319.

Such admissions may be those occurring in verified pleadings in a former action. *Warner v. Sapp* (Tex. Civ. App.), 97 S. W. 125.

84. *Wood v. McGuire*, 15 Ga. 202; *Keener v. Kauffman*, 16 Md. 296; *Beard v. First Nat. Bank*, 41 Minn. 153, 43 N. W. 7; *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 54 S. E. 593.

Such admissions are inadmissible where the evidence does not show whether they were made while the party making them was in possession, or whether they were made before or after he had transferred the title. *Harrell v. Culpepper*, 47 Ga. 635.

85. Admissions of the vendor of personal property, made after delivery, but before the vendee had paid for the property and in the vendee's presence, are competent as against the vendee. *Bender v. Kingman*, 62 Neb. 469, 87 N. W. 142.

86. *White v. Dinkins*, 19 Ga. 285. But where it appears doubtful from the evidence produced whether the party claims through or is in privity with a third party, the latter's admis-

mission made by the vendee as to the vendor's title are not admissible to defeat such third party's claim of title.⁸⁷

VIII. DECLARATIONS.

1. Title to Real Property.—A. PERSONS IN POSSESSION, OR GRANTORS. —a. *In Favor of Declarant or His Privies.*—The declarations of a grantor of real property or of one in possession thereof, in support or in favor of his own claim of title are generally held not to be admissible or competent as evidence of the title to such property, either in favor of the declarant himself⁸⁸ or of his grantees

sions are not competent evidence against the former's claim of title. *Aiken v. Cato*, 23 Ga. 154.

In *Oliver v. Persons*, 30 Ga. 391, it was held that where a party having two distinct claims of title disclaims one and elects to rely upon the other, admissions of his privies in the disclaimed title are not evidence against him.

87. *McMaster v. Stewart*, 11 La. Ann. 546.

88. *United States*.—*Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379.

Alabama.—*Daffron v. Crump*, 69 Ala. 77; *Rawles v. James*, 49 Ala. 183; *Huffaker v. Boring*, 8 Ala. 87; *Hoyle v. Mann*, 144 Ala. 516, 41 So. 835; *Butler v. Butler*, 133 Ala. 377, 32 So. 579; *McLeod v. Bishop*, 110 Ala. 640, 20 So. 130.

Connecticut.—*Smith v. Martin*, 17 Conn. 399.

Kansas.—*Broughan v. Broughan*, 62 Kan. 724, 64 Pac. 608.

Kentucky.—*Skidmore v. Smith*, 27 Ky. L. Rep. 323, 84 S. W. 1163.

Maryland.—*Maslin v. Thomas*, 8 Gill 18.

Massachusetts.—*Blake v. Everett*, 1 Allen 248; *Morrill v. Titcomb*, 8 Allen 100.

Missouri.—*Morey v. Staley*, 54 Mo. 421; *Cottrell v. Spiess*, 23 Mo. App. 35; *Sutton v. Caselleggi*, 5 Mo. App. 111; *Farmers' Bank v. Barbee*, 198 Mo. 465, 95 S. W. 225; *Hannibal R. Co. v. Clark*, 68 Mo. 371; *Carter v. Feland*, 17 Mo. 383.

New York.—*Jackson v. McVey*, 15 Johns. 234.

Pennsylvania.—*Riddle v. Dixon*, 2 Pa. St. 372; *Hugus v. Walker*, 12 Pa. St. 173; *Collins v. Lynch*, 167 Pa. St. 635, 31 Atl. 921; *Hood v. Hood*,

2 Grant Cas. 229; *Feig v. Meyers*, 102 Pa. St. 15.

Texas.—*Mooring v. McBride*, 62 Tex. 309; *Gilbert v. Odum*, 69 Tex. 670, 7 S. W. 510; *Siebert v. Lott*, 20 Tex. Civ. App. 191, 49 S. W. 783.

West Virginia.—*Parkersburg Indust. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255.

Wisconsin.—*Roebke v. Andrews*, 26 Wis. 311. Declarations are not evidence of ownership in favor of the declarant. *Dozier v. McWhorter*, 117 Ga. 786, 45 S. E. 61.

Declarations of a claim to property are not evidence of the existence of a record title in favor of the declarant. *Parkersburg Indust. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536.

The declarations of a party are not admissible in support of his title even in rebuttal. *Criddle's Adm. v. Criddle*, 21 Mo. 522; *Blount v. Hamey*, 43 Mo. App. 644.

Such declarations are not admissible to prove joint ownership with a third party. *Central R. & Banking Co. v. Smith*, 76 Ala. 572.

A Tenant's Statement of his opinion as to the validity of the landlord's title are not evidence of title:

Connecticut.—*Smith v. Martin*, 17 Conn. 399.

Maine.—*Crane v. Marshall*, 16 Me. 27.

Massachusetts.—*Morgan v. Larned*, 10 Metc. 50.

Missouri.—*Watson v. Bissell*, 27 Mo. 220; *Carter v. Feland*, 17 Mo. 383; *State v. Groschke*, 16 Mo. App. 557.

North Carolina.—*Roberts v. Roberts*, 82 N. C. 29.

or successors or privies in interest,⁸⁹ or of his personal representatives,⁹⁰ even though such declarations were made in *articulo mortis*,⁹¹ unless they happen to be admissible on some ground of independent relevancy, as in contradiction of other declarations of the grantor, already in evidence;⁹² nor does the fact that the declarant is deceased and hence his personal testimony is impossible to obtain, alter the rule.⁹³ The same rule applies to declarations of the grantor or party in possession as to the source of his title.⁹⁴

To Show Claim of Ownership. — It has been held, however, that such declarations, if made while the declarant was still in possession of the property, while not competent as evidence to prove his title or that of his grantees, may be admissible to show a claim of owner-

Oregon. — *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678.

Pennsylvania. — *Colt v. Selden*, 5 Watts 525.

Texas. — *McDow v. Rabb*, 56 Tex. 154.

The tenant's declarations as to title have also been held not to be competent evidence in the following cases: *Wardlaw v. Hammond*, 9 Rich. (S. C.) 454 (as to the nature of the landlord's title); *Bynum v. Thompson*, 25 N. C. (3 Ired. L.) 578 (as to the territorial extent of the premises which the landlord owned); *Sharp v. Johnson*, 22 Ark. 79, and *Colt v. Selden*, 5 Watts (Pa.) 525 (as to the nature of a claim of title adverse to that of the landlord); *Crane v. Marshall*, 16 Me. 27, *Alden v. Gilmore*, 13 Me. 178, and *McDow v. Rabb*, 56 Tex. 154 (as to the adverse character of his own possession); *Bell v. Adams*, 81 N. C. 118 (as to changes in the title of those parties for or under whom he holds); *Hendricks v. McDaniel*, 80 Ga. 102, 5 S. E. 194. As to who is the owner of the property.

In *Devall v. Chappin*, 15 La. 566, the court held parol evidence of the facts and circumstances of defendant's possession and of his declarations, in regard thereto admissible, where they were made before plaintiff's claim was known and when the parties could not be suspected of manufacturing evidence for themselves.

^{89.} *Alabama.* — *Doe v. Clayton*, 81 Ala. 391, 2 So. 24; *Doe ex dem. Anniston City Land Co. v. Edmondson*, 40 So. 505.

Connecticut. — *Smith v. Martin*, 17 Conn. 399.

Kentucky. — *Skidmore v. Smith*, 27 Ky. L. Rep. 323, 84 S. W. 1163.

Massachusetts. — *Osgood v. Coates*, 1 Allen 77; *Morrill v. Titcomb*, 8 Allen 100.

Mississippi. — *McMullen v. Mayo*, 16 Miss. 298.

Missouri. — *State v. Groschke*, 16 Mo. App. 557; *Farmers' Bank v. Barbee*, 198 Mo. 465, 95 S. W. 225.

New Hampshire. — *Smith v. Powers*, 15 N. H. 546.

New York. — *Jackson v. Vredenberg*, 1 Johns. 158; *Waring v. Warren*, 1 Johns. 340.

Pennsylvania. — *Edwards v. Morgan*, 100 Pa. St. 330; *Hood v. Hood*, 2 Grant Cas. 229.

Texas. — *Gilbert v. Odum*, 69 Tex. 670, 7 S. W. 510; *Siebert v. Lott*, 20 Tex. Civ. App. 191, 49 S. W. 783.

^{90.} *Holmes v. Sawtelle*, 53 Me. 179; *Cheeseman v. Kyle*, 15 Ohio St. 15; *Curtis v. Wilson*, 2 Tex. Civ. App. 646, 21 S. W. 787.

^{91.} *Jackson v. Vredenberg*, 1 Johns. (N. Y.) 158.

^{92.} *Joyce v. Hamilton*, 111 Ind. 163, 12 N. E. 294.

^{93.} *Saugatuck Cong. Soc. v. East Saugatuck School Dist.*, 53 Conn. 478, 2 Atl. 751; *Pleasanton v. Simons*, 2 Penne. (Del.) 477; *Jaffray v. Brown*, 91 Ga. 57, 16 S. E. 223; *Smith v. Powers*, 15 N. H. 546, 563; *Hays v. Hays*, 66 Tex. 606, 1 S. W. 895.

^{94.} **As to Source of Title.** — *Dothard v. Denson*, 72 Ala. 541.

"Declarations as to the source or manner of acquiring title are narrations of past transactions and are therefore inadmissible." *Ray v. Jackson*, 90 Ala. 513, 7 So. 747.

A declaration of how title was ac-

ship on the part of the declarant.⁹⁵ But where the deed under which he claimed has been lost, his declarations that he had purchased the property, taken in connection with proof that he had paid the taxes thereon, are admissible in favor of the grantees.⁹⁶

The grantor's declarations in his own favor, made after he has executed a deed to the property, are of course not admissible as evidence against the claim of title of the grantees under such deed, either on behalf of such grantor himself or of other parties claiming under him, through subsequent conveyances.⁹⁷

b. *As Against Declarant.* — The declarations of a person in possession of real property as to his title thereto are admissible as evidence against him on an issue involving his title to such property,⁹⁸

quired is not admissible in favor of the declarant in an action in which his title is in issue. *Vincent v. State*, 74 Ala. 274.

95. *Henry v. Brown*, 143 Ala. 446, 39 So. 325; *Hannibal & St. J. R. Co. v. Clark*, 68 Mo. 371; *Jackson v. Vredenbergh*, 1 Johns. (N. Y.) 158; *Jackson v. McVey*, 15 Johns. (N. Y.) 234; *Mooring v. McBride*, 62 Tex. 309.

The declarations of a party in possession are admissible to show the nature of his possession, or under what title he claims to hold but not to prove the title itself. *Sutton v. Casselleggi*, 5 Mo. App. 119.

96. *Walker v. Pittman*, 18 Tex. Civ. App. 519, 46 S. W. 117.

97. *Georgia.* — *Bush v. Rogan*, 65 Ga. 320.

Illinois. — *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150.

Kentucky. — *Short v. Tinsley*, 1 Metc. 397.

Maryland. — *Worthington v. Worthington*, 20 Atl. 911; *Stewart v. Redditt*, 3 Md. 67.

Missouri. — *McLaughlin v. McLaughlin*, 16 Mo. 242.

New Hampshire. — *Perkins v. Towle*, 59 N. H. 583.

New York. — *Burnham v. Brennan*, 74 N. Y. 597.

Pennsylvania. — *Kirkland v. Hepselfefer*, 2 Grant Cas. 84.

Tennessee. — *McCasland v. Carson*, 1 Head 117.

Texas. — *Johnson v. Richardson*, 52 Tex. 481; *Hale v. Hollon*, 14 Tex. Civ. App. 96, 35 S. W. 843, s. c. 36 S. W. 288.

Vermont. — *Edgell v. Bennett*, 7 Vt. 534.

Virginia. — *Thornton v. Gaar*, 87 Va. 315, 12 S. E. 753.

A grantor will not be permitted to disparage his deed by declarations made or acts done by him in his own interest subsequent to its execution. *Ord v. Ord*, 99 Cal. 523, 34 Pac. 83.

A grantor cannot be permitted to undermine his deed either by word or acts. His declarations and acts made and done, in his own interest, months after the deed was delivered, are not admissible as indicating his intentions in delivering the deed. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338.

In *Matteson v. Hartman*, 91 Wis. 485, 65 N. W. 58, the supreme court of Wisconsin said: "There is no rule of evidence better settled than that declarations of a former owner of property, after he has parted with his interest, cannot be used in evidence to affect the title of his grantee."

Contra. — The declarations of the grantor made subsequent to the execution of his deed, are admissible on behalf of his grantee for the purpose of sustaining the deed. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338; *Ord v. Ord*, 99 Cal. 523, 34 Pac. 83.

98. *Greenleaf on Ev.* § 189.

Alabama. — *Fralick v. Presley*, 29 Ala. 457; *Brewer v. Brewer*, 19 Ala. 481; *Arthur v. Gayle*, 38 Ala. 259.

California. — *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.

Connecticut. — *Smith v. Martin*, 17 Conn. 399.

Georgia. — *Meek v. Holton*, 22 Ga. 491.

or for the purpose of showing by what title he claims.⁹⁹ But a statement made by a party in disparagement of his title is not relevant against him as tending to disprove such title if it was made before he was possessed of the particular interest,¹ or after he has parted with or been deprived of his interest.²

Tenants in Common.—The declarations of a tenant in common, made while in possession of the property, are admissible against

Idaho.—Daly *v.* Josslyn, 7 Idaho 657, 65 Pac. 442.

Illinois.—Waggoner *v.* Cooley, 17 Ill. 239.

Maryland.—Dorsey *v.* Dorsey, 3 Har. & J. 410.

Massachusetts.—Osgood *v.* Coates, 1 Allen 77.

Missouri.—Boynton *v.* Miller, 144 Mo. 681, 46 S. W. 754; Cavin *v.* Smith, 24 Mo. 221.

Nebraska.—Cunningham *v.* Fuller, 35 Neb. 58, 52 N. W. 836.

New Hampshire.—South Hampton *v.* Fowler, 54 N. H. 197.

New Jersey.—Horner *v.* Stillwell, 35 N. J. L. 307.

New York.—Jackson *v.* Bard, 4 Johns. 230; Padgett *v.* Lawrence, 10 Paige 170; Keator *v.* Dimmick, 46 Barb. 158.

North Carolina.—Scarboro *v.* Scarboro, 122 N. C. 234, 29 S. E. 352; Guy *v.* Hall, 7 N. C. (3 Murphy's L.) 150; Magee *v.* Blankenship, 95 N. C. 563.

Oregon.—Besser *v.* Joyce, 9 Or. 310.

Pennsylvania.—Reed *v.* Dickey, 1 Watts 152; Alden *v.* Grove, 18 Pa. St. 377.

South Carolina.—Snelgrove *v.* Martin, 2 McCord 241; Renwick *v.* Renwick, 9 Rich. L. 50.

When Declarant Himself Is a Competent Witness.—In Howell *v.* Howell, 37 Mo. 124, it was held that the declarations of a party, in disparagement of his title, are not admissible in an action in which he is a competent witness.

⁹⁹ *United States.*—Ricard *v.* Williams, 7 Wheat. 59.

Alabama.—Savery *v.* Moore, 71 Ala. 236.

California.—Stockton Sav. Bank *v.* Staples, 98 Cal. 189, 32 Pac. 936.

Illinois.—Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306.

Indiana.—Steeple *v.* Downing, 60 Ind. 478.

Iowa.—Casey *v.* Casey, 107 Iowa 192, 77 N. W. 844.

Maryland.—Keener *v.* Kauffman, 16 Md. 296.

Missouri.—Bagnell *v.* Chemical Bank, 76 Mo. App. 121.

New Hampshire.—Bell *v.* Woodward, 46 N. H. 315.

New Jersey.—Outcalt *v.* Ludlow, 32 N. J. L. 239.

New York.—Pitts *v.* Wilder, 1 N. Y. 525; Jackson *v.* Cole, 4 Cow. 587.

North Carolina.—Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

Pennsylvania.—Duffey *v.* Presbyterian Congregation, 48 Pa. St. 46.

Wisconsin.—Austin *v.* Allen, 6 Wis. 134; Roebke *v.* Andrews, 26 Wis. 311.

In Young *v.* Hurst (Tenn.), 48 S. W. 355, it was held that statements made by a husband and his wife to third parties at the time the declarants purchased the property, are competent to show under what title the property was to be held.

A statement made by a tenant in common who claims to have acquired title in severalty by adverse possession, recognizing the title of a cotenant, is competent as an admission against interest. Loranger *v.* Carpenter (Mich.), 112 N. W. 125.

¹ *United States.*—Lamar *v.* Micou, 112 U. S. 452.

Alabama.—Polly *v.* McCall, 37 Ala. 20.

New York.—McIntyre *v.* Union College, 6 Paige 239.

Texas.—Bell *v.* Preston, 19 Tex. Civ. App. 375, 753, 47 S. W. 375.

Vermont.—Barber *v.* Bennett, 60 Vt. 662, 15 Atl. 548, 6 Am. St. Rep. 141, 1 L. R. A. 224.

Virginia.—Burton *v.* Scott, 3 Rand. 399.

² *Boshear v. Lay*, 6 Heisk. 163.

him;³ but the declarations of the owner of a portion of a survey are not evidence against the owners of another portion of the same survey.⁴ Declarations of parties to parol partitions of land as to the extent and ownership of the respective parcels are admissible against the persons making them.⁵

c. *As Against Grantees of the Declarant.* — (1.) *In General.* The declarations of the former owner of real property as to his title, made while he was in possession, are admissible as evidence against his grantees or privies in estate claiming under⁶ him when such declarations were made prior to the acquiring of their interests by such grantees or privies,⁷ although in Vermont this is not the rule, such declarations being held inadmissible to affect the record title under the land registry laws.⁸ The Vermont rule also obtains in Indiana.⁹ The rule in New York is also contrary to the general rule, and in that state declarations of a former owner are held not to be competent evidence as against a grantee.¹⁰ Such declarations must be of a character explaining or qualifying his possession,¹¹ and must have been made by the declarant upon his own knowledge.¹² They are not, however, admissible as evidence against a party claiming an interest or under an interest adverse to such former owner.¹³

3. *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917 (as verbal acts tending to characterize his possession).

4. *Bailey v. Baker* (Tex. Civ. App.), 42 S. W. 124.

5. *Shelburn v. McCrocklin* (Tex. Civ. App.), 42 S. W. 329.

6. *Whelchel v. Gainesville & D. Electric R. Co.*, 116 Ga. 431, 42 S. E. 776.

7. *California.* — *Bell v. Pleasant*, 145 Cal. 410, 78 Pac. 957.

Idaho. — *Daly v. Josslyn*, 7 Idaho 657, 65 Pac. 442.

Indian Territory. — *McCurtain v. Grady*, 1 Ind. Ter. 107, 38 S. W. 65.

Iowa. — *Finch v. Garrett*, 102 Iowa 381, 71 N. W. 429; *Quick v. Cotman*, 124 Iowa 102, 99 N. W. 301.

North Carolina. — *Shaffer v. Gaynor*, 117 N. C. 15, 24, 23 S. E. 154; *Nelson v. Whitfield*, 82 N. C. 46; *Roberts v. Roberts*, 82 N. C. 29; *Nelson v. Bullard*, 82 N. C. 37; *Gates v. Gates*, 76 N. C. 142; *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887.

Pennsylvania. — *Andrews v. Fleming*, 2 Dall. 93; *Brown v. Bank of Chambersburg*, 3 Pa. St. 187, 199.

South Carolina. — *Renwick v. Ren-*

wick, 9 Rich. 50; *Snelgrove v. Martin*, 2 McCord. 241.

8. *Hines v. Soule*, 14 Vt. 99; *Carpenter v. Hollister*, 13 Vt. 552, 37 Am. Dec. 612.

9. *Smith v. McClain*, 146 Ind. 77, 45 N. E. 41, *holding* such declarations not competent to destroy the record title of those holding under the declarant.

10. *Pfeffer v. Kling*, 171 N. Y. 668, 64 N. E. 1125, *affirming* 58 App. Div. 179, 68 N. Y. Supp. 641, *holding* that such declarations are neither binding nor relevant upon a party's title. The declarations of a former owner are not evidence against a subsequent transferee.

11. *Carpenter v. Hollister*, 13 Vt. 552, 37 Am. Dec. 612.

12. *Beasley v. Clarke*, 102 Ala. 254, 14 So. 744.

13. *Hamilton v. Holder*, 15 N. B. (Can.) 222; *Geoghegan v. Marshall* (Miss.) 4 So. 63.

Such declarations, when offered against a party claiming under an interest adverse to such former owner, are held inadmissible upon the ground that they are really made in favor of the declarant, as to the party asserting such adverse interest.

(2.) **Before Title Obtained.** — The declarations of the grantor made before he obtained title to the property are not admissible as evidence against the claim of title of a subsequent holder claiming under such grantor,¹⁴ and this has been so held even in actions involving fraud.¹⁵

(3.) **Before Title Divested.** — The declarations of the owner of real property in disparagement of his title thereto,¹⁶ if made prior to his conveyance thereof, are competent evidence as against the claim of title of his grantees or other privies in estate.¹⁷ Such declara-

Duff *v.* Marshall, 146 Mass. 533, 15 N. E. 417.

14. Noyes *v.* Morrill, 108 Mass. 396; Tyler *v.* Mather, 9 Gray (Mass.) 177; Compau *v.* Dubois, 39 Mich. 274; Renneker *v.* Warren, 17 S. C. 139.

15. Stockwell *v.* Blamey, 129 Mass. 312.

16. Such declarations must clearly be explanatory of and in derogation of the declarant's title. Garner *v.* Bridges, 38 Ala. 276; Barrett *v.* French, 1 Conn. 354; Payne *v.* Craft, 7 Watts & S. (Pa.) 458; Carpenter *v.* Hollister, 13 Vt. 552, 37 Am. Dec. 612; Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582; Campbell *v.* Eichorst, 122 Ill. App. 609; Norcum *v.* Savage, 140 N. C. 472, 53 S. E. 289.

17. *United States.* — Henderson *v.* Wannamaker, 79 Fed. 736.

Canada. — Payson *v.* Good, 5 N. B. 272.

Alabama. — Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744 (statement that the land belonged to another); Baucum *v.* George, 65 Ala. 259; Alexander *v.* Caldwell, 55 Ala. 517; Reed *v.* Smith, 14 Ala. 380; Pearce *v.* Nix, 34 Ala. 183 (statement that he had never paid the purchase price).

California. — Smith *v.* Glenn, 129 Cal. xviii, 62 Pac. 180; Lord *v.* Thomas, 36 Pac. 372; McFadden *v.* Eilmaker, 52 Cal. 348; McFadden *v.* Wallace, 38 Cal. 51; Bollo *v.* Navarro, 33 Cal. 459.

Connecticut. — Smith *v.* Martin, 17 Conn. 399; Rogers *v.* Moore, 10 Conn. 13; Nichols *v.* Hotchkiss, 2 Day 121; Norton *v.* Pettibone, 7 Conn. 319; Peck, Stow & Wilcox Co. *v.* Atwater Mfg. Co., 61 Conn. 31; 23 Atl. 699. See also Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939,

29 L. R. A. 582, in which, however, it was held that certain declarations were inadmissible because under the circumstances they were not in derogation of the grantor's title.

Georgia. — Roberts *v.* Neal, 62 Ga. 163; White *v.* Moss, 92 Ga. 244, 18 S. E. 13; Wood *v.* McGuire, 15 Ga. 202; Johnson *v.* Cox, 81 Ga. 25, 6 S. E. 176.

Idaho. — Daly *v.* Josslyn, 7 Idaho 657, 65 Pac. 442.

Illinois. — Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558.

Indian Territory. — McCurtain *v.* Grady, 1 Ind. Ter. 107, 38 S. W. 65.

Iowa. — Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429; Griffin *v.* Turner, 75 Iowa 250, 39 N. W. 294.

Kentucky. — Baker *v.* Dobyns, 4 Dana 220 (declarations of the *cestui que trust*, under a secret trust to hold and convey land); Forsyth *v.* Kreakbaum, 7 T. B. Mon. 97; Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854.

Louisiana. — Savenet *v.* Le Britton, 8 Mart. (N. S.) 501.

Maryland. — Keener *v.* Kauffman, 16 Md. 296; Richards *v.* Swan, 7 Gill 366.

Massachusetts. — Simpson *v.* Dix, 131 Mass. 179; Osgood *v.* Coates, 1 Allen 77; Hyde *v.* Middlesex Co., 2 Gray 267. *But see* Alexander *v.* Gould, 1 Mass. 165; Bartlet *v.* Delprut, 4 Mass. 702; and Clarke *v.* Waite, 12 Mass. 439 (all of which early cases held that the grantor's declarations, made while he held the land and inconsistent with the claim of title of the grantee, are inadmissible to defeat his title, even after the death of the grantor).

Minnesota. — Taylor *v.* Hess, 57 Minn. 96, 58 N. W. 824.

tions are equally admissible as evidence to disprove title when made by the owner of a fractional interest in the property.¹⁸

Mississippi. — *Farmers' Bank v. Douglass*, 11 Smed. & M. 469.

Missouri. — *Dickerson v. Chrisman*, 28 Mo. 134; *Boynton v. Miller*, 144 Mo. 681, 46 S. W. 754.

Montana. — *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. 291.

Nebraska. — *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836.

New Hampshire. — *Morrill v. Foster*, 33 N. H. 379.

New Jersey. — *Edwards v. Derickson*, 28 N. J. L. 39; *Horner v. Stillwell*, 35 N. J. L. 307; *Van Blarcom v. Kip*, 26 N. J. L. 351.

New York. — *Bingham v. Hyland*, 53 Hun 631, 6 N. Y. Supp. 75; *Hutchins v. Hutchins*, 98 N. Y. 56; *Keator v. Dimmick*, 46 Barb. 158; *Padgett v. Lawrence*, 10 Paige 170; *Roof v. Wadhams*, 35 Hun 57; *Varrick v. Briggs*, 6 Paige 323; *Park v. Peck*, 1 Paige 477; *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757; *Chadwick v. Fonner*, 6 Hun 543, reversed on another point in 69 N. Y. 404.

North Carolina. — *Magee v. Blankenship*, 95 N. C. 563; *Headen v. Womack*, 88 N. C. 468; *Guy v. Hall*, 7 N. C. (3 Murphy's L.) 150.

Ohio. — *Edgar v. Richardson*, 33 Ohio St. 581 (admission of a wife that she had obtained a divorce).

Oregon. — *Besser v. Joyce*, 9 Or. 310.

Pennsylvania. — *Alden v. Grove*, 18 Pa. St. 377; *Maus v. Maus*, 5 Watts 315; *McIlowny v. Williams*, 28 Pa. St. 492; *Reed v. Dickey*, 1 Watts 152; *Stuart v. Line*, 11 Pa. Super. Ct. 345; *Union Canal Co. v. Loyd*, 4 Watts & S. 393; *McElfatrick v. Hicks*, 21 Pa. St. 402; *Frear v. Drinker*, 8 Pa. St. 520.

Texas. — *Wilson v. Simpson*, 80 Tex. 279, 16 S. W. 40; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673; *Wilson v. Williams*, 25 Tex. 55; *Titus v. Johnson*, 50 Tex. 224.

Utah. — *Church of Jesus Christ v. Watson*, 25 Utah 45, 69 Pac. 531.

Vermont. — *Oakman v. Walker*, 69 Vt. 344, 38 Atl. 63; *Downs v. Belden*, 46 Vt. 674.

Virginia. — *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974.

The fact that the declarant is alive does not render the declarations inadmissible. *Stewart v. Doak Bros.*, 58 W. Va. 172, 52 S. E. 95.

In *Davidson v. Thomas* (Iowa), 86 N. W. 291, it was held that declarations made by a grantor prior to executing the deed that he had traded it with a third party, were admissible as against the grantee and to show title in such third party.

An admission by a grantor of the existence of a mistake in the deed under which he held is competent evidence against the claim of title of a subsequent execution purchaser. *Allen v. McGaughey*, 31 Ark. 252.

In *Lang v. Metzger*, 206 Ill. 475, 69 N. E. 493, affirming s. c. 101 Ill. App. 380, it was held that certain letters which had been written by a husband prior to his joining with his wife in the execution of a deed of trust conveying the wife's real property, in which he had an inchoate right of courtesy and a homestead right, and which tended to show that he, as trustee, had invested trust funds in the land, were admissible as against the grantee, who was privy in estate to the husband.

The former owner's statement that he had purchased the land in question for another is admissible as against his subsequent claim of title. *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410.

Existence of Easements on the premises may be shown by such declarations. *Blake v. Everett*, 1 Allen (Mass.) 248; *But see Noyes v. Morrill*, 108 Mass. 396.

Res Gestae. — In *Spaulding v. Hollenbeck*, 39 Barb. (N. Y.) 79, it is said that such evidence is admitted as being part of the *res gestae*.

Remoteness. — The declarations of a grantor, made over two years prior to the alleged fraudulent conveyance, and having no connection therewith, are too remote to be admissible. *Littlefield v. Getchell*, 32 Me. 390.

18. In *Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871, it was held

(4.) **After Title Divested.** — The declarations of a grantor in disparagement of his title, made after divesting himself thereof, are not admissible as evidence against his grantees or any other persons who claim under or through him for the purpose of impeaching their title;¹⁹ or of showing it to have been fraudulently ob-

that the declarations of the owner of a half interest in a tract of land made while in possession and before he purchased the other half interest were admissible for the purpose of impeaching his title.

But see *White v. Moss*, 92 Ga. 244, 18 S. E. 13, in which it was held that admissions made by a person who at the time owned five-sixths of a tract of land that the other sixth belonged to another party are not evidence as against *bona fide* purchasers to whom he subsequently sold the entire tract and who had no notice of such admissions.

19. England. — *Sidmouth v. Sidmouth*, 2 Beav. 447, 2 L. J. Ch. 282, 48 Eng. Reprint 1254.

United States. — *Steinbach v. Stewart*, 11 Wall. 566; *Merrill v. Dawson*, 17 Fed. Cas. No. 9,469.

Alabama. — *Adair v. Craig*, 135 Ala. 332, 33 So. 902; *Anonymous*, 34 Ala. 430.

Arkansas. — *Crow v. Watkins*, 48 Ark. 169, 2 S. W. 659; *Gullett v. Lamberton*, 6 Ark. 109; *Foster v. Beidler*, 79 Ark. 418, 96 S. W. 175.

Arizona. — *Miller v. Miller*, 7 Ariz. 316, 64 Pac. 415.

California. — *Frink v. Roe*, 7 Pac. 481; *Packard v. Moss*, 4 Pac. 638; *Packard v. Johnson*, 4 Pac. 632; *Tompkins v. Crane*, 50 Cal. 478; *Taylor v. Central Pac. R. Co.*, 67 Cal. 615, 8 Pac. 436; *Ord v. Ord*, 99 Cal. 523, 34 Pac. 83; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338.

Connecticut. — *Redfield v. Buck*, 35 Conn. 328; *Nichols v. Hotchkiss*, 2 Day 121; *Barrett v. French*, 1 Conn. 354; *Lockwood v. Lockwood*, 56 Conn. 106, 14 Atl. 293.

Georgia. — *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254, 271; *Towner v. Thompson*, 81 Ga. 171, 6 S. E. 184; *Muller v. Rhuman*, 62 Ga. 332; *Williams v. Cowart*, 27 Ga. 187; *Monroe v. Napier*, 52 Ga. 385; *Adair v. Adair*, 38 Ga. 46; *Gill v. Strozier*, 32 Ga. 688.

Illinois. — *Lang v. Metzger*, 101

Ill. App. 380; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021; *Bentley v. O'Bryan*, 111 Ill. 53; *Brower v. Callender*, 105 Ill. 88; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Simpkins v. Rogers*, 15 Ill. 397; *Bunker v. Green*, 48 Ill. 243; *Gridley v. Bingham*, 51 Ill. 153; *Adler v. Dalton*, 23 Ill. App. 177; *Higgins v. White*, 118 Ill. 619, 8 N. E. 808, *affirming s. c.* 18 Ill. App. 480.

Indiana. — *McSweeney v. McMillan*, 96 Ind. 298; *Stribling v. Brougher*, 79 Ind. 328; *Harness v. Harness*, 49 Ind. 384; *Thompson v. Thompson*, 9 Ind. 323; *Burkholder v. Casad*, 47 Ind. 418; *Jonas v. Hirshburg* (Ind. App.), 79 N. E. 1058.

Indian Territory. — *Ikard v. Miner*, 4 Ind. Ter. 214, 69 S. W. 852.

Iowa. — *O'Neil v. Vandenberg*, 25 Iowa 104; *De France v. Howard*, 1 Iowa 524.

Kansas. — *Sumner v. Cook*, 12 Kan. 162; *Smith v. Wilson*, 5 Kan. App. 379, 48 Pac. 436.

Kentucky. — *Johnson v. Johnson*, 8 Ky. L. Rep. 600, 2 S. W. 487; *Beall v. Barclay*, 10 B. Mon. 261; *Rees v. Lawless*, 4 Litt. 218; *Starling v. Blair*, 4 Bibb. 288; *Sharp v. Wickliffe*, 3 Litt. 10; *Norfleet v. Logan*, 21 Ky. L. Rep. 1200, 54 S. W. 713; *Judah v. Flemming*, 4 Ky. L. Rep. 888; *Christopher v. Covington*, 2 B. Mon. 357; *Stemmons v. Duncan*, 9 B. Mon. 351.

Maine. — *Pierce v. Faunce*, 37 Me. 63.

Maryland. — *Dodge v. Stanhope*, 55 Md. 113; *Hurn v. Soper*, 6 Har. & J. 276; *Kerby v. Kerby*, 57 Md. 345; *Cecil v. Cecil*, 20 Md. 153; *Parks v. Parks*, 19 Md. 323; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26.

Massachusetts. — *Wilcox v. Waterman*, 113 Mass. 296; *Bartlet v. Delprat*, 4 Mass. 702.

Michigan. — *Rix v. Smith*, 145 Mich. 203, 108 N. W. 691.

Minnesota. — *Kurtz v. St. Paul &*

D. R. Co., 61 Minn. 18, 63 N. W. 1; *Beard v. First Nat. Bank*, 41 Minn. 153, 43 N. W. 7; *Groff v. Ramsey*, 19 Minn. 44.

Missouri. — *Enders v. Richards*, 33 Mo. 598; *Cavin v. Smith*, 24 Mo. 221; *J. I. Case Plow Works v. Ross & Co.*, 74 Mo. App. 437; *Current River Lumb. Co. v. Cravens*, 54 Mo. App. 216.

Nebraska. — *Zobel v. Bauersachs*, 55 Neb. 20, 75 N. W. 43; *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887, 62 N. W. 1112.

New Jersey. — *Price v. Plainfield*, 40 N. J. L. 608; *Beeckman v. Montgomery*, 14 N. J. Eq. 106.

New York. — *Hutchins v. Hutchins*, 98 N. Y. 56; *Sanford v. Ellithorp*, 95 N. Y. 48; *Kalish v. Higgins*, 70 App. Div. 192, 75 N. Y. Supp. 397, (*affirmed*, s. c. 175, N. Y. 495, 67 N. E. 1084); *Leary v. Corvin*, 63 App. Div. 151, 71 N. Y. Supp. 335; *Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. Supp. 1063; *Pfeffer v. Kling*, 58 App. Div. 179, 68 N. Y. Supp. 641; *Varick v. Briggs*, 6 Paige 323; *Padgett v. Lawrence*, 10 Paige 170.

North Carolina. — *Headen v. Womack*, 88 N. C. 468; *Melvin v. Bulard*, 82 N. C. 33; *Burroughs v. Jenkins*, 62 N. C. (Phil. Eq.) 33; *Ward v. Saunders*, 28 N. C. (6 Ired. L.) 382.

North Dakota. — *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308.

Ohio. — *Voss v. Murray*, 50 Ohio St. 19, 32 N. E. 1112; *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. 596.

Oregon. — *Krewson v. Purdom*, 11 Or. 266, 3 Pac. 822.

Pennsylvania. — *Baldwin v. Stier*, 191 Pa. St. 432, 43 Atl. 326; *Carr v. H. C. Frick Coke Co.*, 170 Pa. St. 62, 32 Atl. 656; *McLaughlin v. McLaughlin*, 91 Pa. St. 462; *Hartman v. Diller*, 62 Pa. St. 37.

South Carolina. — *Agnew v. Adams*, 26 S. C. 101, 1 S. E. 414; *Renwick v. Renwick*, 9 Rich. L. 50.

Tennessee. — *Merriman v. Lacey*, 4 Heisk. 209; *Caraway v. Caraway*, 7 Coldw. 245.

Texas. — *Wallace v. Berry*, 83 Tex. 328, 18 S. W. 595; *McKnight v. Reed*, 30 Tex. Civ. App. 204, 71 S. W. 318; *Stephens v. Johnson* (Tex. Civ. App.), 45 S. W. 328; *Sauger v.*

Jesse French Piano & O. Co., 21 Tex. Civ. App. 523, 52 S. W. 621; *Hatcher v. Stipe* (Tex. Civ. App.), 45 S. W. 329; *Smith v. James* (Tex. Civ. App.), 42 S. W. 792; *Phillips v. Sherman* (Tex. Civ. App.), 39 S. W. 187; *Hilburn v. Harrell* (Tex. Civ. App.), 29 S. W. 925.

Utah. — *Snow v. Rich*, 22 Utah 123, 61 Pac. 336.

Vermont. — *Norton v. Perkins*, 67 Vt. 203, 31 Atl. 148; *Aiken v. Peck*, 22 Vt. 255; *Shepherd v. Hayes*, 16 Vt. 486; *Brackett v. Wait*, 6 Vt. 411.

Virginia. — *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 54 S. E. 593.

West Virginia. — *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. 253; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799.

In *Burg v. Rivera*, 105 La. 144, 29 So. 482, the rule was well stated: "A vendor of real estate cannot, after he has divested himself of title, affect the rights of the purchaser by declarations made out of the presence of the purchaser derogatory to the title."

Statements made by a grantor after executing the deed cannot affect the grantee's title, and are therefore not competent in evidence. *Doe ex dem. Anniston City Land Co. v. Edmondson* (Ala.), 40 So. 505.

Reservation of Equity in the Land. — The rule applies although the grantor reserves an equitable interest in the land. *Warren v. Carey*, 145 Mass. 78, 12 N. E. 999.

Deed of Trust. — The declarations of a grantor in a deed of trust, made after executing it, and impugning the title to the land covered by it, are not competent as evidence against the grantee. *Lang v. Metzger*, 206 Ill. 475, 69 N. E. 493.

Deed Absolute as a Mortgage. The declarations of a grantor, made after the execution by him of a deed in form absolute, are not admissible to prove that it was intended merely as a mortgage for the purpose of attacking the grantee's title. *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 416; *Jones v. Jones*, 63 Hun 630, 17 N. Y. Supp. 905; *Gadsby v. Dyer*, 91 N. C. 311.

Impeachment. — Such declarations, although inadmissible to defeat title, may be admitted for the purpose of

tained,²⁰ unless collusion or conspiracy between the parties is first shown.²¹ This rule applies whether the title of the declarant has been divested by his own voluntary deed or by operation of law,²² or by his abandonment²³ or dedication of the property to a public use.²⁴

But where the declarations in question, although subsequent to the divesting of the grantor's title, are so intimately connected with those made prior to alienation that they cannot readily be separated,²⁵ or where the grantee was present at the time the declaration was made and assented to or acquiesced in the same,²⁶ or

impeaching the declarant as a witness. *Severson v. Gremm*, 124 Iowa 729, 100 N. W. 862.

20. *United States*. — *Magmai v. Thompson*, 7 Pet. 348, *affirming s. c.* 16 Fed. Cas. No. 8,956.

California. — *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Silva v. Serpa*, 86 Cal. 241, 24 Pac. 1013.

Connecticut. — *White v. Wheaton*, 16 Conn. 530.

Georgia. — *Bush v. Rogan*, 65 Ga. 320.

Illinois. — *Durand v. Weightman*, 108 Ill. 489.

Indiana. — *Skelley v. Vail*, 27 Ind. App. 87, 60 N. E. 961; *Paine v. Griffin*, 7 Blackf. 485.

Iowa. — *Cedar Rapids Nat. Bank v. Lavery*, 110 Iowa 575, 81 N. W. 775.

Kansas. — *Stickel v. Bender*, 37 Kan. 457, 15 Pac. 580; *Crust v. Evans*, 37 Kan. 263, 15 Pac. 214.

Kentucky. — *Judah v. Flemming*, 4 Ky. L. Rep. 888; *Short v. Finsley*, 1 Metc. 397.

Massachusetts. — *Holbrook v. Holbrook*, 113 Mass. 74.

Mississippi. — *Taylor v. Webb*, 54 Miss. 36.

Missouri. — *Mueller v. Weitz*, 56 Mo. App. 36; *Cash v. Penix*, 11 Mo. App. 597; *Gamble v. Johnson*, 9 Mo. 605; *Boyd v. Jones*, 60 Mo. 454.

New York. — *Strauss v. Murray*, 31 Misc. 69, 63 N. Y. Supp. 201; *Kalish v. Higgins*, 70 App. Div. 192, 75 N. Y. Supp. 397; *Noyes v. Morris*, 56 Hun 501, 10 N. Y. Supp. 561. *But see Savage v. Murphy*, 21 N. Y. Super. Ct. 75.

North Carolina. — *Burbank v. Wiley*, 79 N. C. 501.

In *Reed v. Smith*, 14 Ala. 380, which was a controversy between a

purchaser at an execution sale of land sold as the property of A. and a purchaser of the same land from B. to whom A. had sold and conveyed the land, the declarations of B. made while he held the title, are admissible to prove fraud in A's conveyance to him.

Hord v. Rust, 4 Bibb (Ky.) 231, decided in 1815, holds that an admission by the grantor is competent evidence, although made after transfer, but the question is not discussed at length.

21. *Hetrick v. Gregg*, 8 Ohio N. P. 24.

22. *Renshaw v. Steamboat Pawnee*, 19 Mo. 532.

23. *May v. Jones*, 4 Litt. (Ky.) 21.

24. *Hayden v. Stone*, 121 Mass. 413.

25. *Holbrook v. Holbrook*, 113 Mass. 74.

In *Smith v. Leforce*, 14 Ky. L. Rep. 399, it is held that, despite the general rule, in an action brought to subject land conveyed by a debtor to the payment of his debts, upon the ground that the conveyance was fraudulent as to creditors declarations of the grantor, the father of the grantees, made both prior and subsequent to the execution of the deed, are all competent, where they are all so connected that they cannot well be separated.

26. *Connecticut*. — *Barrett v. French*, 1 Conn. 354.

Georgia. — *Adair v. Adair*, 38 Ga. 46.

Illinois. — *Myers v. Kingie*, 26 Ill. 36; *Higgins v. White*, 118 Ill. 619, 8 N. E. 808, *affirming s. c.* 18 Ill. App. 480.

where there is evidence of a conspiracy or collusion between the grantor who made them and the grantee which establishes *prima facie* a relationship of agency,²⁷ such declarations will be admitted in evidence as against such grantee if made while such agency existed.

Where parties claim under successive deeds executed by a common grantor, his declarations (if relevant) affect grantees claiming under conveyances subsequent thereto, but are not evidence against persons whose interests were acquired prior to that time,²⁸

While the declarations of a grantor in support of his title, made after the execution of his deed, are not admissible to impeach the deed, they are competent evidence as against himself or those claiming under him through a subsequent conveyance to sustain the deed and the title conveyed thereby.²⁹

Where the party against whom the declaration is sought to be introduced in evidence has acquiesced therein either by words or conduct, it is competent against him as his own statement, even though it was made subsequent to the divesting of the grantor's title.³⁰

d. *Burden of Proof*.—The party seeking to introduce a former owner's declarations in evidence, either in support of or against a

Indiana.—McSweeney v. McMillen, 96 Ind. 298.

Kansas.—Stickel v. Bender, 37 Kan. 457, 15 Pac. 580.

Louisiana.—Guidry v. Grivot, 2 Mart. N. S. 13, Whiting v. Prentice, 12 Rob. 146.

Mississippi.—Taylor v. Webb, 54 Miss. 36.

Missouri.—Mueller v. Weitz, 56 Mo. App. 36.

New York.—Sanford v. Ellithorp, 95 N. Y. 48.

Tennessee.—Caraway v. Caraway, 7 Coldw. 245.

²⁷. Hetrick v. Gregg, 8 Ohio N. P. 24, 10 Ohio Soc. Pl. Dec. 462.

²⁸. Alexander v. Caldwell, 55 Ala. 517; Colton v. Seavey, 22 Cal. 406; Lockwood v. Lockwood, 56 Conn. 106, 14 Atl. 293; Nichols v. Hotchkiss, 2 Day (Conn.) 121; McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303.

In *Braswell v. Gay*, 75 N. C. 515, it was held that where a party had executed two deeds of trust at different times to different grantees, his declarations, made subsequent to both of them, that he had not paid the debt to secure which the first deed was executed, are admissible

against the party claiming under the second deed, on the ground that such declarations were against interest.

²⁹. *Fulton's Exrs. v. Gracey*, 15 Gratt. (Va.) 314.

Declarations of a grantor cannot be admitted to impeach his deed, while his declarations in support of it are admissible as against himself or those claiming under him. *Kerby v. Kerby*, 57 Md. 345.

The statements of the grantor, made after the execution of a deed, are admissible in a suit to enforce title thereunder when such statements are in favor of the deed, but not when they are against it. *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577.

Declarations of a grantor in his own favor, made subsequently to the execution of the deed, are not admissible to impeach it. But his admission or declarations are admissible to sustain it. *Perkins v. Towle*, 59 N. H. 583.

³⁰. *Higgins v. White*, 18 Ill. App. 480, affirming *s. c.* 118 Ill. 619, 8 N. E. 808.

Such acquiescence must be proved by unequivocal evidence. *Evans v. Merthyor Tydfil Urban Dist. Coun-*

claim of title, has the burden of showing that all the necessary conditions of admissibility exist, as that the declarations sought to be introduced were made while the declarant was the owner of the real estate in question.³¹

e. *Form of Declaration.* — The declarations of a former owner, in order to be admissible in evidence to defeat or establish a claim of title, are not required to be of any particular form, but may be oral or in writing, judicial³² or extrajudicial;³³ and where the declaration is contained in an instrument in writing, the fact that such instrument is invalid or not effective for the purpose for which it is designed is immaterial.³⁴

Silent Acquiescence. — It has even been held that the silent acquiescence of the former owner in a statement made by another, under circumstances which would give such silence a probative value, may constitute a declaration within the rule.³⁵

B. MORTGAGORS AND LIENORS. — a. *Prior to Execution of Mortgage.* — The declarations in disparagement of his title or interest, made by a mortgagor, are competent evidence, in so far only as they affect the interest or estate conveyed,³⁶ as against the mortgagee, when such declarations were made prior to the execution of the mortgage.³⁷

b. *Subsequent to Execution of Mortgage.* — On the other hand, the mortgagor's or owners' declarations made after execution of the mortgage are not evidence against the claim of title of the mortgagee,³⁸ or of a purchaser under foreclosure of a lien or encumbrance which had attached to the land before such declarations

cil, 1 Ch. 241, 68 L. G. Ch. 175, 79 L. T. N. S. 578.

31. Harrell v. Culpepper, 47 Ga. 635.

32. Admissions contained in an answer filed in a chancery suit were held competent evidence in Ford v. Belmont, 7 Robt. (N. Y.) 97.

33. Noble v. Worthy, 1 Ind. Ter. 458, 45 S. W. 137 (recitals in a deed).

34. Steed v. Knowles, 97 Ala. 573, 12 So. 75.

35. Lejeune v. Barrow, 11 La. Ann. 501.

36. Foote v. Beecher, 78 N. Y. 155; Conkling v. Weatherwax, 90 App. Div. 585, 86 N. Y. Supp. 139.

37. Sherman County Bank v. McDonold, 57 Kan. 358, 46 Pac. 703; Hunt v. Haven, 56 N. H. 87; Frear v. Drinker, 8 Pa. St. 520.

38. California. — Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013.

Connecticut. — White v. Wheaton, 16 Conn. 530.

Illinois. — Mullaphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. E. 640; Bell v. Prewitt, 62 Ill. 361.

Kentucky. — Hayden v. McIlvain, 4 Bibb. 57; Nelson v. Terry, 22 Ky. L. Rep. 111, 56 S. W. 672; Boli v. Irwin, 21 Ky. L. Rep. 366, 51 S. W. 444.

Maryland. — Carson v. White, 6 Gill 17.

Missouri. — Thompson v. Longan, 42 Mo. App. 146.

New York. — Newgass v. Auburn Loan Co., 81 App. Div. 411, 80 N. Y. Supp. 778; Duane v. Paige, 82 Hun 139, 31 N. Y. Supp. 310.

North Carolina. — Jarvis v. Vanderford, 116 N. C. 147, 21 S. E. 302.

Pennsylvania. — Hoffman v. Lee, 3 Watts 352.

South Carolina. — Taylor v. Heriot, 4 Desaus. 227.

Deeds of Trust. — The same rule applies to the declarations of the grantor under a deed of trust, made subsequent to the execution thereof.

were made,³⁹ and it has been held that the declarations of the grantor under a deed of trust are inadmissible against either the *cestui que trust* or the trustee, unless it be shown that they were made in his presence, or were known of by him, or that the deed was made with reference thereto.⁴⁰

This rule is, however, not applicable in cases where the mortgagor's retention of possession of the mortgaged premises⁴¹ or some other suspicious fact indicates the existence of a conspiracy between the mortgagor and mortgagee to defraud the mortgagor's creditors.

C. DONORS AND DONEES.—The general rule that the declarations of a former owner in disparagement of his claim or title are competent evidence against his subsequent grantee's claim of title⁴² applies where the subsequent conveyance was in the nature of a gift, made without valuable consideration, when the declarations were made prior to the gift;⁴³ and the donor's declarations made after the gift are not admissible to limit or defeat the estate of the donee claiming title thereto.⁴⁴ The declarations which are shown

Lang v. Metzger, 101 Ill. App. 380, affirmed in 206 Ill. 475, 69 N. E. 493.

39. *Howard v. McKenzie*, 54 Tex. 171; *McCullough v. Cumberland Val. R. Co.*, 186 Pa. St. 112, 40 Atl. 404.

40. *Perkins v. Brinkley*, 133 N. C. 348, 45 S. E. 652.

41. *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159.

42. See notes 16-23 under X, 1, A, c. (1.).

43. *Alabama*.—*Gillespie's Admr. v. Burleson*, 28 Ala. 551.

Georgia.—*Porter v. Allen*, 54 Ga. 623; *Lewis v. Adams*, 61 Ga. 559; *Poullain v. Poullain*, 76 Ga. 420; *Blalock v. Miland*, 87 Ga. 573, 13 S. E. 551; *Ogden v. Dodge County*, 97 Ga. 461, 25 S. E. 321.

Massachusetts.—*Whitney v. Wheeler*, 116 Mass. 490.

New York.—*Burlingame v. Robbins*, 21 Barb. (N. Y.) 327.

Contra.—The declarations of a party in possession, as that he had not given the property in question to the alleged donee, are not competent evidence to disprove a title claimed under him by gift. *Walker v. Blassingame*, 17 Ala. 810.

In Absence of Donee.—The donor's declarations, made in the absence of the donee, are not admissible to defeat the title of the donee. *Prater v. Frazier*, 11 Ark. 249.

Whitney v. Wheeler, 116 Mass. 490.

44. *Alabama*.—*Gillespie's Admr. v. Burleson*, 28 Ala. 551; *Walker v. Blassingame*, 17 Ala. 810; *Strong v. Brewer*, 17 Ala. 706; *Julian v. Reynolds*, 8 Ala. 680; *Gregory v. Walker*, 38 Ala. 26; *Olds v. Powell*, 7 Ala. 652.

Arkansas.—*Rector v. Danley*, 14 Ark. 304.

Georgia.—*Ogden v. Dodge County*, 97 Ga. 461, 25 S. E. 321; *Echols v. Barrett*, 6 Ga. 443; *Cornett v. Fain*, 33 Ga. 219.

Indiana.—*Paine v. Griffen*, 7 Blackf. 485.

Kentucky.—*Dixon v. Labry*, 16 Ky. L. Rep. 522, 29 S. W. 21; *Strelow v. Vonderlude's Exrs.*, 3 Ky. L. Rep. 472.

Massachusetts.—*Whitney v. Wheeler*, 116 Mass. 491.

New York.—*Sanford v. Sanford*, 5 Lans. 486; *Woodruff v. Cook*, 25 Barb. 505.

North Carolina.—*Eelbank v. Burt*, 3 N. C. (Mart. & H.) 501; *Cowan v. Tucker*, 30 N. C. (8 Ired. L.) 426; *Hicks v. Forrest*, 41 N. C. (6 Ired. Eq.) 528.

Ohio.—*Hall v. Geyer*, 14 Ohio C. C. 229.

South Carolina.—*Sumner v. Murphy*, 2 Hill 488; *Hunter v. Parsons*, 2 Bailey 59, *Newman v. Wilbourn* 1 Hill Eq. 10.

to have been made by the donee are admissible as against himself.⁴⁵

D. DECEDENTS. — Evidence of the declarations of a deceased person, made while in possession,⁴⁶ regarding his title to or interest in real estate, are, provided such declarations were relevant,⁴⁷ competent evidence against the claims of title of his heirs at law who have inherited such property,⁴⁸ or of the devisees to whom he de-

Texas. — *Grooms v. Rust*, 27 Tex. 231.

Virginia. — *Brock v. Brock*, 92 Va. 173, 23 S. E. 224; *Smith v. Betty*, 11 Gratt. 752.

The declarations of an alleged donor *causa mortis*, made after the gift are not admissible as evidence in an attack upon the donee's claim of title to the property. *Scheps v. Bowery Sav. Bank*, 97 App. Div. 434, 90 N. Y. Supp. 26.

In *Sims v. Saunders*, Harp. R. 374, an early South Carolina case, it was held that where the plaintiffs evidence *conclusively* establishes a title by gift, no declarations made by the donor subsequent to the time of making such gift can be admitted to impeach or qualify the title thus acquired. By this rule the competency of such after declaration was made to depend upon the degree of clearness and weight of the evidence in favor of the gift. In the later case of *Snowden v. Logan*, Rice's Equity 174, decided in 1839, the rule laid down in *Sims v. Saunders* was questioned and the competency of such declarations were held to depend not on the weight of the plaintiff's evidence as more or less conclusive in favor of the gift, but upon their relevancy to the issue before the court under this rule, it was further held that where a party seeking to establish a gift of slaves introduced and relied upon the admissions of the alleged donor, made at and about the time of the supposed gift, to the effect that he had given the property claimed, the after declarations of the donor, in opposition to and denial of his gift, were irrelevant.

45. *La Master v. Dickson*, 17 Tex. Civ. App. 473, 43 S. W. 911, *affirmed* in 91 Tex. 593, 45 S. W. 1.

46. In *Pentico v. Hayes* (Kan.), 88 Pac. 738; *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. Supp.

208, *affirmed* in 181 N. Y. 581, 74 N. E. 1119.

47. *Stubbs v. Beene*, 37 Ala. 627; *Central Branch U. P. R. Co. v. Andrews*, 37 Kan. 162, 14 Pac. 509; *Baker v. Haskell*, 47 N. H. 479; *Lee v. Parker*, 5 Whart. (Pa.) 342; *Machem v. Machem*, 28 Ala. 374.

The declarations may be contained in the verified pleadings of the decedent in a former action. *Warner v. Sapp* (Tex. Civ. App.), 97 S. W. 125.

The testimony as to such declarations should be clear, strong and well corroborated, a mere preponderance is not sufficient. *Ringo v. Richardson*, 53 Mo. 385. Parol proof of the declarations is, however sufficient. *Midmer v. Midmer*, 26 N. J. Eq. 299.

The declaration to constitute evidence, must be a statement of fact, the existence of an opinion unfavorable to his title in the mind of the decedent is not a probative, and hence not a relevant fact. *Ex parte Yown*, 17 S. C. 532.

48. *Alabama.* — *Pittman v. Pittman*, 124 Ala. 306, 27 So. 242.

Georgia. — *Studstill v. Willcox*, 94 Ga. 690, 20 S. E. 120; *Anderson v. Brown*, 72 Ga. 713; *Yonn v. Pittman*, 82 Ga. 637, 9 S. E. 667; *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38; *Smith v. Page*, 72 Ga. 539.

Illinois. — *Rust v. Mansfield*, 25 Ill. 336.

Indiana. — *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *McSweeney v. McMillen*, 96 Ind. 298.

Iowa. — *Davis v. Melson*, 66 Iowa 715, 24 N. W. 526; *Robinson v. Robinson*, 22 Iowa 427 (declaration that land was being held in trust).

Louisiana. — *Boatner v. Scott*, 1 Rob. 546.

Maine. — *Wentworth v. Wentworth*, 71 Me. 72.

Massachusetts. — *Plimpton v. Chamberlain*, 4 Gray 320; *Hodges v.*

vised the same,⁴⁰ or as against his executor,⁵⁰ or administrator,⁵¹ in any action in which the title to such property is involved.

Tenants in Dower. — A tenant in dower is not a claimant under her deceased husband in such a sense that his declarations are competent against her claim of title, by privity.⁵²

Decedent While in Possession. — It has also been held that the declarations of the decedent favoring his title, made while he was in possession, are admissible to show that he claimed title to the land,⁵³ or to show the character and extent of his claim,⁵⁴ where the issue

Hodges, 2 Cush. 455; *White v. Loring*, 24 Pick. 319.

Michigan. — *Chipman v. Thompson*. Walk. Ch. 405.

Minnesota. — *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018.

Mississippi. — *Graham v. Busby*, 34 Miss. 272.

Missouri. — *Long v. McDow*, 87 Mo. 197.

New Hampshire. — *Baker v. Haskell*, 47 N. H. 479; *Caswell v. Hill*, 47 N. H. 407; *Hurlburt v. Wheeler*, 40 N. H. 73; *Little v. Gibson*, 39 N. H. 505; *Tilton v. Emery*, 17 N. H. 536 (whether or not the decedent was in possession when he made the declaration).

New Jersey. — *Midmer v. Midmer*, 26 N. J. Eq. 299.

New York. — *Gibney v. Marchay*, 34 N. Y. 301; *Enders v. Sternbergh*, 33 How. Pr. 464, 2 Abb. Dec. 31, 1 Keyes 264; *Rose v. Adams*, 22 Hun 389; *Spaulding v. Hallenbeck*, 39 Barb. 79; *Baird v. Slaight*, 55 Hun 603, 8 N. Y. Supp. 603; *Luchy v. Odell*, 46 N. Y. Super. Ct. 547.

Ohio. — *Tipton v. Ross*, 10 Ohio 273.

Pennsylvania. — *Hunt's Appeal*, 100 Pa. St. 590; *Williard v. Williard*, 56 Pa. St. 119.

Wisconsin. — *Kreckeberg v. Leslie*, 111 Wis. 462, 87 N. W. 450.

The admissions of a deceased ancestor, appearing in the pleadings in a former action, are admissible against parties suing for the land as his heirs. *Warner v. Sapp* (Tex. Civ. App.), 97 S. W. 125.

49. *Rust v. Mansfield*, 25 Ill. 336; *Hale v. Monroe*, 28 Md. 98; *Enders v. Sternbergh*, 2 Abb. Dec. 31, 33 How. Pr. 464, 1 Keyes 264; *Gibney v. Marchay*, 34 N. Y. 301; *Broadrup v. Woodman*, 27 Ohio St. 553.

50. *Machem v. Machem*, 28 Ala. 374; *Turner v. Berry*, 74 Ga. 481; *Scott v. Crouch*, 24 Utah 377, 67 Pac. 1068.

51. *Alabama.* — *Stubbs v. Beene*, 37 Ala. 627; *Gillespie's Admr. v. Burleson*, 28 Ala. 551; *Lide v. Lide's Admr.*, 32 Ala. 449.

California. — *Stoddard v. Newhall*, 1 Cal. App. 111, 81 Pac. 666 (under Code of Civil Procedure, § 1853).

Georgia. — *Anderson v. Brown*, 72 Ga. 713.

Iowa. — *Robinson v. Robinson*, 22 Iowa 427.

Kansas. — *Central Branch U. P. R. Co. v. Andrews*, 37 Kan. 162, 14 Pac. 509.

Massachusetts. — *Fellows v. Smith*, 130 Mass. 378.

New York. — *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482.

South Carolina. — *Burckmyer v. Mairs*, Riley 208.

Texas. — *Schmidt v. Huff*, 19 S. W. 131; *Bush v. Barron*, 78 Tex. 5, 14 S. W. 238.

52. *Richardson v. Taylor*, 45 Ark. 472; *Davis v. Evans*, 102 Mo. 164, 14 S. W. 875; *Derush v. Brown*, 8 Ohio 412. *Contra.* — *Van Duyne v. Thayre*, 14 Wend. (N. Y.) 233.

53. *Luce v. Parsons*, 192 Mass. 8, 77 N. E. 1032 (under a statutory provision, Rev. Laws c. 175, § 66); *Lindsley v. McGrath*, 62 N. J. Eq. 478, 50 Atl. 236.

When Not in Possession. — Where such declarations were made while the decedent was not in possession, they are not admissible. *Doe ex dem. Anniston City Land Co. v. Edmondson* (Ala.), 40 So. 505.

54. *Seawell v. Young*, 77 Ark. 309, 91 S. W. 544.

is whether or not it belonged to the decedent or to another party.

The declarations of a deceased stockholder in an unincorporated association, made to the trustees thereof, are admissible in an attack against the title of the association, when it is made to appear that such stockholders spoke from personal knowledge.⁵⁵

E. STRANGERS AND THIRD PARTIES. — It is the general rule that the statements and declarations of strangers to the title or of third parties, are inadmissible as evidence, either in support or in derogation of title, such statements and declarations being regarded as hearsay.⁵⁶

2. Title to Personal Property. — A. IN GENERAL. — Generally speaking, declarations made by persons in possession of personal property, explanatory of the title by which they hold, are admissible against them as part of the *res gestae*.⁵⁷

B. CLAIMANTS. — a. *In Favor of Declarant*. — b. *Against Declarant*. — The declarations or statements of a claimant of personal property,⁵⁸ or of one in possession thereof, are never admissible as evidence in favor of his claim of title thereto.⁵⁹

55. Long v. Moore, 19 Tex. Civ. App. 363, 48 S. W. 43.

56. California. — Riley v. Martinnelli, 97 Cal. 575, 32 Pac. 579.

Colorado. — Morrison v. Bartholomew, 9 Colo. App. 27, 47 Pac. 410.

Georgia. — Tillman v. Fontaine, 98 Ga. 672, 27 S. E. 149.

Illinois. — Redmon v. Holley, 10 Ill. App. 202.

Indiana. — Tobin v. Young, 124 Ind. 507, 24 N. E. 121.

Massachusetts. — Long v. Lamkin, 9 Cush. 361.

New Hampshire. — Heywood v. Brooks, 47 N. H. 231.

New Jersey. — Hoyt v. Hoyt, 27 N. J. Eq. 485.

New York. — Colburn v. Marsh, 68 Hun 269, 22 N. Y. Supp. 990.

Pennsylvania. — Thomas v. Mad-dan, 50 Pa. St. 261; Com. v. Kreager, 78 Pa. St. 477; Tarr v. Robinson, 158 Pa. St. 60, 27 Atl. 859.

Texas. — Odom v. Woodward, 74 Tex. 41, 11 S. W. 925; Davidson v. Wallingford (Tex. Civ. App.), 30 S. W. 286; Warren v. Fredericks, 76 Tex. 647, 13 S. W. 643.

57. Alabama. — Larkin v. Baty, 18 So. 666; Oden v. Stubblefield, 4 Ala. 40; Hair v. Little, 28 Ala. 236; Mims v. Sturdevant, 23 Ala. 664; McCrae v. Young, 43 Ala. 622; Daffron v. Crump, 69 Ala. 77.

Georgia. — McNab v. Lockhart, 18 Ga. 495.

Iowa. — Stephens v. Williams, 46 Iowa 540 (in replevin); Blake v. Graves, 18 Iowa 312; Hardy v. Moore, 62 Iowa 65, 17 N. W. 200.

Kansas. — Reiley v. Haynes, 38 Kan. 259, 16 Pac. 440.

Missouri. — Vermillion v. Le Clure, 89 Mo. App. 55.

58. Rowan v. Hutchisson, 27 Ala. 328.

59. Alabama. — Oden v. Stubblefield, 4 Ala. 40; McCrae v. Young, 43 Ala. 622; Parker v. Goldsmith, 16 Ala. 526; Daffron v. Crump, 69 Ala. 77; Calvert v. Marlow, 18 Ala. 67.

Arkansas. — Yarbrough v. Arnold, 20 Ark. 592.

Colorado. — Doane v. Glenn, 1 Colo. 495.

Georgia. — Dickinson v. Solomons, 26 Ga. 685.

Illinois. — Redmon v. Holley, 10 Ill. App. 202; Gray v. Morey, 57 Ill. 221.

Indiana. — Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351.

Iowa. — Ross v. Hayne, 3 G. Gr. 211; Taylor v. Lusk, 9 Iowa 444.

Massachusetts. — Beecher v. Mayall, 16 Gray 376.

Mississippi. — Barber v. Kinard, 4 So. 120.

Missouri. — Turner v. Belden, 9

Declarations made by a party in possession of personal property, and in derogation of his title thereto, are admissible as evidence to impeach his title.⁶⁰

C. FORMER OWNERS AND VENDORS. — a. *Before Transfer*. — The relevant ⁶¹ declarations of the former owner of a chattel or of a chose in action, in derogation of his title thereto, are generally held competent evidence as against one claiming under him.⁶² But it must be affirmatively shown by the party seeking to introduce such testimony⁶³ that the adverse party claims under the declarant⁶⁴ and

Mo. 797; McCune v. McCune, 29 Mo. 117; Melcher v. Derkum, 44 Mo. App. 650; Degenhart v. Schmidt, 7 Mo. App. 117.

New York. — Schwab v. Heindel, 9 N. Y. Supp. 521, 30 N. Y. St. 547.

North Carolina. — Swindell v. Warden, 52 N. C. (7 Jones L.) 575. Oregon. — Besser v. Joyce, 9 Or. 310.

Texas. — Rankin v. Bell, 85 Tex. 28, 19 S. W. 874.

Wisconsin. — Roebke v. Andrews, 26 Wis. 311.

While such declarations are not admissible as evidence of title, they may be received as evidence to show the ground upon which the declarant claims to hold the property. Thomas v. Degraffenreid, 27 Ala. 651; Blake v. White, 13 N. H. 267.

60. Babcock v. Huntington, 9 Ala. 869; Nelson v. Iverson, 24 Ala. 9; Vincent v. State, 74 Ala. 274; Thomas v. Degraffenreid, 17 Ala. 602; Jones v. Morgan, 13 Ga. 515; Criddle v. Criddle, 21 Mo. 522; Swab v. Miller (Pa.), 9 Atl. 667.

A mere naked declaration that the property belongs to another, while it cannot confer title, may be evidence of title. Prater v. Frazier, 11 Ark. 249.

In Powell v. Watts, 72 Ga. 770, it is held that such declarations, to be admissible, must have been made before commencement of the action in which they are sought to be introduced.

61. O'Brien v. Hilburn, 22 Tex. 616, 625; Wustland v. Potterfield, 9 W. Va. 438.

62. Alabama. — Jennings v. Blocker's Admr., 25 Ala. 415; Barnes v. Mobley, 21 Ala. 232.

Georgia. — Doughty v. McMillan, 92 Ga. 818, 19 S. E. 59.

Iowa. — Miller v. O'Neal, 9 Iowa 444.

Mississippi. — Walker v. Marseilles, 70 Miss. 283, 12 So. 211.

North Carolina. — Johnson v. Paterson, 9 N. C. (2 Hawks) 183.

Ohio. — Ritchy v. Martin, Wright 441.

South Carolina. — Land v. Lee, 2 Rich. L. 168.

63. Holly v. Flournoy, 54 Ala. 99; Gregory v. Walker, 38 Ala. 26; Roberts v. Medbery, 132 Mass. 100; Givens v. Manns, 6 Munf. (Va.) 191.

64. Alabama. — Elmore v. Fitzpatrick, 56 Ala. 400.

Arkansas. — Dorr v. School Dist. No. 26, 40 Ark. 237.

California. — Hyde v. Buckner, 108 Cal. 522, 41 Pac. 416; Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159.

Georgia. — Oliver v. Persons, 30 Ga. 391.

Illinois. — Fyffe v. Fyffe, 106 Ill. 646.

Iowa. — Oberholtzer v. Hazen, 101 Iowa 340, 70 N. W. 207.

Mississippi. — Levy v. Holberg, 71 Miss. 66, 14 So. 537; Sharp v. Maxwell, 30 Miss. 589.

In Clark v. Wilson, 127 Ill. 449, 19 N. E. 860, it was held that the execution of a deed cannot be proved by the admissions or declarations of persons not themselves shown to have been in privity with the title under which the grantee claims, nor can the execution of a deed be proved by showing the state of the accounts between the parties.

A Claimant Under an Adverse or Paramount Title cannot be affected by the declarations of a former owner as to his title. Elmore v. Fitzpatrick, 56 Ala. 400.

that at the time the statement in question was made the declarant had not transferred the property.⁶⁵

New York Rule. — A contrary rule obtains in New York, and in that state the admissions or declarations of a former owner of personal property are not evidence in derogation of the claim of title of a subsequent vendee or assignee.⁶⁶ This also appears to be the

65. Alabama. — *Elmore v. Fitzpatrick*, 56 Ala. 400; *Gregory v. Walker*, 54 Ala. 99; *Jemison v. Smith*, 37 Ala. 185; *Jennings v. Blocker*, 25 Ala. 415; *Holly v. Flournoy*, 54 Ala. 99; *Barnes v. Mobley*, 21 Ala. 232; *Inge v. Murphy*, 10 Ala. 885; *Horton v. Smith*, 8 Ala. 73.

Georgia. — *Doughty v. McMillan*, 92 Ga. 818, 19 S. E. 59; *Saulsbury v. McKellar*, 59 Ga. 301.

Illinois. — *First Nat. Bank v. Strang*, 138 Ill. 347, 27 N. E. 903; *Gill v. Crosby*, 63 Ill. 190; *Vennum v. Thompson*, 38 Ill. 143.

Indiana. — *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190; *Bunberry v. Brett*, 18 Ind. 343.

Kentucky. — *Gentry v. McMinnis*, 3 Dana 382; *Carrel v. Early*, 4 Bibb 270.

Maine. — *White v. Chadbourne*, 41 Me. 149; *McLanathan v. Patten*, 39 Me. 142; *Holt v. Walker*, 26 Me. 107; *Hale v. Smith*, 6 Me. 416.

Mississippi. — *Walker v. Marseilles*, 70 Miss. 283, 12 So. 211.

Missouri. — *Burgess v. Quimby*, 21 Mo. 508; *Cavin v. Smith*, 21 Mo. 444; *Renshaw v. Steamboat Pawnee*, 19 Mo. 532.

New Hampshire. — *Baker v. Haskell*, 47 N. H. 479.

New York. — *White v. Chouteau*, 10 Barb. 202.

North Carolina. — *Johnson v. Patterson*, 9 N. C. (2 Hawks) 183.

Ohio. — *Ritchy v. Martin*, Wright 441.

Pennsylvania. — *Caldwell v. Gamble*, 4 Watts 292.

South Carolina. — *Crawley v. Tucker*, 4 Rich. L. 560; *Land v. Lee*, 2 Rich. L. 168.

Tennessee. — *Drennon v. Smith*, 3 Head. 389.

Texas. — *Smith v. Gillum*, 80 Tex. 120, 15 S. W. 794.

Vermont. — *Alger v. Andrews*, 47 Vt. 238.

Virginia. — *Givens v. Manns*, 6 Munf. 191.

West Virginia. — *Crothers v. Crothers*, 40 W. Va. 169, 20 S. E. 927.

Wisconsin. — *Fay v. Rankin*, 47 Wis. 400, 2 N. W. 562.

The declaration is not competent evidence if made before the declarant acquired title to the property. *Tuttle v. Cone*, 108 Iowa 468, 79 N. W. 267.

Seizure Under Legal Process is equivalent to a voluntary transfer within the rule stated in the text. *Renshaw v. Steamboat Pawnee*, 19 Mo. 532.

66. Flannery v. Van Tassell, 127 N. Y. 631, 27 N. E. 393; *Tousley v. Barry*, 16 N. Y. 497; *Conkling v. Weatherwax*, 90 App. Div. 585, 86 N. Y. Supp. 139; *Booth v. Swizey*, Seld. Notes (N. Y.) 153; *Squire v. Greene*, 47 App. Div. 636, 62 N. Y. Supp. 48; *Woodhouse v. Jones*, 5 N. Y. Leg. Obs. 20; *Stark v. Boswell*, 6 Hill (N. Y.) 405.

Paige v. Cogwin, 7 Hill (N. Y.) 361, 379, decided in 1843, is referred to in the later New York cases as the leading case upon this subject. The point at issue in that case was whether the declarations made by the payee of a negotiable promissory note, while he was the holder and owner thereof, were admissible against a party to whom it was subsequently transferred after maturity. A great many cases, both English and American, were reviewed and discussed in the opinion which was written by Senator Lott, the conclusion reached was that such declarations were not admissible. "It may, I think be laid down as a general proposition, that the cases in which such evidence has been held admissible are those only where the declarations were made by a party really in interest or by one through whom the plaintiff claimed as a privy by representation, as in cases of bankruptcy, death and others of a

rule in Idaho⁶⁷ and has been followed in the United States supreme court.⁶⁸

Grantor of Trust Deed of Chattels. — The declarations of the grantor in a deed of trust of chattels, made in disparagement of his title thereto, but not made in the presence of the trustee, are not admissible in an action against either the trustee or the *cestui que trust*.⁶⁹

As to Execution Purchaser. — The former owner's declarations in support of his title have been held competent evidence in favor of one claiming title under him by virtue of an execution sale, as against a third party who also claims title.⁷⁰

b. After Transfer. — The declarations of a former owner of personal property, when made after he has transferred the same, are not competent evidence in derogation of title, either against the transferee or one holding under him.⁷¹ But such a declaration,

similar character. Where the rule is applicable there must, it is conceded, be 'an identity of interest' between the assignor and the assignee. *Where a person becomes a purchaser of a chose in action or of a chattel, for a valuable consideration, his rights are independent of the assignor and beyond his control.* Although it may be necessary to found his title on a transfer, yet the mere proof of such transfer is evidence of his right. Personal property is frequently acquired by delivery merely. Possession alone then is *prima facie* evidence of title, and the rights of the possessor do not necessarily depend upon the title of the person by whom delivery was made or from whom such possession was obtained."

The assignee of a chattel mortgage comes within the benefit of the New York rule laid down in the text. *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757, *reversing s. c.* 30 App. Div. 14, 51 N. Y. Supp. 916.

67. *Deasey v. Thurman*, 1 Idaho 775.

68. *Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 382.

69. *Boltz v. Engelke* (Tex. Civ. App.), 63 S. W. 899; *Bergen v. Marble Yard*, 72 Tex. 53, 11 S. W. 1027; *Clarke v. Waite*, 12 Mass. 439; *Hinson v. Walker*, 65 Tex. 103.

70. *Nodle v. Hawthorn*, 107 Iowa 380, 77 N. W. 1062.

71. *United States*. — *Many v. Jagger*, 1 Blatchf. 372, 16 Fed. Cas.

No. 9,055; *Clements v. Moore*, 6 Wall. 299.

Alabama. — *McCormick v. Joseph*, 77 Ala. 236; *McKenzie v. Hunt*, 1 Port. 37; *Martin v. Kelly*, 1 Stew. 198.

Arkansas. — *Clinton v. Estes*, 20 Ark. 235; *Humphries v. McCraw*, 9 Ark. 91; *Gullett v. Lamberton*, 6 Ark. 109; *Brown v. Wright*, 17 Ark. 9; *Smith v. Hamlet*, 43 Ark. 324.

California. — *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110; *Banning v. Marleau*, 121 Cal. 240, 53 Pac. 692; *Visher v. Webster*, 13 Cal. 58; *Cohn v. Mulford*, 15 Cal. 52.

Georgia. — *Flanders v. Maynard*, 58 Ga. 56; *Bass v. Bass*, 52 Ga. 531; *Gill v. Strozier*, 32 Ga. 688; *Howard v. Snelling*, 32 Ga. 195; *James v. Kerby*, 29 Ga. 684; *Monroe v. Napier*, 52 Ga. 385; *Smith v. Haire*, 58 Ga. 450.

Illinois. — *Milling v. Hillenbrand*, 156 Ill. 310, 40 N. E. 941; *Randegger v. Ehrhardt*, 51 Ill. 101; *Miner v. Phillips*, 42 Ill. 123; *Hessing v. McCloskey*, 37 Ill. 341; *Myers v. Kinzie*, 26 Ill. 36; *McCartney v. Krapfer*, 84 Ill. App. 266; *Rust v. Mansfield*, 25 Ill. 336; *Edwards v. Hamilton*, 19 Ill. App. 340.

Indiana. — *Campbell v. Coon*, 51 Ind. 76.

Iowa. — *Neuffer v. Moehn*, 96 Iowa 731, 65 N. W. 334; *Bixby v. Carskaddon*, 70 Iowa 726, 29 N. W. 626; *Benson v. Lundy*, 52 Iowa 265, 3 N. W. 149; *McCormicks v. Fuller*, 56 Iowa 43, 8 N. W. 800; *Gray v.*

made after the transfer, if made in the presence of the transferee, and acquiesced in by him, may be competent against such transferee

Earl, 13 Iowa 188; Urdangen v. Doner, 122 Iowa 533, 98 N. W. 317.

Kansas.—Scheble v. Jordan, 30 Kan. 353, 1 Pac. 121, s. c. 12 Kan. 165.

Kentucky.—Gatlif v. Rose, 8 B. Mon. 629; Meriweather v. Herran, 8 B. Mon. 162; Ring v. Gray, 6 B. Mon. 368; Brashear v. Burton, 3 Bibb 9.

Louisiana.—Ford v. Mills, 46 La. Ann. 331, 14 So. 845.

Maine.—Dennison v. Benner, 41 Me. 332.

Maryland.—Cooke v. Cooke, 29 Md. 538; Lark v. Linstead, 2 Md. Ch. 162.

Massachusetts.—Kimball v. Leland, 110 Mass. 325; Taylor v. Robinson, 2 Allen 562; Sumner v. M'Neil, 12 Metc. 519; Roberts v. Medbery, 132 Mass. 100.

Michigan.—Vyn v. Keppel, 108 Mich. 244, 65 N. W. 966; Carr v. McCarthy, 69 Mich. 258, 38 N. W. 241.

Minnesota.—Adler v. Apt, 30 Minn. 45, 14 N. W. 63; Howland v. Fuller, 8 Minn. 50; Zimmerman v. Lamb, 7 Minn. 421; Derby v. Gallup, 5 Minn. 119; Burt v. McKinstry, 4 Minn. 204; Shaw v. Robertson, 12 Minn. 334; Hathaway v. Brown, 18 Minn. 373; Glaucke v. Gerlick, 91 Minn. 282, 98 N. W. 94.

Mississippi.—Ferriday v. Selser, 4 How. 506.

Missouri.—Steward v. Thomas, 35 Mo. 202; Renshaw v. Steamboat Pawnee, 19 Mo. 532; Worley v. Watson, 22 Mo. App. 546.

Nebraska.—Williams v. Eickenberry, 25 Neb. 721, 41 N. W. 770.

Nevada.—Perley v. Forman, 7 Nev. 309; Lewis v. Wilcox, 6 Nev. 215.

New York.—Tabor v. Van Tassell, 86 N. Y. 642; Tilson v. Terwilliger, 56 N. Y. 273; Moravec v. Grell, 78 App. Div. 146, 79 N. Y. Supp. 533; Knight v. Forward, 63 Barb. 311; Peck v. Crouse, 46 Barb. 151; Sprague v. Kneeland, 12 Wend. 161.

North Carolina.—Williams v.

Clayton, 29 N. C. (7 Ired. L.) 442.

Ohio.—Ohio Coal Co. v. Davenport, 37 Ohio St. 194.

Oklahoma.—Woods v. Taurot, 14 Okla. 171, 77 Pac. 346.

Pennsylvania.—Pringle v. Pringle, 59 Pa. St. 281.

South Carolina.—Kittles v. Kittles, 4 Rich. L. 422.

South Dakota.—Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

Tennessee.—Holmark v. Molin, 5 Coldw. 482.

Texas.—Bradford v. Taylor, 74 Tex. 175, 12 S. W. 20; Wooley v. Bell, 33 Tex. Civ. App. 399, 76 S. W. 797; Schmick v. Noel, 64 Tex. 406; Bruce v. Bruce (Tex. Civ. App.), 89 S. W. 435; Garrahy v. Green, 32 Tex. 202; Boltz v. Engelke (Tex. Civ. App.), 63 S. W. 899; D'Arrigo v. Texas Produce Co. (Tex. Civ. App.), 31 S. W. 713.

Vermont.—Bullard v. Billings, 2 Vt. 309; Murray v. Chadwick, 52 Vt. 293.

Virginia.—Givens v. Manns, 6 Munf. 191; Vaughan v. Winckler, 4 Munf. 136.

Wisconsin.—Small v. Champeny, 102 Wis. 61, 78 N. W. 407.

Wyoming.—Toms v. Whitmore, 6 Wyo. 220, 44 Pac. 56.

Such declarations are equally as inadmissible against a subsequent transferee as against an immediate transferee. Woodhouse v. Jones, 5 N. Y. Leg. Obs. 20.

Hearsay.—Declarations made by a vendor of personal property after the transfer thereof are those of a stranger to the title, and as such are hearsay and inadmissible. Paige v. O'Neal, 12 Cal. 496.

Transfer Under Legal Process. The conduct and declarations of a defendant in attachment, made subsequent to the levy of the attachment and the transfer of the goods to the claimant, and not accompanying or explaining any material fact in the case, are not competent evidence against the claimant. Pulliam, Wells, Rankin & Co. v. Newberry's Admr., 41 Ala. 168.

as an admission by him,⁷² and the statements of the vendor made after the sale are admissible to contradict his own testimony.⁷³

D. MORTGAGORS, MORTGAGEES AND PLEDGORS.—The declarations of the mortgagor of personal property in derogation of his title thereto, when made prior to the execution of the mortgage, are generally held to be competent evidence against the mortgagee's claim of title,⁷⁴ although the contrary rule obtains in New York.⁷⁵ But if the declarations were made after the mortgage was executed, they are not admissible against the mortgagee.⁷⁶ For the same reason, and to the same extent, the declarations of a chattel mortgagee, in disparagement of his title, if made while he holds the mortgage, are evidence against the claim of title of those subsequently holding under him.⁷⁷ A pledgor's declarations of the same character, if made prior to the pledge, are competent evidence against the pledgee on an issue as to title, but otherwise if made subsequent to the pledge.⁷⁸

E. ASSIGNORS.—*a. Before Assignment.*—It is the general rule that the declarations in derogation of his title, made by the assignor of a chose in action, are competent evidence against the assignee and his privies in interest,⁷⁹ where such declarations are affirma-

⁷². *Randegger v. Ehrhardt*, 51 Ill. 103; *Peck v. Crouse*, 46 Barb. (N. Y.) 151; *Garrahy v. Green*, 32 Tex. 202.

⁷³. *Fiske v. Small*, 25 Me. 453.

⁷⁴. *Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394; *Beedy v. Macomber*, 47 Me. 451.

⁷⁵. *Dwelly v. Van Houghton*, 4 N. Y. Leg. Obs. 101; *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757, reversing s. c. 30 App. Div. 14, 51 N. Y. Supp. 916; *Conkling v. Weatherwax*, 90 App. Div. 585, 86 N. Y. Supp. 139.

⁷⁶. *United States v. Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, affirming s. c. 58 Fed. 670, 7 C. C. A. 426; *Winchester, etc. Mfg. Co. v. Creary*, 116 U. S. 161.

Arkansas.—*Gauss v. Doyle*, 46 Ark. 122.

Idaho.—*Meyer v. Munro*, 9 Idaho 46, 71 Pac. 969.

Illinois.—*Bell v. Prewitt*, 62 Ill. 361.

Indiana.—*Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394.

Iowa.—*Fowler Co. v. McDonnell*, 100 Iowa 536, 69 N. W. 873.

Michigan.—*Krementz v. Howard*, 109 Mich. 466, 67 N. W. 526.

Vermont.—*Davis v. Buchanan*, 73 Vt. 67, 50 Atl. 545.

Wisconsin.—*Donaldson v. Johnson*, 2 Pinn. 482, 2 Chand. 160.

⁷⁷. *Farmer's Loan & Trust Co. v. Montgomery*, 30 Neb. 33, 46 N. W. 214; *Kinna v. Smith*, 3 N. J. Eq. 14; *Walthol v. Johnson*, 2 Call (Va.) 275.

The New York Rule is contrary to that stated in the text. *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757, reversing s. c. 30 App. Div. 14, 51 N. Y. Supp. 916.

⁷⁸. *Fuqua's Admr. v. Bogard*, 22 Ky. L. Rep. 1910, 62 S. W. 480.

⁷⁹. *Alabama.*—*Grayson v. Glover*, 33 Ala. 182.

Georgia.—*National Bank v. Exchange Bank*, 110 Ga. 692, 36 S. E. 265.

Illinois.—*Anderson v. South Chicago Brew. Co.*, 173 Ill. 213, 50 N. E. 655; *Hanchett v. Kimbark*, 118 Ill. 121, 7 N. E. 491; *Williams v. Judy*, 8 Ill. 282; *Merrick v. Hulbert*, 15 Ill. App. 606.

Indiana.—*Abbott v. Muir*, 5 Ind. 444.

Kentucky.—*Scott v. Coleman*, 5 Litt. 349.

Maryland.—*Clary v. Grimes*, 12 Gill & J. 31.

Massachusetts.—*Stevens v. Parker*, 5 Allen 333.

tively shown to have been made while the declarant was the owner of such chose in action and prior to assignment and notice to the debtor,⁸⁰ although the New York doctrine is to the contrary, and in that state such declarations are not competent evidence as against the assignee's claim of title.⁸¹ The New York doctrine is apparently followed in Montana.⁸²

Possession of Interest. — Only such declarations as were made by the assignor while he possessed the substantial interest are competent evidence against the assignee, and hence the fact that the assignor is a party to the record does not affect the application of the rule.⁸³

Self-Serving Declarations. — The declarations of the assignor are of course not competent as evidence of his own title or that of his assignee.⁸⁴

Mississippi. — *Brown v. McGraw*, 12 Smed. & M. 267.

Missouri. — *Murray v. Oliver*, 18 Mo. 405.

Pennsylvania. — *Magee v. Raiguel*, 64 Pa. St. 110; *Kellogg v. Krauser*, 14 Serg. & R. 137; *Brindle v. M'Ilvaine*, 10 Serg. & R. 282.

South Carolina. — *Westbury v. Simmons*, 57 S. E. 467, 35 S. E. 764.

Utah. — *McCornick v. Sadler*, 14 Utah 463, 47 Pac. 667.

Virginia. — *Wilcox v. Pearman*, 9 Leigh 144.

Wisconsin. — *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725.

80. *Grayson v. Glover*, 33 Ala. 182; *Norton v. Woods*, 5 Paige (N. Y.) 249; *Patrick v. McWilliams*, 23 Ga. 348.

81. *Truax v. Slater*, 86 N. Y. 630; *Tousley v. Barry*, 16 N. Y. 497; *Booth v. Swezey*, 8 N. Y. 276; *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043; *Title v. Van Valkenburg*, 75 App. Div. 69, 77 N. Y. Supp. 786; *Robinson v. Bishop*, 39 Hun (N. Y.) 370; *Edington v. Aetna Life Ins. Co.*, 13 Hun (N. Y.) 543; *Von Sachs v. Kretz*, 72 N. Y. 548. See also *Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379.

In *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757, reversing s. c. 30 App. Div. 14, 51 N. Y. Supp. 916, it was held that the declarations made by the assignor of a chattel mortgage while he owned such mortgage, were not competent evidence either to defeat the title of the assignee or to establish equities in favor of the mortgagor.

Admissible Only Against Declarant. — In *Smith v. Webb*, 1 Barb. (N. Y.) 230, it was held that the declarations of a prior holder of a chose in action, e. g., a mortgage and bond, made before assignment thereof, are not admissible in evidence against a subsequent purchaser who has acquired title for a valuable consideration.

82. In *Shober v. Jack*, 3 Mont. 351, the court held itself bound to follow the rule laid down by the United States Supreme Court in *Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379, which held that the declarations or admissions of the assignor of a note cannot be introduced in evidence against a subsequent holder. The court stated that it followed this rule with great reluctance, and that it was opposed to the weight of authority. Montana was a territory at the time this decision was rendered.

83. *United States.* — *Palmer v. Cassin*, 2 Cranch C. C. 66, 18 Fed. Cas. No. 10,687.

Alabama. — *Head v. Shaver*, 9 Ala. 791.

Illinois. — *Dazey v. Mills*, 10 Ill. 67.

Maine. — *Butler v. Millett*, 47 Me. 492.

Massachusetts. — *Wing v. Bishop*, 3 Allen 456.

New York. — *Eberhardt v. Schuster*, 10 Abb. N. C. 374; *Frear v. Evertson*, 20 Johns. 142.

Tennessee. — *Moyers v. Inman*, 2 Swan 80.

84. *Heywood v. Reed*, 4 Gray (Mass.) 574.

b. *After Assignment*.—Declarations in disparagement of title or of the validity of the assignment, when made by the assignor subsequent to the assignment and notice to the debtor⁸⁵ and where the assignment was a *bona fide* transaction,⁸⁶ are not competent evidence against the assignee or persons who claim under him.⁸⁷

In Favor of Claimants Under Other Transfer.—The assignor's declarations against his own interest and in support of the assignment

85. *Georgia*.—Patrick *v.* McWilliams, 23 Ga. 348.

Iowa.—Reinecke *v.* Gruner, 111 Iowa 731, 82 N. W. 900.

Kentucky.—Turpin *v.* Marksberry, 3 J. J. Marsh. 622.

Missouri.—Garland *v.* Harrison, 17 Mo. 282.

New York.—Harlam *v.* Green, 31 Misc. 261, 64 N. Y. Supp. 79; Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Norton *v.* Woods, 5 Paige Ch. 249; Finance Co. of America *v.* Josephson, 88 N. Y. Supp. 707.

Pennsylvania.—Eby *v.* Eby, 5 Pa. St. 435; Bailey *v.* Clayton, 20 Pa. St. 295.

Texas.—Reed *v.* Herring, 37 Tex. 160.

Vermont.—Halloran *v.* Whitcomb, 43 Vt. 306.

86. In McKean *v.* Adams, 11 Misc. 387, 32 N. Y. Supp. 281, it was held that where an assignment is merely colorable or without consideration, the declarations of the assignor are admissible against the assignee, but that where the assignment was for full value and made in good faith such declarations are not admissible.

87. *Alabama*.—Vickers *v.* Mooney, 6 Ala. 97; Smith *v.* Rogers, 1 Stew. & P. 317.

Arkansas.—State *v.* Jennings, 10 Ark. 428.

Colorado.—Erock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512; Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107.

Connecticut.—Scripture *v.* Newcomb, 16 Conn. 588.

Georgia.—Patrick *v.* McWilliams, 23 Ga. 348; Wright *v.* Zeigler Bros., 70 Ga. 501; Shields *v.* Blanchard, 74 Ga. 805; Lindrum *v.* Robinson, 50 Ga. 44.

Illinois.—Oliver *v.* McDowell, 100 Ill. App. 45.

Indiana.—Wynne *v.* Glidewell, 17 Ind. 446.

Iowa.—Reinecke *v.* Gruner, 111 Iowa 731, 82 N. W. 900; Savery *v.* Spaulding, 8 Iowa 239.

Kansas.—Wichita Wholesale Groc. Co. *v.* Records, 40 Kan. 215, 19 Pac. 851; Hairgrove *v.* Millington, 8 Kan. 480.

Kentucky.—Turpin *v.* Marshberry, 3 J. J. Marsh. 622.

Maine.—Gillighan *v.* Tebbetts, 33 Me. 360; Matthews *v.* Houghton, 10 Me. 420.

Maryland.—Owings *v.* Low, 5 Gill & J. 134.

Michigan.—Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 562.

Minnesota.—Burt *v.* McKinstry, 4 Minn. 204.

Missouri.—Garland *v.* Harrison, 17 Mo. 282; Claflin *v.* Sommers, 39 Mo. App. 419.

New York.—Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Beste *v.* Burger, 110 N. Y. 644, 17 N. E. 734, *affirming s. c.* 13 Daly 317, 17 Abb. N. C. 164; Truax *v.* Slater, 86 N. Y. 630; Coyne *v.* Weaver, 84 N. Y. 386; Barnett *v.* Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. Supp. 842; Gerding *v.* Funk, 48 App. Div. 603, 64 N. Y. Supp. 423, *affirmed*, 169 N. Y. 572, 61 N. E. 1129; Peck *v.* Crouse, 46 Barb. 151; Harlam *v.* Green, 31 Misc. 261, 64 N. Y. Supp. 79; Vidvard *v.* Powers, 34 Hun 221; Hanna *v.* Curtis, 1 Barb. Ch. 263; Burhans *v.* Kelly, 49 Hun 610, 2 N. Y. Supp. 175; Christie *v.* Bishop, 1 Barb. Ch. 105; Norton *v.* Woods, 5 Paige 249.

Pennsylvania.—Work's Appeal, 59 Pa. St. 444; Bailey *v.* Clayton, 20 Pa. St. 295; Eby *v.* Eby, 5 Pa. St. 435; Smith *v.* Gibson, 1 Yeates 291.

Texas.—Reed *v.* Herring, 37 Tex. 160; Cundiff *v.* Herron, 33 Tex. 623; Carleton *v.* Baldwin, 27 Tex. 572.

are competent in evidence against those claiming under him by a transfer other than such assignment.⁸⁸

Burden of Proof.—The party offering the declaration as evidence to defeat a claim of title of an assignee or subsequent holder has the burden of affirmatively showing that such declaration was made prior to the assignment and notice to the debtor.⁸⁹

F. DECEDENTS.—The declarations of the deceased owner of personal property in disparagement of his title thereto are competent evidence against his personal representatives and next of kin,⁹⁰ or against his legatees,⁹¹ nor is it material to whom such declarations were made.⁹² Such declarations are, however, not competent evidence in favor of the deceased declarant's personal representatives, next of kin, or legatees,⁹³ for the reason that they are regarded as

Vermont.—*Halloran v. Whitcomb*, 43 Vt. 306.

Virginia.—*Ginter v. Breeden*, 90 Va. 565, 19 S. E. 656; *Strother v. Mitchell*, 80 Va. 149; *Barbour v. Duncanson*, 77 Va. 76.

Wisconsin.—*Bates v. Ableman*, 13 Wis. 644; *Norton v. Kearney*, 10 Wis. 443.

Subsequent Death of Declarant. The fact that the assignor has died subsequent to making the declarations does not render them competent evidence. *Crawford v. Hord* (Tex. Civ. App.), 89 S. W. 1097.

Presence of Assignee.—But where the conversation in the course of which the declarations were made took place in the presence of the assignee and shortly after the assignment, such declarations may be admitted in evidence as against the assignee. *Hazel v. Bank of Tipton*, 95 Mo. 60, 8 S. W. 173.

^{88.} *Oliver v. McDowell*, 100 Ill. App. 45.

^{89.} *Oliver v. McDowell*, 100 Ill. App. 45; *Wilcox v. Pearman*, 9 Leigh (Va.) 144.

^{90.} *California.*—*Harp v. Harp*, 136 Cal. 421, 69 Pac. 28.

Indiana.—*Clouser v. Ruckman*, 104 Ind. 588, 4 N. E. 202; *Slade v. Leonard*, 75 Ind. 172; *Wilcox v. Duncan*, 3 Ind. 146; *Bevins v. Cline*, 21 Ind. 37; *Denman v. McMahan*, 37 Ind. 241.

Michigan.—*Chipman v. Kellogg*, 60 Mich. 438, 27 N. W. 592.

Missouri.—*Smith v. Witton*, 69 Mo. 458; *Hart v. Hart*, 41 Mo. 441; *Diel v. Stegner*, 56 Mo. App. 535.

New York.—*Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375; *Wooster v. Booth*, 2 Hun 426; *Hunter v. Hunter*, 19 Barb. 631; *Ackley v. Ackley*, 66 Hun 636, 21 N. Y. Supp. 877; *Ginocchio v. Porcella*, 3 Bradf. Surr. 277; *Komitsch v. De Groot*, 80 App. Div. 970, 80 N. Y. Supp. 970.

South Carolina.—*Blake v. Jones*, Bailey Eq. 141; *Richards v. Munro*, 30 S. C. 284.

Texas.—*Dooley v. McEwing*, 9 Tex. 306.

Where the declarations made by an intestate would be competent evidence against him were he living and had the action been brought by him, they are admissible for the defendant when the action is brought by his administrator. *Dale v. Gower*, 24 Me. 563.

In an action to recover possession of property claimed by virtue of a *donatio mortis causa*, the declarations of the alleged donor, since deceased, made after delivering the property to the plaintiff to the effect that he had given the same to the plaintiff, are admissible as against the personal representatives of the alleged donor. *Smith v. Maine*, 25 Barb. (N. Y.) 33.

^{91.} In *Mueller v. Rebhan*, 94 Ill. 142.

^{92.} *Slade v. Leonard*, 75 Ind. 171; *Ekert v. Triplett*, 48 Ind. 174; *Denman v. McMahan*, 37 Ind. 241; *Bemis v. Cline*, 21 Ind. 37.

^{93.} *Gamber v. Gamber*, 18 Pa. St. 363.

self-serving on account of the privity of interest between the declarant and his representatives, next of kin, or legatees. It has been held that the declarations of a deceased person, that he owned personal property which was in his possession when he made such declarations, are admissible as evidence of title in an action by his administrator to recover such property, as part of the *res gestae*.⁹⁴

G. DONORS. — Statements in derogation of his title, by a donor of personal property, made after delivery thereof to the recipient, are not evidence against the latter's claim of title, especially when such declarations were not made in the presence of the alleged donee.⁹⁵

H. BANKRUPTS AND INSOLVENTS. — The declarations in disparagement of his title to personal property, made by a bankrupt or insolvent prior to the filing of his petition in bankruptcy, or the execution of his assignment for the benefit of his creditors, are generally held to be competent evidence against his trustee in bankruptcy or assignee in insolvency,⁹⁶ although the contrary rule prevails in New York.⁹⁷ Declarations which were made subsequent

94. *McConnell v. Hannah*, 96 Ind. 102; *Rollins v. Strout*, 6 Nev. 150; *Cheeseman v. Kyle*, 15 Ohio St. 15.

Contra. — In *Holmes v. Sawtelle*, 53 Me. 179, the court held that in an action of replevin for a colt, brought by an executor, the plaintiff will not be permitted to prove the declarations of his testator, made while the colt remained on his premises with his other stock, and tending to show that he claimed to own the colt, to rebut the testimony offered by the defendant tending to show a previous gift by the testator to his son who lived with him and of whom the defendant had purchased the colt. The court held such evidence incompetent upon the ground that to allow its admission would be to permit a party to prove his own declarations in support of his own case, and that the executor or administrator of a deceased person can not be allowed to put in such declarations of the individual whose interest and title he represents.

95. *California*. — *Walden v. Purvis*, 73 Cal. 518, 15 Pac. 91.

Georgia. — *Echols v. Barrett*, 6 Ga. 443; *Cornett v. Fain*, 33 Ga. 219.

Kentucky. — *Dixon v. Labry*, 16 Ky. L. Rep. 522, 29 S. W. 21.

New York. — *Graves v. King*, 15 Hun 367.

North Carolina. — *Cowan v.*

Tucker, 30 N. C. (8 Ired. L.) 426; *Hicks v. Forrest*, 41 N. C. (6 Ired. Eq.) 528.

South Carolina. — *Newman v. Wilbourne*, 1 Hill Eq. 10; *Snowden v. Logan*, Rice Eq. 174.

Where Possession Has Not Been Entirely Parted With. — In *Eppinger v. Scott*, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, the court, while upholding the rule laid down in the text, held that such declarations were admissible when made before the removal of the property had been completed.

96. *England*. — *Smallcombe v. Bruges*, 13 Price 136; *Watts v. Thorpe*, 1 Campb. 376; *Brett v. Levett*, 13 East. 213; *Downton v. Cross*, 1 Esp. 168; *Bateman v. Bailey*, 5 T. R. 512.

Florida. — *Armour v. Doig*, 45 Fla. 162, 34 So. 249.

Indiana. — *Compton v. Fleming*, 8 Blackf. 153.

Massachusetts. — *Carnes v. White*, 15 Gray 378.

Pennsylvania. — *Pierce v. McKeehan*, 3 Pa. St. 136.

97. *Humphrey v. Smith*, 7 App. Div. 442, 39 N. Y. Supp. 1055; *Flagler v. Wheeler*, 40 Hun (N. Y.) 125; *Morris v. Wells*, 54 Hun 634, 7 N. Y. Supp. 61; *Vidvard v. Powers*, 34 Hun (N. Y.) 221; *Truax v. Slater*, 86 N. Y. 630.

to an assignment for the benefit of creditors are not competent evidence against the assignee or trustee.⁹⁸

I. THIRD PARTIES AND STRANGERS. — The declarations of third parties, strangers to the title, whether favorable to or in derogation of the title of a party or of his grantors, are not competent evidence.⁹⁹

In New York evidence of such declarations is regarded as hearsay. *Bullis v. Montgomery*, 50 N. Y. 352.

But see *Von Sachs v. Kretz*, 72 N. Y. 548, which holds that such declarations are admissible to prove a demand against the bankrupt estate.

⁹⁸. *Whetmore v. Murdock*, 3 Woodb. & M. 380, 29 Fed. Cas. No. 17,509; *Glenn v. Grover*, 3 Md. 212.

But in *Koch v. Lyon*, 82 Mich. 513, 46 N. W. 779, it was held that an assignee for the benefit of creditors not being a purchaser for value, takes only what title his assignor possessed, and where the assignor obtained title to goods through fraud, any declarations of the assignor, whenever made, which tend to establish such fraud are relevant testimony as against a claim of title in an action to recover such goods.

⁹⁹. *Alabama*. — *Cook v. Thornton*, 109 Ala. 523, 20 So. 14; *Spencer v. Godwin*, 30 Ala. 355; *Hartshorn v. Williams*, 31 Ala. 149.

Connecticut. — *Bucknam v. Barnum*, 15 Conn. 67; *Burns v. Fredericks*, 37 Conn. 86.

Georgia. — *Robinson v. Stevens*, 93 Ga. 535, 21 S. E. 96; *Churchman v. Robinson*, 93 Ga. 731, 20 S. E. 215; *Gill v. Strozier*, 32 Ga. 688.

Illinois. — *Kent v. Mason*, 79 Ill. 540.

Indiana. — *Tobin v. Young*, 124 Ind. 507, 24 N. E. 121; *Somers v. Somers*, 85 Ind. 599; *Shirts v. Irons*, 37 Ind. 98.

Iowa. — *Pond v. Okey*, 70 Iowa 244, 30 N. W. 500.

Louisiana. — *Barry v. Louisiana Ins. Co.*, 12 Mart. (O. S.) 493.

Maine. — *Gilbert v. Woodbury*, 22 Me. 246.

Massachusetts. — *Brown v. Mooers*, 6 Gray 451; *Wilson v. Bowden*, 113 Mass. 422.

Mississippi. — *Wells v. Shipp*, 1 Walk. 353; *Black v. Robinson*, 61 Miss. 54.

Missouri. — *Wright v. Richmond*, 21 Mo. App. 76; *Bagnell v. Chemical Bank*, 76 Mo. App. 121; *Bain v. Clark*, 39 Mo. 252.

New Hampshire. — *Davis v. Sanders*, 11 N. H. 259.

New Jersey. — *Kaufhold v. Roth*, 64 Atl. 1057.

New York. — *Overseers of Germantown v. Overseers of Poor of Livingston*, 2 Caines 106; *Jones v. East Soc. of M. E. Church*, 21 Barb. 161; *Covert v. Townsend*, 48 Hun 618, 1 N. Y. Supp. 816.

North Carolina. — *Rowland v. Rowland*, 24 N. C. (2 Ired. L.) 61.

South Carolina. — *Fraser v. Charleston*, 8 Rich. 318; *Mars v. Virginia Home Ins. Co.*, 17 S. C. 514.

Texas. — *Thurmond v. Trammell*, 22 Tex. 257; *O'Brien v. Hilburn*, 22 Tex. 616; *Batte v. Chandler*, 53 Tex. 613; *McClure v. Sheek's Heirs*, 68 Tex. 426, 4 S. W. 552; *Keller v. Faickney* (Tex. Civ. App.), 94 S. W. 103; *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

Vermont. — *Deming v. Lull*, 17 Vt. 398.

Virginia. — *Vaughan's Admr. v. Winckler's Exr.*, 4 Munf. 136.

West Virginia. — *Vandiver v. Hyre*, 5 W. Va. 414.

Where the controversy over the ownership of property is between a son, living with his father, and a third party, the "talk and conversation of the family" to the effect that the property in question belonged to the son, is hearsay and inadmissible as against such third party and in support of the son's claim of title. *Stevens v. William Deering & Co.*, 6 S. D. 200, 60 N. W. 739.

Declarations of persons assuming to be in charge of goods being packed, made in the absence of the purchaser thereof, as to the possession and ownership of the goods by the seller, are not admissible to defeat the purchaser's title thereto.

3. Fraudulent Alienations. — A. AS AFFECTING GRANTORS AND VENDORS. — Evidence of the relevant¹ declarations of a grantor of real property, or of a vendor or donor of personal property is admissible against him upon an issue of fraudulent alienation, as tending to establish his fraudulent intent, and as the intent existing at the time the transfer was made is the essential fact, it is generally held immaterial whether such declarations were made before² or after³ the transfer, so long as the court does not regard them as being too remote to be sufficiently relevant.⁴ But the declarations of the vendee, made long after the purchase, are not competent evidence in favor of the vendor seeking to rescind the sale on the ground of fraud.⁵

B. AS AFFECTING GRANTEEES OR VENDEES. — a. *Prior to Transfer.* — Where it is sought to attack or set aside the claim of title of a transferee of property, real or personal, by showing that the transfer was fraudulent, the declarations of the grantor or vendor thereof, made while he was in possession and prior to the transfer, are competent evidence against the transferee,⁶ although in New

Shidlovsky *v.* Gorman, 51 App. Div. 253, 64 N. Y. Supp. 993.

1. *Oden v. Rippetoe*, 4 Ala. 68.

2. *United States.* — *Bowie v. Hunter*, 4 Cranch C. C. 699, 3 Fed. Cas. No. 1,731.

Alabama. — *Murphy v. Butler*, 75 Ala. 381, *Moses v. Dunham*, 71 Ala. 173.

California. — *Visher v. Webster*, 8 Cal. 109.

Iowa. — *Thomas v. McDonald*, 102 Iowa 564, 71 N. W. 572.

Louisiana. — *Hoose v. Robbins*, 18 La. Ann. 648; *Erwin v. Kentucky Bank*, 5 La. Ann. 1.

Maine. — *Fisher v. True*, 38 Me. 534.

Maryland. — *McDowell v. Goldsmith*, 6 Md. 319.

Massachusetts. — *Foster v. Hall*, 12 Pick. 89.

Michigan. — *Baldwin v. Buckland*, 11 Mich. 389.

Missouri. — *Gage v. Trawick*, 94 Mo. App. 307, 68 S. W. 85; *Whitney Holmes Oregon Co. v. Pettit*, 34 Mo. App. 536.

New York. — *Kennedy v. Wood*, 52 Hun 46, 4 N. Y. Supp. 758; *Jellenik v. May*, 41 Hun 386; *Savage v. Murphy*, 8 Bosw. 75.

North Carolina. — *Satterwhite v. Hicks*, 44 N. C. (Busb. L.) 105; *Harshaw v. Moore*, 34 N. C. (12 Ired. L.) 247.

South Carolina. — *Head v. Halford*, 5 Rich. Eq. 128.

3. *Indiana.* — *Vansickle v. Shenk*, 150 Ind. 413, 50 N. E. 381; *Hogan v. Robinson*, 94 Ind. 138.

Louisiana. — *Hoose v. Robbins*, 18 La. Ann. 648.

Missouri. — *Holmes v. Braidwood*, 82 Mo. 610; *Gamble v. Johnson*, 9 Mo. 605.

Nebraska. — *Armagost v. Rising*, 54 Neb. 763, 75 N. W. 534.

North Carolina. — *Burbank v. Wiley*, 79 N. C. 501.

Tennessee. — *Carnahan v. Wood*, 2 Swan 500.

Texas. — *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 62 S. W. 956; *Cooper v. Friedman*, 23 Tex. Civ. App. 585, 57 S. W. 581; *Mayo v. Savoni*, 1 Tex. App. Civ. Cas. § 216. *Contra.* — *Wells v. O'Connor*, 27 Hun (N. Y.) 426.

4. *Kelly v. Perrault*, 5 Idaho 221, 48 Pac. 45; *Littlefield v. Getchell*, 32 Me. 390 (declarations made over two years before the transfer are too remote); *Doe v. Fraser*, 8 N. B. (Can.) 417. See article "RELEVANCY," Vol. XI.

5. *Sommer v. Adler*, 36 App. Div. 107, 55 N. Y. Supp. 483.

6. *Alabama.* — *Moses v. Dunham*, 71 Ala. 173. *But see* *Hodge v. Thompson*, 9 Ala. 131.

York the general rule which obtains in that state to the effect that declarations of a former owner are not admissible against a subsequent grantee or vendee, has been applied to such cases.⁷ But evidence of such declarations, while admissible, is not in itself sufficient to prove fraudulent intent on the part of the transferee,⁸ and some of the decisions have held that such declarations are not admissible unless made in the presence of the grantee and with his knowledge,⁹ or unless it be first shown that he had notice of them at the time he accepted the conveyance.¹⁰

Third Parties.—The declarations of third parties, made when in the grantee's presence and hearing¹¹ or at a time when the declarant was in exclusive possession and control of the property,¹² are

Georgia.—*Ernest v. Merritt*, 107 Ga. 61, 32 S. E. 898.

Louisiana.—*Hoose v. Robbins*, 18 La. Ann. 648.

Maine.—*Parker v. Marston*, 34 Me. 386.

North Carolina.—*Harshaw v. Moore*, 34 N. C. (12 Ired. L.) 247.

Pennsylvania.—*Hollinshead v. Allen*, 17 Pa. St. 275.

Texas.—*Martel v. Somers*, 26 Tex. 551.

"**Prior to the Transfer**" means prior to the execution of the deed, not merely prior to its recording. *Thompson v. Cody*, 100 Ga. 771, 28 S. E. 669.

Remoteness.—Such declarations are not admissible to show fraud or defect in title when made many months before the sale. *Murphy v. Butler*, 75 Ala. 381.

7. *Pfeffer v. Kling*, 58 App. Div. 179, 68 N. Y. Supp. 641.

8. *Alabama.*—*Abney v. King-land*, 10 Ala. 355; *Hodge v. Thompson*, 9 Ala. 131.

Colorado.—*Jefferson County Bank v. Hummel* (Colo. App.), 53 Pac. 286.

Connecticut.—*Partelo v. Harris*, 26 Conn. 480; *Beach v. Catlin*, 4 Day 284.

Illinois.—*Hamilton v. Gilman*, 12 Ill. 260.

Louisiana.—*Whiting v. Prentice*, 12 Rob. 141; *Hoose & Victor v. Robbins*, 18 La. Ann. 648; *Guidry v. Grivot*, 2 Mart. N. S. 13.

Massachusetts.—*Foster v. Hall*, 12 Pick. 89.

Missouri.—*Peters-Miller Shoe Co. v. Casebeer*, 53 Mo. App. 640; *Will-*

iams v. Williams, 53 Mo. App. 617.

New York.—*Brillis v. Montgomery*, 50 N. Y. 352; *Flagler v. Wheeler*, 40 Hun 125.

Oregon.—*Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025.

Tennessee.—*Collger v. Francis*, 2 Baxt. 422.

9. *Connecticut.*—*Beach v. Catlin*, 4 Day 284; *Partelo v. Harris*, 26 Conn. 480.

Illinois.—*Smith v. Mohler*, 24 Ill. App. 407.

Kentucky.—*Nelson v. Terry*, 22 Ky. L. Rep. 111, 56 S. W. 672.

Louisiana.—*Trezevant v. Courtney*, 23 La. Ann. 628.

Missouri.—*Whitney Holmes Organ Co. v. Pettit*, 34 Mo. App. 536.

North Carolina.—*Webb v. Atkinson*, 124 N. C. 447, 32 S. E. 737.

Oregon.—*Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025.

10. *Beach v. Catlin*, 4 Day (Conn.) 284; *Farmers' Bank v. Douglass*, 11 Smed. & M. (Miss.) 469; *Peters-Miller Shoe Co. v. Casebeer*, 53 Mo. App. 640; *Williams v. Casebeer*, 53 Mo. App. 644; *Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025; *McElfatrick v. Hicks*, 21 Pa. St. 402.

In *Foster v. Hall*, 12 Pick. (Mass.) 89, it was held that such declaration, while admissible without proof of the grantee's knowledge, are not sufficient to disprove his claim of *bona fide* title without proof that he knew of them.

11. *Webb v. Atkinson*, 124 N. C. 447, 32 S. E. 737 (declarations of grantee's daughters).

12. *Chan v. Slater*, 33 Mont. 155, 82 Pac. 657 (declarations of hus-

sometimes admitted as evidence that the grantee's title was fraudulent.

b. *Subsequent to Transfer*.—The declarations of the alleged fraudulent grantor, if made subsequent to the transfer, are not evidence as against the claim of title of the transferee,¹³ except in

band while in exclusive possession and control of property claimed by the wife).

13. *United States*.—Winchester, Etc., Mfg. Co. v. Creary, 116 U. S. 161; Clements v. Moore, 6 Wall. 299; Orr & Lindsley Shoe Co. v. Needles, 67 Fed. 990, 15 C. C. A. 142.

Alabama.—McArthur v. Carrie, 32 Ala. 75; Weaver v. Yeatmans, 15 Ala. 539.

Arkansas.—Clinton v. Estes, 20 Ark. 216.

California.—Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013; Walden v. Purvis, 73 Cal. 518, 15 Pac. 91; Hutchings v. Castle, 48 Cal. 152; Jones v. Morse, 36 Cal. 205; Paige v. O'Neal, 12 Cal. 483; Visser v. Webster, 13 Cal. 58.

Connecticut.—Woodruff v. Whitteley, Kirby 60.

Georgia.—Bush v. Rogan, 65 Ga. 320.

Illinois.—Myers v. Kinzie, 26 Ill. 36; Durand v. Weightman, 108 Ill. 489.

Indiana.—Paine v. Griffin, 7 Blackf. 485; Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961.

Iowa.—Neuffer v. Moehn, 96 Iowa 731, 65 N. W. 334; Cedar Rapids Nat. Bank v. Lavery, 110 Iowa 575, 81 N. W. 775; Allen v. Kirk, 81 Iowa 658, 47 N. W. 906; Bixby v. Carskaddon, 70 Iowa 726, 29 N. W. 626.

Kansas.—Stickel v. Bender, 37 Kan. 457, 15 Pac. 580.

Kentucky.—Short v. Tinsley, 1 Metc. 397; Judah v. Flemming, 4 Ky. L. Rep. 888.

Maine.—White v. Chadbourne, 41 Me. 149. *But see* Stone v. Redman, 38 Me. 578, in which such declarations were admitted to show fraud in the transfer.

Maryland.—Hall v. Hinks, 21 Md. 406.

Massachusetts.—Parry v. Libley, 166 Mass. 112, 44 N. E. 124; Roberts v. Medbery, 132 Mass. 100; Lincoln

v. Wilbur, 125 Mass. 249, Holbrook v. Holbrook, 113 Mass. 74; Winchester v. Charter, 97 Mass. 140; Tapley v. Forbes, 2 Allen 20; Aldrich v. Earle, 13 Gray 578; Bridge v. Eggleston, 14 Mass. 245; Clarke v. Waite, 12 Mass. 439; Horrigan v. Wright, 4 Allen 514; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

Michigan.—Buckingham v. Tyler, 74 Mich. 101, 41 N. W. 868; Vyn v. Keppel, 108 Mich. 244, 65 N. W. 966.

Minnesota.—Adler v. Apt, 30 Minn. 45, 14 N. W. 63; Shaw v. Robertson, 12 Minn. 445; Derby v. Gallup, 5 Minn. 119; Burt v. McKinsty, 4 Minn. 204.

Mississippi.—Taylor v. Webb, 54 Miss. 36.

Missouri.—Albert v. Besel, 88 Mo. 150; Exchange Bank v. Russell, 50 Mo. 531; Weinrich v. Porter, 47 Mo. 293; Gamble v. Johnson, 9 Mo. 605; Wall v. Beedy, 161 Mo. 625, 61 S. W. 864; Boyd v. Jones, 60 Mo. 454; Blasland-Parcels-Jordan Shoe Co. v. Hilig, 70 Mo. App. 301; Stam v. Smith, 183 Mo. 464, 81 S. W. 1217; Sammons v. O'Neill, 60 Mo. App. 530; Cash v. Penix, 11 Mo. App. 597. *But see* Holmes v. Braidwood, 82 Mo. 610.

Nevada.—Hirschfeld v. Williamson, 18 Nev. 66, 1 Pac. 201.

New York.—Kalish v. Higgins, 175 N. Y. 495, 67 N. E. 1084; Noyes v. Morris, 56 Hun 501, 10 N. Y. Supp. 561; Scofield v. Spaulding, 54 Hun 523, 7 N. Y. Supp. 927; Strauss v. Murray, 31 Misc. 69, 63 N. Y. Supp. 201; Wells v. O'Connor, 27 Hun. 426; Burnham v. Brennan, 74 N. Y. 597, *reversing s. c.* 42 N. Y. Super. Ct. 49; Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. Supp. 1063.

North Carolina.—Burbank v. Wiley, 79 N. C. 501; Harshaw v. Moore, 34 N. C. (12 Ired. L.) 247.

cases where the grantor or transferer remained in possession after the conveyance, and the declarations, although made after the transfer, were made during such possession; in which case they are generally held competent evidence against the grantee's title,¹⁴ although

Ohio. — *Ohio Coal Co. v. Davenport*, 37 Ohio St. 194.

Pennsylvania. — *Scott v. Heilager*, 14 Pa. St. 238.

Tennessee. — *McClellan v. Cornwell*, 2 Coldw. 298; *Perry v. Smith*, 4 Yerg. 323; *Green v. Huggins*, 52 S. W. 675. *But see Neal v. Peden*, 1 Head 546 (where the whole record appears to show a fraudulent intent).

Vermont. — *Edgell v. Bennett*, 7 Vt. 534.

Virginia. — *Smith v. Betty*, 11 Gratt. 752.

Wisconsin. — *Bates v. Ableman*, 13 Wis. 644; *Donaldson v. Johnson*, 2 Pin. 482; *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407.

The theory of admission by privity is then removed from the case. *Vansickle v. Shenk*, 150 Ind. 413, 50 N. E. 381; *Boli v. Irwin*, 21 Ky. L. Rep. 366, 51 S. W. 444.

Where, however, declarations made subsequent to the transfer are so connected with declarations made prior thereto that they cannot well be separated, they will be received in evidence. *Smith v. Leforce*, 14 Ky. L. Rep. 399.

In *Carnahan v. Wood*, 2 Swan (Tenn.) 500, it was held that the general rule that declarations made after the transfer are inadmissible to disparage the title of the grantee, is inapplicable to cases where fraudulent sales were claimed. This, however, is in conflict with the Tennessee cases cited above.

But see Mayo v. Savoni, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 218, where it was held that such declarations should be received on the ground that the plaintiff who had the burden of proving fraud was of necessity forced to rely upon circumstantial evidence and therefore great latitude should be allowed in admitting testimony.

14. *Alabama*. — *Mobley v. Bilberry*, 17 Ala. 428; *Price v. Branch Bank*, 17 Ala. 374; *Goodgame v. Cole*, 12 Ala. 77.

Arkansas. — *Bowden v. Spellman*, 59 Ark. 251, 27 S. W. 602.

California. — *Gallagher v. Williamson*, 23 Cal. 331.

Connecticut. — *Redfield v. Buck*, 35 Conn. 328.

Georgia. — *Oatis v. Brown*, 59 Ga. 711; *Williams v. Hart*, 65 Ga. 201.

Illinois. — *Jones v. King*, 86 Ill. 225, (where the grantor continued to treat the property as if it were still his own).

Kansas. — *Turner v. Tootle*, 9 Kan. App. 765, 58 Pac. 562.

Kentucky. — *Kendall v. Hughes*, 7 B. Mon. 368.

Minnesota. — *Lehman v. Chapel*, 70 Minn. 496, 73 N. W. 402.

Nebraska. — *Armagost v. Rising*, 54 Neb. 763, 75 N. W. 534.

Nevada. — *Gregory v. Frothingham*, 1 Nev. 253.

New York. — *Roeber v. Bowe*, 30 Hun 379.

North Carolina. — *Marsh v. Hampton*, 50 N. C. (5 Jones' L.) 382; *Piedmont Sav. Bank v. Levy*, 138 N. C. 274, 50 S. E. 657; *Hilliard v. Phillips*, 81 N. C. 99; *Gadsby v. Dyer*, 91 N. C. 311; *Gidney v. Logan*, 79 N. C. 214; *Foster v. Woodfin*, 33 N. C. (11 Ired. L.) 339.

Pennsylvania. — *Helfrich v. Stein*, 17 Pa. St. 143.

South Carolina. — *McCord v. McCord*, 3 Rich. 577.

Tennessee. — *Harton v. Lyons*, 97 Tenn. 180, 36 S. W. 851; *Carney v. Carney*, 7 Baxt. 284. *But see McClellan v. Cornwell*, 2 Coldw. 298 (holding such declarations not competent evidence unless made in the transferee's presence).

Texas. — *Cooper v. Friedman*, 23 (Tex. Civ. App.) 585, 57 S. W. 581.

Wisconsin. — *Grant v. Lewis*, 14 Wis. 487.

Where there was an actual change of possession, but several weeks later the vendor obtained possession again, and during such possession made declarations in derogation of the title under which he held prior to such

it is to be noted that a contrary rule is laid down in some cases.¹⁵

Where such declarations have been acquiesced in or ratified by the transferee under such circumstances as to make them in effect his own declarations,¹⁶ or where it is shown that some relation akin to agency existed between the transferer and transferee, such as that they were united in a common design to defraud the creditors of the former, they are competent as against the grantee or transferee's claim of title. In the latter case the declarations of either transferer or transferee, made during the existence of such design

first mentioned change of possession, and of the good faith of such transfer, they are not competent evidence. *Sutton v. Shearer*, 1 Grant. Cas. (Pa.) 207.

15. *Alabama*.—*Weaver v. Yeatmans*, 15 Ala. 539. *But see Mobley v. Bilberry*, 17 Ala. 428 (*holding* such declarations competent if part of the *res gestae*).

District of Columbia.—*Tierney v. Corbett*, 2 Mackey 264.

Iowa.—*McCormicks v. Fuller*, 56 Iowa 43, 8 N. W. 800.

Massachusetts.—*Gates v. Mowry*, 15 Gray 564.

New York.—*Wells v. O'Connor*, 27 Hun 426; *Scofield v. Spaulding*, 54 Hun 523, 7 N. Y. Supp. 927; *Williams v. Williams*, 142 N. Y. 156, 36 N. E. 1053. *But see Persse & Brooks Paper Wks. v. Willett*, 24 N. Y. Super. Ct. 131, (in which such declarations were held competent evidence when the vendor had remained in possession after the transfer, treating the property as if it were his own).

Vermont.—*Ellis v. Howard*, 17 Vt. 330.

Wisconsin.—*Donaldson v. Johnson*, 2 Pin. 482.

16. *United States*.—*Jones v. Simpson*, 116 U. S. 609; *Moyer v. Dewey*, 103 U. S. 301; *Lincoln v. Clafin*, 7 Wall. 132.

California.—*Howe v. Scannell*, 8 Cal. 325.

Illinois.—*Philpot v. Taylor*, 75 Ill. 309.

Indiana.—*Barkley v. Tapp*, 87 Ind. 25; *Kennedy v. Divine*, 77 Ind. 490; *Hogue v. McClintock*, 76 Ind. 205; *Ewing v. Gray*, 12 Ind. 64.

Kentucky.—*Oldham v. Bentley*, 6 B. Mon. 428.

Louisiana.—*Gaidry v. Lyons*, 29

La. Ann. 4; *Bushnell v. City Nat. Bank*, 20 La. Ann. 464, (even though such declarations were not made in the presence of the party against whom they are sought to be introduced).

Maryland.—*Powell v. Young*, 45 Md. 494.

Massachusetts.—*Alexander v. Gould*, 1 Mass. 165.

Missouri.—*Williams v. Casebeer*, 53 Mo. App. 644; *Peters-Miller Shoe Co. v. Casebeer*, 53 Mo. App. 640.

Montana.—*Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145; *Kleinschmidt v. Dunphy*, 1 Mont. 118; *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793.

Nebraska.—*Bender v. Kingman*, 62 Neb. 469, 87 N. W. 142.

New Hampshire.—*Coburn v. Storer*, 67 N. H. 86, 36 Atl. 607.

New York.—*Galle v. Tode*, 74 Hun 542, 26 N. Y. Supp. 633; *Lee v. Huntoon*, Hoff. 447; *Dewey v. Moyer*, 72 N. Y. 70 (*affirming s. c.* 9 Hun 473, and *affirmed* in *Moyer v. Dewey*, 103 U. S. 301).

North Carolina.—*Hauser v. Tate*, 85 N. C. 81.

Oregon.—*Walker v. Harold*, 44 Or. 205, 74 Pac. 705.

Pennsylvania.—*Boyer v. Weimer*, 204 Pa. St. 295, 54 Atl. 21; *Pier v. Duff*, 63 Pa. St. 59; *Brown v. Parkinson*, 56 Pa. St. 336; *Deakers v. Temple*, 41 Pa. St. 234; *Peterson v. Speer*, 29 Pa. St. 478; *Jackson v. Summerville*, 13 Pa. St. 359; *Irwin v. Keen*, 3 Whart. 347; *M'Kee v. Gilchrist*, 3 Watts 230; *Kelsey v. Murphy*, 26 Pa. St. 78.

Texas.—*Thompson v. Rosenstein* (Tex. Civ. App.), 67 S. W. 439.

Vermont.—*Quinn v. Halbert*, 57 Vt. 178.

and within the scope thereof, are admissible, whether made before¹⁷ or after the transfer.¹⁸

Common Design to Defraud.—Generally, in order to render such declarations, when made subsequent to the transfer, admissible, it must first be shown, by satisfactory evidence *de hors* the declaration itself, that such common design to defraud creditors existed,¹⁹ although proof that the transferer retained possession of the property in question after the alleged transfer thereof, by sufferance of the transferee, and under circumstances in which it would have been natural for the latter, if acting in good faith, to take possession, is sufficient to establish *prima facie* the fact that such a common design to defraud the transferer's creditors existed between the transferer and transferee so that relevant declarations made by the transferer subsequent to the transfer and while he retained possession of the property are competent evidence against the claim of title of the transferee²⁰ or against claims of such as are his privies in in-

17. *Winchester, Etc., Mfg. Co. v. Creary*, 116 U. S. 161; *Adler v. Apt*, 30 Minn. 45, 14 N. W. 63; *Williamson v. Williams*, 11 Lea. (Tenn.) 355; *Neal v. Peden*, 1 Head (Tenn.) 546; *Jones v. Simpson*, 116 U. S. 609; *Borland v. Mayo*, 8 Ala. 104.

Where a conspiracy exists between the vendor and vendee and other persons to defraud the creditors of the vendor, acts, declarations, and writings of any one of the conspirators in execution or furtherance of the common purpose are deemed to be the acts of all, but are not admissible against the vendee's chain of title unless it is first shown that he was a party to such conspiracy. *Allen v. Kirk*, 81 Iowa 658, 47 N. W. 906.

18. *United States*.—*Jones v. Simpson*, 116 U. S. 609; *Jones v. Hoisington*, 116 U. S. 609.

District of Columbia.—*Rich v. Henry*, 4 Mackey 155.

Indiana.—*Caldwell v. Williams*, 1 Ind. 405; *Wiler v. Manley*, 51 Ind. 169; *Daniels v. McGinnis*, 97 Ind. 549. *But see* *Hubble v. Osborn*, 31 Ind. 249.

Missouri.—*Boyd v. Jones*, 60 Mo. 454; *Wall v. Beedy*, 161 Mo. 625, 61 S. W. 864.

New York.—*Cuyler v. McCartney*, 33 Barb. 165; *Vilas Nat. Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

Pennsylvania.—*Hartman v. Diller*,

62 Pa. St. 37; *Souder v. Schechterly*, 91 Pa. St. 83.

Res Gestae.—In *Newlin v. Lyon*, 49 N. Y. 661, it was held that the acts and declarations of an assignor, made after the assignment but while still in possession of the property, are admissible against the assignee's claim of title, as part of the *res gestae*; but in *Scofield v. Spaulding*, 54 Hun 523, 7 N. Y. Supp. 927, it was held that when such declarations were merely narrative of a completed transaction, they formed no part of the *res gestae* and were not competent evidence against the vendor.

19. *United States*.—*Klein v. Hoffheimer*, 132 U. S. 367.

Alabama.—*Bilberry v. Mobley*, 21 Ala. 277; *Weaver v. Yeatmans*, 15 Ala. 539.

Missouri.—*Wall v. Beedy*, 161 Mo. 625, 61 S. W. 864.

New York.—*Jones v. Hurlburt*, 39 Barb. 403; *Vilas Nat. Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

Tennessee.—*Neal v. Peden*, 1 Head 546.

Texas.—*Hudson v. Willis*, 73 Tex. 256, 11 S. W. 273; *Moore v. Robinson* (Tex. Civ. App.), 75 S. W. 890.

20. *Alabama*.—*Mobile Sav. Bank v. McDonell*, 89 Ala. 434, 8 So. 137; *Borland v. Mayo*, 8 Ala. 104.

Arkansas.—*Bowden v. Spellman*, 59 Ark. 251, 27 S. W. 602.

terest,²¹ especially where the case is one of a transfer of personal property.²²

Burden of Proof.—When the party seeking to introduce such declarations to attack a claim of title fails to show affirmatively that the same were made while the declarant was in possession of the property,²³ or where he fails to show circumstances giving rise to such a *prima facie* inference of conspiracy to defraud creditors²⁴

California.—*Bush v. Helbing*, 134 Cal. 676, 66 Pac. 967; *Gallagher v. Williamson*, 23 Cal. 331. *But see* *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303, (decided under § 1849, Code of Civil Procedure).

Connecticut.—*Redfield v. Buck*, 35 Conn. 328.

Georgia.—*Williams v. Hart*, 65 Ga. 201; *Oatis v. Brown*, 59 Ga. 711.

Illinois.—*Jones v. King*, 86 Ill. 225.

Indiana.—*Creighton v. Hoppis*, 99 Ind. 369.

Minnesota.—*Lehmann v. Chapel*, 70 Minn. 496, 73 N. W. 402.

Nevada.—*Gregory v. Frothingham*, 1 Nev. 253.

New Hampshire.—*Osgood v. Eaton*, 63 N. H. 355.

New York.—*Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. 99.

North Carolina.—*Woodley v. Hassell*, 94 N. C. 157; *Hilliard v. Phillips*, 81 N. C. 99; *Gidney v. Logan*, 79 N. C. 214; *Marsh v. Hampton*, 50 N. C. (5 Jones' L.) 382.

South Carolina.—*Richardson v. Mounce*, 19 S. C. 477; *McCord v. McCord*, 3 S. C. 577.

Tennessee.—*Harton v. Lyons*, 97 Tenn. 180, 36 S. W. 851; *Carney v. Carney*, 7 Baxt. 284.

Texas.—*Hays v. Hays*, 66 Tex. 606, 1 S. W. 895.

Vermont.—*Spaulding v. Albin*, 63 Vt. 148, 21 Atl. 530. *But see* *Ellis v. Howard*, 17 Vt. 330 (which held such declarations not competent evidence).

A Reasonable Time for the transfer of possession according to the usual course of business must have elapsed before the inference of such common design to defraud will arise. *Donaldson v. Johnson*, 2 Pin. (Wis.) 482.

Res Gestae.—It is held that such declarations as to title and possession

are part of the *res gestae*. *Mobley v. Bilberry*, 17 Ala. 428; *Vermillion v. Le Clare*, 89 Md. App. 55; *Newlin v. Lyon*, 49 N. Y. 661; *Adams v. Davidson*, 10 N. Y. 309; *Grant v. Lewis*, 14 Wis. 487.

²¹. *Poundstone v. Jones*, 182 Pa. St. 574, 38 Atl. 714.

²². *Alabama.*—*Goodgame v. Cole*, 12 Ala. 77.

Arkansas.—*Eaton v. Sims*, 59 Ark. 611, 28 S. W. 429.

Iowa.—*Blake v. Graves*, 18 Iowa 312.

Kansas.—*Turner v. Tootle*, 9 Kan. App. 765, 58 Pac. 562.

Kentucky.—*Kendall v. Hughes*, 7 B. Mon. 368.

Michigan.—*Frankel v. Coots*, 41 Mich. 75, 1 N. W. 940.

Montana.—*Gallick v. Bordeaux*, 21 Mont. 470, 56 Pac. 961.

New York.—*Adams v. Davidson*, 10 N. Y. 309; *Jellenik v. May*, 41 Hun 386; *Persse & B. Paper Wks. v. Willett*, 1 Robt. 131.

North Carolina.—*Foster v. Woodfin*, 33 N. C. (11 Ired. L.) 339; *Webb v. Atkinson*, 124 N. C. 447, 32 S. E. 737.

Pennsylvania.—*Helfrich v. Stem*, 17 Pa. St. 143; *Reeper v. Grevy*, 5 Pa. Super. Ct. 316; *Sutton v. Shearer*, 1 Grant Cas. 207.

Rhode Island.—*Dodge v. Goodell*, 16 R. I. 48, 12 Atl. 236.

Where a chattel mortgage contemplates that the mortgagee shall take possession, declarations made by the mortgagor, restraining possession after execution of the mortgage, are competent. *Rochester City Bank v. Westbury*, 16 Hun (N. Y.) 458.

²³. *Visher v. Webster*, 13 Cal. 58.

²⁴. *Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263; *Carpenter v. Carpenter*, 8 Bush. (Ky.) 283; *Sweetser v. Bates*, 117 Mass. 460; *Gates v. Mowry*, 15 Gray (Mass.) 564; *Gordon v. Ritenour*, 87 Mo. 54; *Vrooman v. King*, 36 N. Y.

they are not admissible, and they are never relevant unless the fact of fraud is relevant.²⁵

C. AS AFFECTING CREDITORS. — In actions between transferees of property, real or personal, and attaching or execution creditors of the former owner, where fraudulent alienation is claimed, declarations made by such former owner while he was in possession of the property and in disparagement of his title thereto, are competent evidence against the party claiming title under him, by attachment or judgment,²⁶ whether made prior to the time the debt was contracted,²⁷ before²⁸ or after²⁹ judgment, or prior to the issuance of execution³⁰ or levy thereof,³¹ so long as such declarations were made prior to the time when the rights of such creditor accrued; if made thereafter they are not admissible³² and it has also been

477; *Robinson v. Pitzer*, 3 Va. 335.

25. *Williams v. Williams*, 142 N. Y. 156, 36 N. E. 1053. *But see* *Gadsby v. Dyer*, 91 N. C. 311.

26. *Nunn v. Owens*, 2 Strobb. L. (S. C.) 101; *Moses v. Dunham*, 71 Ala. 113; *McCanless v. Reynolds*, 67 N. C. 268.

In *Bell v. Kendall*, 93 Ala. 489, 8 So. 492, it was held that any admission or declaration by the debtor, of an indebtedness on his part to the purchasing creditor, made prior to the sale or transfer of the property, is admissible as evidence against a subsequent attaching creditor, unless it is shown that the debt due the latter antedated such admission or declaration; but any declarations of the debtor, made subsequent to such sale, and tending to show that he continued to own the property are inadmissible as evidence against the vendee or purchasing creditor, unless they are shown to have been made in his presence or with his knowledge and approbation.

The declarations of a husband, in disparagement of his own title and admitting that his wife had an equitable interest in lands which he had partly paid for with her moneys, made while negotiating an exchange of the lands, are admissible as evidence for the wife against a party claiming as a subsequent purchaser at an execution sale against the husband. *Walker v. Elledge*, 65 Ala. 51.

Contra. — *Vandyke v. Bastedo*, 15 N. J. L. 224, holding that statements made by the execution debtor, at the sale, to the effect that a certain pur-

chaser was purchasing for him, are inadmissible to defeat the title of such purchaser. *Clark v. Wright*, 8 Humph. (Tenn.) 528.

27. *Horn v. Ross*, 20 Ga. 210; *Smith v. Cox*, 20 Ga. 240; *Foster v. Rutherford*, 20 Ga. 676; *Goodgame v. Cole*, 12 Ala. 77.

28. *Cole v. Varner*, 31 Ala. 244; *Park v. Peck*, 1 Paige (N. Y.) 477; *Morrison v. Funk*, 23 Pa. St. 421.

29. *James v. Taylor*, 93 Ga. 275, 20 S. E. 309; *Maxwell v. Moore*, 4 Blackf. (Ind.) 445; *Kinzer v. Mitchell*, 8 Pa. St. 64; *King v. Weible*, 10 Pa. Co. Ct. 521.

30. *Shell v. Haywood*, 16 Pa. St. 523.

31. *Massachusetts.* — *Pickering v. Reynolds*, 119 Mass. 111.

Missouri. — *Kirkendall v. Hartsock*, 58 Mo. App. 234.

New Hampshire. — *Walcott v. Keith*, 22 N. H. 196; *Putnam v. Osgood*, 52 N. H. 148.

Tennessee. — *Mulholland v. Elliston*, 1 Coldw. 307.

Vermont. — *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29. *But see* *Hines v. Soule*, 14 Vt. 99.

32. *Alabama.* — *Bell v. Kendall*, 93 Ala. 489, 8 So. 492; *Goodgame v. Cole*, 12 Ala. 77.

Georgia. — *James v. Taylor*, 93 Ga. 275, 20 S. E. 309; *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *Foster v. Rutherford*, 20 Ga. 676.

Maine. — *Tarr v. Smith*, 68 Me. 97.

Missouri. — *Blasland-Parcels-Jordon Shoe Co. v. Hilig*, 70 Mo. App. 301.

New Hampshire. — *Wolcott v. Keith*, 22 N. H. 196.

held that the declarations of the former owner are not admissible as against the grantee of the debtor and in favor of the creditors, unless they were made in the presence of such grantee.³³ But where the attaching or judgment creditor is endeavoring to have the transfer set aside on the ground that as to him it was fraudulent, the declarations of the debtor are not competent evidence on behalf of the alleged fraudulent transferee's claim of title;³⁴ nor are his declarations that the property belonged to another admissible as against his creditors seeking to obtain possession thereof to satisfy their claims.³⁵

4. Res Gestae. — Testimony as to statements, declarations³⁶ and conduct³⁷ which would otherwise be inadmissible as evidence of title or against it, is often admitted as part of the *res gestae* when such statements or declarations were made, or such conduct took

New Jersey. — Vandyke v. Bastedo, 15 N. J. L. 224.

New York. — Wise v. Grant, 59 Hun 466, 13 N. Y. Supp. 376; Taylor v. Marshal, 14 Johns. 204.

Pennsylvania. — Wall v. Staley, 91 Pa. St. 27; Magee v. Raiguel, 64 Pa. St. 110; Morrison v. Funk, 23 Pa. St. 421; Kinzer v. Mitchell, 8 Pa. St. 64; Pond v. Cruse, 10 Wkly. Notes Cas. 223. (But in King v. Weible, 10 Pa. Co. Ct. 54, a declaration of trust, made by the judgment debtor after the judgment had been entered was held competent evidence).

Tennessee. — Mulholland v. Ellitson, 1 Coldw. 307; Clark v. Wright, 8 Humph. 528.

But where the judgment creditor permitted the debtor to remain in possession of the premises after a levy, without payment of rent or any other recognition of the creditor's rights, the debtor's declarations made while thus continuing in possession, are admissible. Spaulding v. Albin, 63 Vt. 148, 21 Atl. 530.

33. Norfleet's Admr. v. Logan, 21 Ky. L. Rep. 1200, 54 S. W. 713.

34. Hooper v. Edwards, 18 Ala. 280. See Sayward v. Nunan, 6 Wash. 87, 32 Pac. 1022.

35. Tharp v. Page, 66 Ark. 229, 50 S. W. 454.

36. *United States.* — Barclay v. Howell, 6 Pet. 498.

Alabama. — David v. David's Admr., 66 Ala. 139; Jones v. Chennault, 124 Ala. 610, 27 So. 515; Wright v. Smith, 66 Ala. 514; Frank

v. Thompson, 105 Ala. 211, 16 So. 634.

Colorado. — Doane v. Glenn, 1 Colo. 495.

Connecticut. — Sears v. Hayt, 37 Conn. 406.

Georgia. — Morgan v. Sims, 26 Ga. 283.

Iowa. — Sweet v. Wright, 57 Iowa 510, 10 N. W. 870.

Maryland. — Smith v. Morgan, 8 Gill 133.

Massachusetts. — Boyden v. Moore, 11 Pick. 362.

Michigan. — Davis v. Zimmerman, 40 Mich. 24.

Missouri. — Colt v. La Due, 54 Mo. 486.

New Hampshire. — Newman v. Bean, 21 N. H. 93.

New York. — Howe v. Brundage, 1 Thomp. & C. 424; McGraw v. Tatham, 84 N. Y. 677.

North Carolina. — Bunch v. Bridgers, 101 N. C. 58, 7 S. E. 584.

Pennsylvania. — Vincent v. Huff, 8 Serg. & R. 381; Woodwell v. Brown, 44 Pa. St. 121.

Tennessee. — Baird v. Vaughn, 15 S. W. 734.

Contra. — In Wadsworth v. Harrison, 14 Iowa 272, the court held that the declarations of the defendant in attachment, made at the time of the attachment were not admissible in a subsequent action of replevin brought by him against the sheriff.

37. Swift v. Williams, 1 La. 165 (having survey made); Smith v. Morgan, 8 Gill (Md.) 133; Davis v.

place at the time of the transaction in which the alleged title was acquired or lost,³⁸ or when the claim of title is of such a nature or arises under such circumstances that it can only be proved by acts and words of the claimant.³⁹ In such cases even self-serving declarations are sometimes admitted as evidence of the title of the declarant.⁴⁰

IX. POSSESSION AND DOMINION.

1. In General.—Testimony as to the possession of a certain tract of real property⁴¹ or of specified personal property⁴² by a

Zimmerman, 40 Mich. 24; Howe v. Brundage, 1 Thomp. & C. (N. Y.) 429; Eddy v. Davis, 34 Vt. 209.

38. Roberts, Long & Co. v. Ringemann (Ala.), 40 So. 81; Lee v. Kennedy, 25 Misc. 140, 54 N. Y. Supp. 155; Walkley v. Clarke, 107 Iowa 451, 78 N. W. 70; Elkins v. Hamilton, 20 Vt. 627.

39. Phipps v. Pierce, 94 N. C. 514; Baker v. Drake (Ala.), 41 So. 845; Samaha v. Mason, 27 App. D. C. 470.

40. Martin v. Simpson, 4 McCord (S. C.) 262; Adams v. Lathan, 14 Rich. Eq. (S. C.) 304.

41. England.—Asher v. Whitlock, L. R. 1 Q. B. 1, 11 Jur. N. S. 925, 35 L. J. Q. B. 17, 14 Wkly. Rep. 26, 13 L. T. 254; Jayne v. Price, 1 Marsh. 68, 5 Taunt. 326, 15 R. R. 518, 1 E. C. L. 173.

Alabama.—Finch v. Alston, 2 Stew. & P. 83; Glass v. Memphis & C. R. Co., 94 Ala. 581, 10 So. 215.

Arkansas.—Oxley Stave Co. v. Staggs, 59 Ark. 370, 27 S. W. 241.

Georgia.—Tillman v. Fontaine, 98 Ga. 672, 27 S. E. 149.

Illinois.—Herbert v. Herbert, 1 Ill. 354.

Iowa.—Shelley v. Smith, 97 Iowa 259, 66 N. W. 172.

Louisiana.—D'Orgenoy v. Droz, 13 La. 382.

Massachusetts.—Pettingell v. Boynton, 139 Mass. 244, 29 N. E. 655.

Missouri.—Rafferty v. Missouri Pac. R. Co., 91 Mo. 33, 3 S. W. 393.

Nebraska.—Filley v. Duncan, 1 Neb. 134.

New Hampshire.—Wendell v. Blanchard, 2 N. H. 456.

New York.—Jackson v. Waltermire, 5 Cow. 299.

North Dakota.—McTavish v.

Great Northern R. Co., 8 N. D. 94, 76 N. W. 985.

Ohio.—Ward v. McIntosh, 12 Ohio St. 231.

Texas.—Burroughs v. Farmer (Tex. Civ. App.), 45 S. W. 846; Watkins v. Smith, 91 Tex. 589, 45 S. W. 560; Western Union Tel. Co. v. Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478.

Virginia.—Baring v. Reeder, 1 Hen. & M. 154, 171.

Possession of real property by one who claimed title thereto while in such possession, is *prima facie* evidence of ownership and seisin of the inheritance. Ricard v. Williams, 7 Wheat. (U. S.) 59.

Continuous Possession.—Wilson v. Palmer, 18 Tex. 592.

As Against an Intruder.—Saboriego v. Maverick, 124 U. S. 261.

In an action to recover the statutory penalty for cutting trees on the land of another, evidence that the plaintiff was in possession of the land upon which the cutting was done is sufficient as against a mere trespasser. Higdon v. Kennemer, 120 Ala. 193, 24 So. 439.

In Ejectment.—Bradshaw v. Ashley, 180 U. S. 59.

Mining Claims.—Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283; Doe v. Waterloo Min. Co., 54 Fed. 935; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 63 Fed. 540; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887; Cheesman v. Shreve, 16 Morr. Min. Rep. 79.

42. United States.—Reece v. Johnson, 20 Fed. Cas. No. 11,633a; Belford v. Scribner, 144 U. S. 488; The Carlos F. Roses, 177 U. S. 655; Murphy v. United States, 14 Ct. Cl. 537.

particular person is admissible (subject to the best evidence rule)⁴³ as evidence of his title thereto at the time of such possession. But such evidence is regarded by the courts as of very little weight⁴⁴ and is easily overcome by evidence explaining or qualifying such possession.⁴⁵

Alabama.—Thomas v. De Grafenreid, 27 Ala. 651 (slaves); David v. David's Admr., 66 Ala. 139 (bonds); Phillips v. Poindexter, 18 Ala. 579 (negotiable paper); Hobbs v. Bibb, 2 Stew. 54 (where personal property remained in the alleged vendor's possession).

California.—Goodwin v. Garr, 8 Cal. 615.

Colorado.—Reed v. First Nat. Bank, 23 Colo. 380, 48 Pac. 507 (promissory note).

Delaware.—Drummond v. Hopper, 4 Harr. 327; State v. Patton, 41 Atl. 193.

Illinois.—Roberts v. Haskell, 20 Ill. 59; Amick v. Young, 69 Ill. 542 (building).

Indiana.—Wiseman v. Lynn, 39 Ind. 250; McAfee v. Montgomery, 21 Ind. App. 196, 51 N. E. 957; Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387.

Iowa.—Courtright v. Deeds, 37 Iowa 503.

Louisiana.—Alexander's Succession, 18 La. Ann. 337; Lee v. Palmer, 18 La. 405; Robinson v. Taylor, 6 La. 393.

Maine.—Vining v. Baker, 53 Me. 544; Millay v. Butts, 35 Me. 139.

Michigan.—Trevor v. Trevor, 65 Mich. 234, 31 N. W. 908 (a team of horses).

Minnesota.—Rollofson v. Nash, 75 Minn. 237, 77 N. W. 954; Ames & Frost Co. v. Smith, 65 Minn. 304, 67 N. W. 999 (promissory notes).

Missouri.—Miller v. Marks, 20 Mo. App. 369; Vogel v. St. Louis, 13 Mo. App. 116; Crow v. Marshall, 15 Mo. 499.

Nebraska.—Booknau v. Clark, 58 Neb. 610, 79 N. W. 159.

New York.—Rawley v. Brown, 71 N. Y. 85; Eyre v. Higbee, 35 Barb. 502 (autograph letters of great historical value); Fish v. Skut, 21 Barb. 333.

Oregon.—Spreckels & Bros. Co. v. Bender, 30 Or. 577, 48 Pac. 418.

Pennsylvania.—Entriken v. Brown, 32 Pa. St. 364; St. Augustine

v. Philadelphia County, Brightly 116, 4 Pa. L. J. 120.

Texas.—Andrews v. Beck, 23 Tex. 455; Herndon v. Casiano, 7 Tex. 322; Clifton v. Lilley, 12 Tex. 130.

West Virginia.—Tefft v. Marsh, 1 W. Va. 38 (letters).

Wisconsin.—Wausau Boom Co. v. Plumer, 35 Wis. 274.

But evidence of possession of personal property by consent of the true owner, is not evidence of title. Magee v. Scott, 9 Cush. (Mass.) 148. Nor is evidence of possession of a building purchased at an execution sale evidence of title to an organ standing in such building at the time. Caraher v. Royal Ins. Co., 63 Hun 82, 17 N. Y. Supp. 858.

In Virginia evidence of the possession of the fixtures and machinery of a tobacco factory is not evidence of title to such fixtures and machinery. *In re Binford*, 3 Hughes 295, 3 Fed. Cas. No. 1,411, reversed in 3 Fed. Cas. No. 1,411a.

43. See note 45 under VI, 1.

44. Martin v. Martin, 68 Ill. App. 169; *In re Binford*, 3 Hughes 295, 3 Fed. Cas. No. 1,411; Rawley v. Brown, 71 N. Y. 85.

45. *Alabama*.—Hobbs v. Bibb, 2 Stew. 54; Higdon v. Kennemer, 120 Ala. 193, 24 So. 439.

Illinois.—Roberts v. Haskell, 20 Ill. 59.

Indiana.—Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387.

Iowa.—American Exch. Nat. Bank v. Crooks, 97 Iowa 244, 66 N. W. 168.

Maine.—Linscott v. Trask, 35 Me. 150.

Massachusetts.—Magee v. Scott, 9 Cush. 148.

Michigan.—Trevor v. Trevor, 65 Mich. 234, 31 N. W. 908; Matteson v. Morris, 40 Mich. 52; Lull v. Davis, 1 Mich. 77.

Nebraska.—Booknau v. Clark, 58 Neb. 610, 79 N. W. 159.

New York.—New York v. Lent, 51 Barb. 19.

Property Purchased at Execution Sales. — Parol evidence that personal property in possession of a party was purchased at a sheriff's sale is not sufficient proof of the title thereto.⁴⁶

Dominion Over Property. — Evidence of such acts of dominion over real⁴⁷ or personal⁴⁸ property as are consistent with ownership thereof and would not be apt to be performed by one not having or claiming ownership is admissible to prove title, and, conversely, evidence of such conduct as is inconsistent with ownership, is admissible to disprove a claim of title.⁴⁹

North Carolina. — Threadgill v. Anson County, 116 N. C. 616, 21 S. E. 425.

Pennsylvania. — Philadelphia Trust, S. D. & I. Co. v. Philadelphia & E. R. Co., 177 Pa. St. 38, 35 Atl. 688.

Tennessee. — Park v. Harrison, 8 Humph. 412.

Texas. — Burroughs v. Farmer (Tex. Civ. App.), 45 S. W. 846.

Virginia. — Baring v. Reeder, 1 Hen. & M. 154, 171.

Wisconsin. — Wausau Boom Co. v. Plumer, 35 Wis. 274.

Possession of land ceases to be material evidence of title where abandonment is shown. Burroughs v. Farmer (Tex. Civ. App.), 45 S. W. 846.

46. *Dane v. Mallory*, 16 Barb. (N. Y.) 46, which holds that the judgment on which the sale was based must be proved.

47. *Goldsberry v. Gentry*, 92 Ind. 193; *Clayton v. School Dist. No. 1*, 20 Kan. 256; *Fitzgerald v. Pendergast*, 114 Mass. 368; *Pettingell v. Boynton*, 139 Mass. 244, 29 N. E. 655; *Moon v. Hawks*, 2 Aik. (Vt.) 390, 16 Am. Dec. 725.

In *Rankin v. Busby* (Tex. Civ. App.), 25 S. W. 678, it is held that acts of ownership are competent to show a party's title under a conveyance, the execution of which is in issue in the case.

In an action against a railroad company for damages for injuries arising from the company's having allowed combustible material on its right of way to become ignited by sparks from its locomotives, the fact that the company was using the ground is evidence of its title thereto. *McTavish v. Great Northern R. Co.*, 8 N. D. 94, 76 N. W. 985.

48. *Alabama.* — *Wolfe v. Parham*, 18 Ala. 441; *Thomas v. De Graffenreid*, 27 Ala. 651 (furnishing necessary supplies to slaves); *Lanier v. Branch Bank*, 18 Ala. 625.

California. — *Fitch v. Brockmon*, 3 Cal. 348.

Iowa. — *Smyth v. Ward*, 46 Iowa 339; *Everingham v. Lee*, 78 Iowa 630, 43 N. W. 459.

Kentucky. — *Miles v. Edelen*, 1 Duv. 270.

Minnesota. — *Irish-American Bank v. Ludlum*, 49 Minn. 255, 51 N. W. 1047; *Rollofson v. Nash*, 75 Minn. 237, 77 N. W. 954.

Missouri. — *Meredith v. Wilkinson*, 31 Mo. App. 1.

Nebraska. — *Paddock v. Sam Gosney Live Stock Com. Co.*, 48 Neb. 176, 66 N. W. 1121; *Oberfelder v. Kavenaugh*, 21 Neb. 483, 32 N. W. 295.

South Carolina. — *Norton v. Livingston*, 14 S. C. 177.

Texas. — *Lumpkin v. Montgomery* (Tex. Civ. App.), 25 S. W. 661.

Vermont. — *Moon v. Hawks*, 2 Aik. 390, 16 Am. Dec. 725; *Henry v. Huntley*, 37 Vt. 316.

In *Townsend v. Kerns*, 2 Watts (Pa.) 180, it was held that a book of original entry, kept by the owner of a farm and containing the receipts and expenditures thereof, was evidence, although not sufficient, to show that title to personal property attached as belonging to a tenant, was in the owner.

49. *Connecticut.* — *Brown v. Butler*, 71 Conn. 576, 42 Atl. 654; *Waller v. Eleventh School Dist.*, 22 Conn. 326.

Massachusetts. — *Snow v. Inhabitants of Orleans*, 126 Mass. 453.

Michigan. — *Howard v. Patrick*, 38 Mich. 795.

2. Execution of Mortgages. — Evidence that a party has executed a mortgage upon real or personal property is admissible as tending to show that he had title thereto.⁵⁰

3. Insurance. — On an issue as to the title to property, the fact that a party had it insured in his own name and paid the premium on the policy is admissible.⁵¹

4. Assessment and Payment of Taxes. — It has sometimes been held that the fact that property, real or personal, has been assessed in the name of a particular party,⁵² or that he has paid the taxes thereon,⁵³ is admissible as evidence that he held the title to such property, or at least as raising an inference of title,⁵⁴ although there are also decisions which hold that such evidence is inadmissible for the purpose of proving title.⁵⁵

5. Enrolment of Vessels. — A certificate of the enrolment of a ship pursuant to a United States statute is some evidence of the title thereto and in the absence of opposing proof is sufficient to

Missouri. — *Langsdorf v. Field*, 36 Mo. 440.

Pennsylvania. — *Union Canal Co. v. Loyd*, 4 Watts & S. 393; *Galbraith v. Elder*, 8 Watts 81.

Texas. — *Evans v. Martin*, 6 Tex. Civ. App. 331, 25 S. W. 688; *Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337.

Evidence of failure to include a claim in the inventory of an estate is admissible to prove that it was not the property of such estate. *Crane v. Brooks*, 189 Mass. 228, 75 N. E. 710.

The fact that a party erected a house on certain land under contract with the owner, but reserved no right to remove it, is evidence that he had no interest in the property after the expiration of such contract. *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582.

50. *Rowan v. Hutchisson*, 27 Ala. 328; *Treat v. Barber*, 7 Conn. 274; *Simpson v. Smith*, 27 Kan. 565; *Stanley v. Gaylord*, 10 Metc. (Mass.) 82; *Sweetman v. Ramsey*, 22 Mont. 323, 56 Pac. 361.

Proof that a person in possession of a piano executed a chattel mortgage thereon is admissible to show his title thereto. *Downey v. Arnold*, 97 Ill. App. 91.

Contra. — *Ellis v. Purvis*, 10 N. Y. St. 628. Mortgages given by a father upon real property previously conveyed by him to his son are not

admissible to prove the father's title thereto.

51. *Bettes v. Magoon*, 85 Mo. 580; *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289.

52. *Turner v. Bradley*, 85 Iowa 512, 52 N. W. 364; *City of Kansas v. Hannibal & St. J. R. Co.*, 77 Mo. 180; *Little v. Downing*, 37 N. H. 355; *Carr v. Dodge*, 40 N. H. 403; *Hunt v. Haven*, 56 N. H. 87; *Aldous v. Olverson*, 17 S. D. 190, 95 N. W. 917; *Holcroft v. Halbert*, 16 Ind. 256.

The Absence of Any Assessment against a party may be admitted as evidence against such party's claim of title. So held in *Smokey v. Johnson* (Miss.), 4 So. 788, where such evidence was admitted to disprove a claim of title to property levied on as that of the claimant's wife.

53. *Little v. Downing*, 37 N. H. 355; *Carr v. Dodge*, 40 N. H. 403; *Hodgdon v. Shannon*, 44 N. H. 572; *Hunt v. Haven*, 56 N. H. 87; *Walker v. Pittman*, 18 Tex. Civ. App. 519, 46 S. W. 117; *Ellen v. Ellen*, 16 S. C. 132.

54. *Irwin v. Patchen*, 164 Pa. St. 51, 30 Atl. 436.

55. *Larkin v. Baty*, 111 Ala. 303, 18 So. 666; *Adams v. Hickox*, 55 Iowa 632, 8 N. W. 485; *Starke v. Smith*, 5 Ohio 455; *Hetch v. Eherke*, 95 Iowa 757, 64 N. W. 650.

show title in the person in whose name it is enroled,⁵⁶ but such evidence is not conclusive.⁵⁷

6. Advertisement. — Evidence of the public advertisement by a person of his ownership of personal property is competent as tending to prove his title thereto, where such evidence is not introduced by himself to establish his own title,⁵⁸ although such evidence is by no means conclusive.⁵⁹

X. OPINIONS.

The general rule is that the opinion of a witness as to the title or ownership of property is not admissible in evidence of title;⁶⁰ but as to whether a direct statement that the witness himself, or some other person, is the owner of property is a mere opinion and therefore inadmissible, or is a statement of fact and properly received in evidence, the authorities differ, some holding that a statement as to ownership of property is a conclusion of law,⁶¹ while

56. *McClintock v. Lary*, 23 Ark. 215; *Central R. & B. Co. v. Smith*, 76 Ala. 572.

57. *Gilmore v. Brenham*, 3 La. Ann. 32.

58. *Turner v. Bradley*, 85 Iowa 512, 52 N. W. 364; *Nodle v. Hawthorn*, 107 Iowa 380, 77 N. W. 1062.

The appearance of the name and address of a person upon a wagon in use upon a public street is evidence of his ownership thereof. *Ferguson v. Ehret*, 14 Misc. 454, 35 N. Y. Supp. 1020; *Edgeworth v. Wood*, 58 N. J. L. 463.

The fact that the name of a railroad company appears upon cars and locomotives is some evidence of the title of such company thereto. *Chicago Gen. St. R. Co. v. Capek*, 68 Ill. App. 500.

59. *Chicago Gen. St. R. Co. v. Capek*, 68 Ill. App. 500; *Ferguson v. Ehret*, 14 Misc. 454, 35 N. Y. Supp. 1020.

60. *Alabama*. — *Ashford v. Ashford*, 136 Ala. 631, 34 So. 10.

California. — *Winter v. Stock*, 29 Cal. 407.

Georgia. — *Phillips v. Collinsville Granite Co.*, 123 Ga. 830, 51 S. E. 666.

Kansas. — *Stiles v. Steele*, 37 Kan. 552, 15 Pac. 561.

Kentucky. — *Williams v. Taylor*, 1 Bibb 41.

Massachusetts. — *Luce v. Parsons*, 77 N. E. 1032.

New York. — *Coats v. Dickenson*, 5 Alb. L. J. 333.

Pennsylvania. — *Steffy v. Carpenter*, 37 Pa. St. 41.

Texas. — *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 843; *Howard v. Zimpelman*, 14 S. W. 59; *Johnston v. Martin*, 80 Tex. 18, 16 S. W. 550; *Continental Ins. Co. v. Cummings* (Tex. Civ. App.), 95 S. W. 48; *Huff v. Crawford* (Tex. Civ. App.), 32 S. W. 592, s. c. 34 S. W. 606.

61. *California*. — *Winter v. Stock*, 29 Cal. 407.

Georgia. — *Phillips v. Collinsville Granite Co.*, 123 Ga. 830, 51 S. E. 666.

Illinois. — *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71; *Bake v. Baker*, 44 Ill. App. 578.

Michigan. — *Webster v. Bearinger*, 72 Mich. 630, 40 N. W. 772.

Mississippi. — *Dunlap v. Hearn*, 37 Miss. 471.

Nebraska. — *Cropsey v. Averill*, 8 Neb. 151.

Texas. — *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 843; *Ballew v. Casey*, 9 S. W. 189; *Johnston v. Martin*, 80 Tex. 18, 16 S. W. 550; *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478.

In *Richmond v. Brewster*, 2 N. Y. Supp. 400, the plaintiff's husband had

others hold that it is a statement of fact and may be received as evidence.⁶²

XI. REPUTATION.

It is the general rule that title to property cannot be proved by evidence of reputation⁶³ or general rumor,⁶⁴ neither is such evidence admissible to show that a party has never claimed or has disclaimed

been shown to have purchased a carriage, paying partly in cash and partly with his own promissory notes. It was held that plaintiff's statement: "It is mine and I pay for it" was a conclusion of law only and not evidence of title.

Whether or not a person was the owner of certain personal property at a certain date is a conclusion from several facts and a witness cannot be allowed to testify in regard thereto. *Simpson v. Smith*, 27 Kan. 565.

62. *Norton v. Linton*, 18 Ala. 690; *Daffron v. Crump*, 69 Ala. 77; *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365; *Catlin v. Frazier* (Conn.), 12 Atl. 871; *Cogley v. Cushman*, 16 Minn. 397; *Caspar v. O'Brien*, 15 Abb. Pr. N. S. (N. Y.) 402.

Ownership is a question of fact and a witness who knows that a certain person has owned the property in question may properly so testify. *Nelson v. Iverson*, 24 Ala. 9; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469.

A witness may testify that he never had any interest in certain land or any title thereto (*Florence Land, M. & M. Co. v. Warren*, 91 Ala. 533, 9 So. 384), or that certain property was hers at a certain time. *Hawley v. Bond* (S. D.), 105 N. W. 464.

A deposition of the register of the land office is competent to prove that title to the land in controversy was in the government. *Lacey v. Mannan*, 37 Ind. 168.

It is proper to ask a witness who claims to be the owner of certain property. "To whom did the property belong?" *Lipschitz v. Halperin*, 53 Misc. 280, 103 N. Y. Supp. 202.

63. *California*.—*Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. 598.

Connecticut.—*South School Dist. v. Blakeslee*, 13 Conn. 228.

Illinois.—*Munford v. Miller*, 7 Ill. App. 62.

Kentucky.—*Williams v. Taylor*, 1 Bibb 41.

Maryland.—*Johnson v. Turner*, 22 Atl. 1103.

Massachusetts.—*Howland v. Crocker*, 7 Allen 153; *Green v. Chelsea*, 24 Pick. 71.

Michigan.—*Sanscrainte v. Torongo*, 87 Mich. 69, 49 N. W. 497.

New Hampshire.—*Wendell v. Abbott*, 45 N. H. 349.

New Jersey.—*Browning v. Skillman*, 24 N. J. L. 351.

Pennsylvania.—*Urket v. Coryell*, 5 Watts & S. 60; *Sample v. Roff*, 16 Pa. St. 305.

South Carolina.—*Sexton v. Hollis*, 26 S. C. 231, 1 S. E. 893; *Hiers v. Risher*, 54 S. C. 405, 32 S. E. 509.

Tennessee.—*Jones v. Jennings*, 10 Humph. 428.

Vermont.—*Canfield v. Hard*, 58 Vt. 217, 2 Atl. 136.

Virginia.—*Cline's Heirs v. Catron*, 22 Gratt. 378, *Taliaferro v. Pryor*, 12 Gratt. 277.

Wisconsin.—*Fowler v. Schafer*, 69 Wis. 23, 32 N. W. 292.

Evidence that certain land is generally known as the property of a certain person is inadmissible to prove title. *Davis v. Arnold*, 143 Ala. 228, 39 So. 141.

In *Eastern Oregon Land Co. v. Cole*, 92 Fed. 949, 35 C. C. A. 100, the circuit court of appeals held that where the possession of a defendant in ejectment who relied upon adverse possession was admitted, evidence of his reputed ownership was admissible to prove the character of his possession. *Citing Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586.

64. *Whitsett v. Slater*, 23 Ala. 626; *Sample v. Robb*, 16 Pa. St. 305.

title,⁶⁵ although it has been held that evidence of reputation, taken in connection with proof of acts of ownership, is admissible to establish title to a private right in derogation of a public right⁶⁶ and in Oregon, under a statutory provision, common reputation is admissible in evidence to prove the ownership of property in dispute.⁶⁷

XII. QUIETING TITLE.

1. Burden of Proof.—A. GENERAL RULE.—A plaintiff cannot obtain a decree quieting his title to property upon the mere weakness of defendant's claim, but only upon the strength of his own title, and generally the burden is upon him to prove possession and a good title as against the defendant.⁶⁸ However, where it

65. *McCoy v. Odom*, 20 Ala. 502; *Hackett v. Amsden*, 59 Vt. 553, 8 Atl. 737.

66. *Russell v. Stocking*, 8 Conn. 236.

67. *Wilson v. Maddock*, 5 Or. 480 (under § 766, Civil Code).

Antiquity of the subject-matter to be established is an essential prerequisite to the admission of reputation as evidence of title. *McEwen v. Portland*, 1 Or. 300.

68. *Arkansas*.—*Nix v. Pfeifer*, 73 Ark. 199, 83 S. W. 951; *Lawrence v. Zimbleman*, 37 Ark. 643.

California.—*Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *Orena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268; *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398.

Connecticut.—*Roberts v. Merwin*, 68 Atl. 377.

Illinois.—*Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709; *Johnson v. Huling*, 127 Ill. 14, 18 N. E. 786.

Indiana.—*Pittsburg, C., C. & St. L. R. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528.

Kentucky.—*McHargue v. Parks*, 104 S. W. 955; *Davidson v. Ritchie*, 14 Ky. L. Rep. 830, 21 S. W. 585.

Minnesota.—*Pinney v. Russell & Co.*, 52 Minn. 443, 54 N. W. 484; *Wakefield v. Day*, 41 Minn. 344, 43 N. W. 71; *Jellison v. Halloran*, 40 Minn. 485, 42 N. W. 392.

Mississippi.—*Stevens Lumb. Co. v. Hughes*, 38 So. 769; *Griffin v. Harrison*, 52 Miss. 824.

New Hampshire.—*Parker v. Stevens*, 59 N. H. 203.

New York.—*Townsend v. Trustees of Freeholders*, 89 N. Y. Supp. 982; *Davis v. Reed*, 65 N. Y. 566.

North Carolina.—*Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784.

Texas.—*Scanlan v. Hitchler*, 19 Tex. Civ. App. 689, 48 S. W. 762.

West Virginia.—*Stephenson v. Collins*, 57 W. Va. 351, 50 S. E. 439.

To entitle plaintiff to relief in an action to quiet title, where defendant denies it, the plaintiff must prove his title. *Memphis Land & Timber Co. v. Stotts*, 68 Ark. 620, 56 S. W. 873.

Plaintiff in an action to quiet title must succeed upon the strength of his own title, and not upon the weakness of the title of his adversary. *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852.

On the trial of an issue at law under a bill to quiet title, it is incumbent on the plaintiff to establish his title as in ejectment. *Powell v. Mayo*, 27 N. J. Eq. 440.

In an action to quiet title when the plaintiff's title is denied by the answer, it is incumbent on the plaintiff to establish upon the trial that he is the owner of the legal or equitable title to the property, or has some interest therein superior to the rights of the defendant, in order to maintain his action. *McCauley v. Ohenstein*, 44 Neb. 89, 62 N. W. 232.

Must Show Title in Himself.—In *Hutchinson v. Howe*, 100 Ill. 11, 19, the court said: "A principle recognized in all the cases is, that unless

appears that the land in controversy is vacant and unoccupied, the extent of such burden is proof of a legal title carrying the right of possession.⁶⁹ *Contra.* — In Alabama under the statutes, where it appears that the plaintiff is in possession of the premises, the burden of proving an adverse title is on the defendant.⁷⁰

B. FACT OF DEFENDANT'S CLAIM. — In an action to quiet title it is necessary for the plaintiff to show that some claim is made to the property by the defendant, and that such claim is unfounded.⁷¹

a party shows title to land in himself, it is not for him to complain there is a cloud upon it. He must have a title to the land to give him a standing in court before he can contest a cloud upon the title, whether it is created by an incumbrance, or an adverse title."

Where Defense Charges Fraud. *Collier v. Carlisle*, 133 Ala. 478, 31 So. 970, was an action to quiet title to real estate brought by a married woman who claimed the title by mesne conveyance from her husband. The defendant alleged in his answer that the conveyances by which complainant claimed the title, were made to hinder, delay, and defraud the defendant and other creditors of the husband. *Held*, that the burden was upon the complainant to establish her title and possession as alleged in the bill, and to show a consideration paid for the property.

Title Claimed Through Heir. — In *Coates v. Teabo*, 44 Wash. 271, 87 Pac. 355, both parties admitted that the land in dispute was conveyed by United States patent to one Marcellus Spott, an Indian, and that he died intestate and owned the land at the time of his death. The plaintiff alleged that Spott left surviving him a brother known as James Coates who was his sole surviving heir at law; under whom plaintiff claimed title. *Held*, that it was incumbent on plaintiff to prove that James Coates was the heir at law of Marcellus Spott.

69. *Glos v. Huey*, 181 Ill. 149, 54 N. E. 905; *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643; *Glos v. Randolph*, 133 Ill. 197, 24 N. E. 426; *Johnson v. Huling*, 127 Ill. 14, 18 N. E. 786.

In an action to quiet title, if the premises be not vacant and unoccupied the plaintiff must prove that

he was in possession thereof at the time when the action was commenced. *Glos v. Kemp*, 192 Ill. 72, 61 N. E. 473.

In *Skidmore v. Smith*, 27 Ky. L. Rep. 323, 84 S. W. 1163, the evidence showed that the land in controversy was wild, unfenced, unoccupied mountain timber land. *Held*, that it was therefore incumbent upon the plaintiff to prove a superior paper title.

70. Burden on Defendant. — In *Kendrick v. Colyar*, 143 Ala. 597, 42 So. 110, the court said: "Under the statutes the court is not required to ascertain the strength or validity of the complainant's title, but is required only to determine 'whether the defendant has any right, title or interest in, or incumbrance upon such lands or any part thereof, and what such right, title or interest is, and in and upon what part of the lands the same exists.' When the complainant, as here, showed by evidence peaceable possession by her of the land as alleged, and that there was no suit pending at the time of the filing of the bill to test the defendant's claim of title, this made a *prima facie* case, and she was entitled to a decree adjudging defendant's claim invalid, unless he established a good title."

71. *Davis v. Com. Land & Lumb. Co.*, 141 Fed. 711, 733; *Head v. Fordyce*, 17 Cal. 149; *Cuthrell v. Cuthrell*, 101 Ind. 375.

In an action to quiet title, it is incumbent on the plaintiff to show that the defendant asserts some claim to the property, and that such claim is prejudicial to plaintiff's title. *Blasdel v. Williams*, 9 Nev. 161, 169.

In an action to quiet title, the burden of establishing by a fair preponderance of evidence that the de-

But where the defendant in his answer sets up a claim to the property, it is not necessary for the plaintiff to prove the assertion of the claim.⁷²

C. BURDEN OF PROVING TITLE ON PARTY ASSERTING IT.—In an action to quiet title where each party claims to be the owner of the property, the burden is on each to make good by evidence his affirmative averments touching his own title to it.⁷³

defendant's claim to the premises is unjust, is upon the plaintiff. *Brown v. Brown*, 110 App. Div. 913, 96 N. Y. Supp. 1002.

Non-Delivery of Deed.—In *Salisbury v. Salisbury*, 49 Mich. 306, 13 N. W. 602, the bill was brought to remove a cloud from complainant's title, by setting aside deeds made by his ancestor which he claimed were never delivered. *Held*, that the burden rested on him to make out his case by a preponderance of testimony.

Invalid Tax Deed.—In *Hyde v. Heath*, 75 Ill. 381, the court held that upon a bill to impeach and set aside a tax deed as a cloud upon the complainant's title, the burden of proof was upon the complainant to prove the allegations of her bill and show the invalidity of the tax deed.

Invalid Mortgage.—In *Robertson v. Sebastian*, 30 Ky. L. Rep. 883, 99 S. W. 933, the plaintiff averred that a certain mortgage held by the defendant constituted a cloud on her title to land, and that the mortgage and the note secured by it were given for an illegal consideration, and were obtained by undue influence, and that they had been satisfied. *Held*, that the burden of establishing these allegations was on the plaintiff.

Notice to Purchaser.—In an action to quiet title, where a defendant claims title to the property in controversy by virtue of being a *bona fide* purchaser thereof, and shows that he has paid a valuable consideration, the burden of showing that he purchased with notice is upon the party alleging it, who relies upon the notice to defeat the claim of a *bona fide* purchaser. *Osceola Land Co. v. Chicago Mill & Lumb. Co. (Ark.)*, 103 S. W. 609.

⁷² *Vaca Valley & C. R. R. v. Mansfield*, 84 Cal. 560, 24 Pac. 145.

In *Brown v. Cox*, 158 Ind. 364, 377, 63 N. E. 568, the evidence

showed that the defendant while owner of the real estate in controversy, executed a mortgage thereon to the plaintiff, which mortgage was foreclosed, and the property purchased by the plaintiff, and that after the expiration of the year of redemption, a sheriff's deed was executed to the plaintiff, and thereafter the defendant unsuccessfully prosecuted an action to set aside the sale and conveyance, alleging ownership of the land, and in the action to quiet title, appeared and filed an answer in general denial, and a cross complaint asserting ownership and right of possession against the plaintiff. *Held*, that no direct proof that defendant was claiming title or interest in the land adverse to plaintiff, was necessary.

⁷³ *California.*—*Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Stoddard v. Burge*, 53 Cal. 394; *Crook v. Forsyth*, 30 Cal. 662.

Minnesota.—*Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424.

Texas.—*O'Neal v. Manning*, 48 Tex. 403; *Keys v. Mason*, 44 Tex. 140; *Herrington v. Williams*, 31 Tex. 448; *Deen v. Wills*, 21 Tex. 642.

Burden on Defendant.—Where a defendant in an action to quiet title denies the title of the plaintiff and sets up in himself an adverse interest, the burden is upon him to establish it by evidence. *Dorris v. McManus*, 4 Cal. App. 147.

In an action to quiet title where the defendant sets up in his answer a legal or equitable title to the property in himself, the burden of proof is upon him to establish it. *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. 662.

In *Fitzgerald, Trustee v. Goff*, 99 Ind. 28, the defendant by way of cross-complaint asserted that he was the owner of the real estate in controversy, and that the plaintiff's claim thereto was unfounded, and a

2. Presumptions. — A. OF POSSESSION FROM LEGAL TITLE.

Where a party in an action to quiet title is shown to have the legal title to the property, he is presumed to have possession thereof, and the right of possession.⁷⁴

B. AS TO CONTINUING POSSESSION. — Where it is shown that a party once had possession of property, such possession is presumed to continue.⁷⁵

C. OF DELIVERY OF DEED. — A deed duly signed, acknowledged, and recorded, is presumed to have been delivered.⁷⁶

D. OF OWNERSHIP FROM POSSESSION. — It is presumed that a claimant of property who is in possession, holds the title thereto.⁷⁷

cloud upon his title, which he prayed to have quieted; the plaintiff answered said cross-complaint, denying under oath the execution of the deed under which cross-complainant claimed to derive title. *Held*, that upon the issue so presented the burden of proof rested upon the cross-complainant, without shifting or change throughout the trial.

Paramount Title. — To entitle a party to relief in an action to quiet title, he must show that he has the paramount legal title to the property in controversy. *Chinn v. Taylor*, 64 Tex. 385.

74. *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338, 347, 92 S. W. 534; *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852.

Possession. — In an action to quiet title where the evidence shows that the plaintiff has the exclusive legal title to the real estate in controversy, it will be presumed that he is in possession thereof until the contrary appears. *Judge v. Lackland*, 3 Mo. App. 107.

Right of Possession. — The principal and controlling issue in an action to quiet title is as to the ownership of the property, — who has the paramount title. When this is shown to be in a party, the law presumes that such party has the right of possession, and hence a *prima facie* case is made against the adverse party. *Flood v. Templeton* (Cal.), 92 Pac. 78.

75. *Lazarus v. Phelps*, 156 U. S. 202; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647.

In an action to quiet title, when

it is proved that a party had possession of the property in controversy, the law presumes that such possession continued in the party and those claiming under him. *North Carolina Min. Co. v. Westfeldt*, 151 Fed. 290, 301.

76. In *McGorray v. Robinson*, 135 Cal. 312, 67 Pac. 279, the plaintiff introduced and read in evidence the record of a deed dated December 29, 1891, and made by Stephen W. McGorray to plaintiff, describing the lands as described in the complaint, which deed was signed, acknowledged and recorded the day of its date. No objection was made to the deed or the record thereof being read in evidence. The court held that it was admissible in evidence and carried with it the presumption that it was delivered on the day of its date. The defendant offered no evidence tending to show title in herself, nor that the property was held in trust in any manner. The court said that it was not necessary for plaintiff to show title in his grantor at the time the deed was made and delivered, as it appeared by the verified answer of defendant that she and the plaintiff claimed title from the same common source, and that in such a case it is not necessary to prove title in the grantor.

77. *Harland v. Eastman*, 119 Ill. 22, 8 N. E. 810.

In an action to quiet title, proof of possession under claim of ownership is *prima facie* evidence of such ownership in the claimant so in possession. *Glos v. Huey*, 181 Ill. 149, 54 N. E. 905.

3. Facts Necessary To Maintain Action.—A. **FACTS NECESSARY AT COMMON LAW.**—Formerly, to entitle a plaintiff to relief on a bill *quia timet* to remove a cloud upon title it was necessary for him to prove three things, viz.: *First*, that he was in possession of the property; *second*, that he had been disturbed in his possession by repeated actions at law, and *third*, that his right to the property had been established by successive judgments in his favor.⁷⁸

B. **REQUIREMENTS CHANGED BY STATUTES.**—The statutes of many of the states have changed the common law as to the evidence necessary to maintain an action to quiet title.

Legal Title and Possession.—It is generally necessary for the plaintiff to prove that he holds the legal title to the property in controversy, and was in possession thereof at the commencement of his action.⁷⁹

78. *Stark v. Starrs*, 6 Wall. (U. S.) 402; *Davis v. Com. Land & Lumb. Co.*, 141 Fed. 711, 733; *Curtis v. Sutter*, 15 Cal. 259; *Shepley v. Rangely*, 2 Ware (U. S.) 242.

To maintain an action to quiet title, it is, as a general rule, necessary for the plaintiff to prove that he is in possession of the property, and that his title, if it be a legal one, shall have been established at law except where the defendants are numerous, or that it is founded on undisputed evidence, or long continued possession. *Livingston v. Hall*, 73 Md. 386, 395, 21 Atl. 49.

At Common Law.—In order to maintain a bill to quiet title to real estate a party was required to prove his possession thereof, and the disturbance of such possession by repeated actions at law, and the establishment of his right by successive judgments in his favor. *Holland v. Challen*, 110 U. S. 15.

79. *United States.*—*Alexander v. Pendleton*, 8 Cranch 462; *Peirsoll v. Elliott*, 6 Pet. 95; *Dewing v. Woods*, 111 Fed. 575, 49 C. C. A. 443.

Kentucky.—*Sheffield v. Day*, 28 Ky. L. Rep. 754, 90 S. W. 545; *Smith v. Lewis*, 21 Ky. L. Rep. 1400, 55 S. W. 551; *Packard v. Beaver Val. L. & M. Co.*, 96 Ky. 249, 28 S. W. 779.

Maryland.—*Helden v. Hellen*, 80 Md. 616, 31 Atl. 506, 45 Am. St. Rep. 371; *McCoy v. Johnson*, 70 Md. 490, 17 Atl. 387; *Polk v. Pendleton*, 31 Md. 118; *Crook v. Brown*, 11 Md. 158, 173.

South Carolina.—*Pollitzer v. Be-*

inkempen, 76 S. C. 517, 57 S. E. 475.

West Virginia.—*Logan v. Ward*, 58 W. Va. 366, 52 S. E. 398; *Mills v. Henry Oil Co.*, 57 W. Va. 255, 50 S. E. 157; *Hitchcox v. Morrison*, 47 W. Va. 206, 34 S. E. 993; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682.

Proof of both legal title and possession is necessary to maintain an action to quiet title. *Orton v. Smith*, 18 How. (U. S.) 263.

Under § 11 of the Kentucky statutes of 1903, the plaintiff to maintain an action to quiet title must not only prove the legal title to be in himself, but the actual possession of the land. The legal title and constructive possession are not sufficient. *Brown v. Ward (Ky.)*, 105 S. W. 964.

In *Weeks v. Cranmer*, 18 S. D. 441, 101 N. W. 32, the evidence showed that the plaintiff was in actual possession of the premises, claiming to be the owner in fee by virtue of a deed, and certain judicial proceedings. *Held*, that such possession and claim of ownership was sufficient evidence of title to justify a decree quieting title in plaintiff as against the defendant who did not prove color of title.

In *Frost v. Spitley*, 121 U. S. 552, the court said: "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his pos-

C. ACTUAL POSSESSION.—In some jurisdictions, the plaintiff must show an actual possession of the premises in controversy, in order to maintain his action.⁸⁰

Vacant Property.—In other jurisdictions, it is not necessary to prove actual possession if the property be vacant and unoccupied.⁸¹

session or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff."

Proof of mere possession of land, however long continued, unless it be exclusive and adverse, is of no avail against one who holds an established record title accompanied by evidence tending to show his actual possession. *Dawson v. Orange*, 78 Conn. 96, 128, 61 Atl. 101.

Possession Alone Not Sufficient. In *Cook v. Ziff Colored Masonic Lodge No. 119*, 80 Ark. 31, 96 S. W. 618, the court said: "Possession is not title, and possession alone without any other evidence of title is not sufficient to enable one to maintain a suit to remove cloud and quiet title. By mere possession, one does not show that he has any title to quiet."

Record Title.—In an action to quiet title the petitioner must show that he has a record title to the land. *Blanchard v. Lowell*, 177 Mass. 501, 59 N. E. 114.

^{80.} *United States.*—*United States v. Wilson*, 118 U. S. 86; *Fussell v. Gregg*, 113 U. S. 550; *Miller v. Ahrens*, 150 Fed. 644; *Davis v. Com. Land & Lumb. Co.*, 141 Fed. 711, 738; *Peck v. Ayers & Lord Tie Co.*, 116 Fed. 273, 53 C. C. A. 551.

Colorado.—*Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639.

New York.—*Moore v. Townsend*, 102 N. Y. 387, 7 N. E. 401.

Pennsylvania.—*Heppenstall v. Leng*, 217 Pa. St. 491, 66 Atl. 991.

In *Mackey v. Maxin* (W. Va.), 59 S. E. 742, the court said: "To obtain a footing in equity for the purpose of removing a cloud from title, the plaintiff must show his inability to sue at law, because of his own occupancy of the land; it being impossible for him to sue himself, and there being no other person in possession."

Possession by Tenant.—In an ac-

tion to quiet title, proof that at the time the action was commenced the land in controversy was in possession of tenants of the plaintiff, sufficiently establishes his possession. *Krebs v. Dodge*, 9 Wis. 1.

An allegation that the complainant is in possession of the premises, is not sustained by proof that the land was being plowed by a squatter who was not a tenant of complainant, nor in privity with her title. *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643.

Public Domain.—*Brauca v. Fernin*, 10 Idaho 239, 77 Pac. 636, was an action brought to quiet title to land which was at the time a part of the public domain. The evidence failed to show that the plaintiff or his predecessor in interest ever filed a possessory claim to the property in dispute, or ever lived upon or occupied it. *Held*, that he must have shown one or the other of these facts to exist, in order to maintain his action.

Possession of Part.—It is not necessary for the plaintiff to prove actual possession of every part of the tract of land in dispute in order to maintain his action. He may succeed as to part of the land and fail in his proofs as to the remainder. *Wellendorf v. Tesch*, 77 Minn. 512, 80 N. W. 629.

Where Defendant Claims Interest. In an action to quiet title where the plaintiff avers possession coupled with title, he is not required to prove possession unless the defendant asserts an adverse interest in himself and specifies its nature. *Lambert v. Shumway*, 36 Colo. 350, 85 Pac. 89.

^{81.} *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852; *Shirk v. Williamson*, 50 Ark. 562, 9 S. W. 307; *Rutz v. Kehn*, 143 Ill. 558, 29 N. E. 553; *Gage v. Schmidt*, 106 Ill. 107; *Gage v. Parker*, 103 Ill. 528; *Gage v. Bailey*, 100 Ill. 530; *Gage v. Abbott*, 99 Ill. 366.

In an action to quiet title it is not

D. POSSESSION ACQUIRED BY FORCE. — Proof that possession of the premises was acquired by forcibly ousting the defendant, is not sufficient to support the action.⁸²

E. PEACEABLE POSSESSION. — Under the statutes of Alabama and New Jersey it is necessary for a plaintiff in an action to quiet title, to show a peaceable possession as contradistinguished from a disputed or contested possession.⁸³

F. PROOF OF POSSESSION UNNECESSARY. — Under the statutes of Arizona, Arkansas, California, Florida, Indiana, Iowa, Tennessee and Washington, it is not necessary for the plaintiff in an action to quiet title, to prove his possession of the premises.⁸⁴

necessary to prove actual possession of wild and unoccupied land. Constructive possession is sufficient, and that is established by proof of the legal title thereto. *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338, 347, 92 S. W. 534.

To maintain an action to quiet title, the plaintiff must prove either actual possession of the premises, or that they were vacant and unoccupied when the action was commenced. *Glos v. Randolph*, 133 Ill. 197, 24 N. E. 426.

82. In *Crosby v. Hutchinson*, 126 Mich. 56, 85 N. W. 255, it appeared in evidence that the complainant sought to take possession of the premises in controversy on the 20th of April, 1895, and exclude the defendant who was then in possession. That on that day the complainant set up a tent on the premises close to the house, and left men there to guard the property, and that two or three days later they broke into the house, and that on April 25th, 1895, the bill to quiet title was sworn to. *Held*, that the possession of complainant was only through an unlawful and forcible dispossession of the defendant, and was for the purpose of filing a bill to quiet title, and to avoid a suit at law and would not maintain an action to quiet title.

83. *Ladd v. Powell*, 144 Ala. 408, 39 So. 46; *Randle v. Daughdrill*, 142 Ala. 490, 39 So. 162; *Lyon v. Arndt*, 142 Ala. 486, 38 So. 242; *Brand v. United States Car Co.*, 128 Ala. 579, 30 So. 60; *Adler v. Sullivan*, 115 Ala. 582, 22 So. 87; Ala. Code 1896, § 809.

Actual and Peaceable Possession. In New Jersey, under a statute which confers the right to file a bill

in equity to quiet title, "when any person is in peaceable possession of land . . . claiming to own the same, etc.," actual and peaceable possession by the complainant are jurisdictional facts, and if denied by the answer, they must be proved as the preliminary matter. *Allaire v. Ketcham*, 55 N. J. Eq. 168, 35 Atl. 900.

Peaceable Possession. — In *Oberon Land Co. v. Dunn*, 56 N. J. Eq. 749, 40 Atl. 121, Vice Chancellor Gray, speaking of the possession required by the statute of that state, to confer jurisdiction upon the court, to quiet title, said: "This peaceable possession must exist at the time of the filing of the bill; but the evidence of such a possession may be the action of the complainant, and of those under whom it claims, at any reasonable time preceding the beginning of the action in this court. Any acts regarding the premises which would naturally convey to an onlooker the sense that the party doing or directing them was the owner, are evidential of such a possession as the statute contemplates. These acts must necessarily vary greatly, according to the character of the property in question. A house would not be dealt with as would a tract of woodland, nor a sand beach property as would a farm."

84. *United States*. — *Wehrman v. Conklin*, 155 U. S. 314, 323.

Arkansas. — *Lawrence v. Zimpleman*, 37 Ark. 643.

California. — *Reiner v. Schroeder*, 146 Cal. 411, 80 Pac. 517.

Florida. — *Sloan v. Sloan*, 25 Fla. 53.

G. EQUITABLE TITLE. — In some states it is not necessary for the plaintiff to prove a legal title to the premises in controversy in order to maintain an action to quiet title, proof of an equitable title being sufficient.⁸⁵

4. Nature of Evidence. — A. GENERAL RULE. — The nature of the evidence in an action to quiet title is determined somewhat by the character of claims pleaded, as to whether they be legal or equitable.⁸⁶

B. DOCUMENTARY EVIDENCE. — a. *Deeds*. — In an action to quiet title, a deed executed by the plaintiff's grantor which recognizes defendant's claim of title to the property, in controversy, is

Indiana. — *McCaslin v. State ex. rel. Auditor*, 99 Ind. 428.

Iowa. — *Lewis v. Soule*, 52 Iowa 11, 2 N. W. 400.

Tennessee. — *Ross v. Young*, 5 Sneed 627.

Washington. — *Brown v. Baldwin*, 89 Pac. 483.

Indiana. — § 1070, Rev. Stat. of Indiana, 1881: "An action may be brought by any person either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to, or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title."

Iowa. — "An action to determine and quiet title to real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession." § 3273, Code of Iowa.

It is not necessary for the plaintiff in an action to quiet title to prove that he is in possession, or that the premises are vacant and unoccupied. *Vietzen v. Otis* (Wash.), 90 Pac. 264.

In an action to quiet title where it appears that the complainant is not in possession of the property in controversy, he must prove a good title thereto, or such an equity as against the defendant as to draw from him his title. *Coal Creek M. & M. Co. v. Ross*, 12 Lea (Tenn.) 1.

85. *United States*. — *Wehrman v. Conklin*, 155 U. S. 314, 323; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405.

Arizona. — *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553.

California. — *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398.

Illinois. — *Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709.

Indiana. — *Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742.

Montana. — *Pollock M. & M. Co. v. Davenport*, 31 Mont. 452, 78 Pac. 768.

North Carolina. — *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823; *Geer v. Geer*, 109 N. C. 679, 14 S. E. 297; *Phillips v. Davis*, 69 N. C. 117; *Rutherford v. Green*, 37 N. C. (2 Ired. Eq.) 121.

Oregon. — *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605.

South Carolina. — *Pollitzer v. Beninkempen*, 76 S. C. 517, 57 S. E. 475.

West Virginia. — *Swick v. Rease*, 59 S. E. 510.

In an action to quiet title the plaintiff alleged a title in fee simple and right of possession. *Held*, that proof of possession under an equitable title was sufficient. *Van Vranken v. Granite County*, 35 Mont. 427, 90 Pac. 164.

86. In an action under the Minnesota statute to determine an adverse claim to real estate, the defendant is called upon to disclose by his answer the nature of his claim or title, which thereupon becomes the subject of adjudication. If he sets up a legal title his proof must be confined to a claim of that character. If his claim be an equitable one, equitable rules and principles must govern. If he avers ownership in fee he will not be permitted to show on the trial that he has succeeded to an equitable

admissible.⁸⁷ But a deed which does not refer to the land in controversy is not admissible.⁸⁸

b. *Copies of Lost Deeds.* — The loss of deeds and the material parts thereof must be clearly established in an action to quiet title, before copies thereof can be admitted in evidence.⁸⁹ But it has been held in California that a copy of a United States patent duly certified by the acting commissioner of the general land office at Washington, was admissible without proof of the loss of the original.⁹⁰

c. *Maps and Surveys.* — Maps and surveys which are referred to in deeds of the property in controversy are admissible.⁹¹

title or interest. *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. 662.

87. In *Dumont v. Dufore*, 27 Ind. 263, the defendant answered claiming title to an undivided one-third of the property in controversy, under a deed from plaintiff's grantor, and alleging possession under the deed for twenty years. On the trial the defendant offered in evidence a deed executed jointly by himself and the plaintiff's grantor, for a part of the property. *Held*, that the deed was admissible as tending to show the defendant's claim of title, and a recognition of it by the plaintiff's grantor.

Admission by Deed. — *Wyland v. Mendel*, 78 Iowa 739, 37 N. W. 160, was an action to quiet title. It was claimed by defendants on appeal that the evidence did not support the decree quieting title. In determining this question, the court said: "It is alleged in the petition that the plaintiffs hold the fee simple title, and the claim to recover possession is in effect an allegation that defendants hold it. The petition is not denied and its allegations are therefore admitted. In addition to this the deed given in evidence shows that two of the defendants conveyed the property to plaintiffs. These facts sufficiently support the decree."

88. The offer of a deed in evidence which upon its face did not refer to any of the land in controversy, was not admissible in the absence of other evidence showing its relevancy to the issue. *Oldham v. Ramsner*, 149 Cal. 540, 87 Pac. 18.

89. In an action to quiet title where a party relies upon a lost deed to sustain his claim, he must estab-

lish the deed's original existence, its loss and the material parts of it, by clear and convincing evidence. *Garland v. Foster County State Bank*, 11 N. D. 374, 92 N. W. 452.

In *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8, the plaintiff claimed title to the land in controversy under a deed from one Allen, who claimed title under a deed from one Commow. The last mentioned deed was alleged to be lost. *Held*, that the execution and delivery of said lost deed, and the contents thereof, should be established by clear and satisfactory evidence.

90. In *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647, the plaintiff testified that he purchased the quarter section of land in controversy from the United States, but that he never received the patent for it, and did not know what became of it. He introduced in evidence the copy of a United States patent conveying to him the land. Attached to this copy, was a certificate of the acting commissioner of the General Land Office, under seal certifying "that the annexed copy of patent in favor of David Eltzroth founded on Visalia California Cash entry No. 2212, is a true and literal exemplification from the record in this office."

The court held the copy admissible, saying: "It was not necessary that the plaintiff prove the loss of the original patent before he could introduce the copy in evidence." Citing California Code of Civil Procedure, §§ 1919, 1951.

91. In an action to quiet title it is admissible to introduce in evidence a survey and map in connection with certain deeds introduced in which

d. *Judicial Proceedings*.—Judgments and probate proceedings and pleadings in civil actions, when they affect the title or right of possession to the property in dispute, are admissible.⁹²

C. PAROL EVIDENCE.—a. *To Identify Property*.—While parol evidence is not competent to aid a defective description of land, it is admissible in an action to quiet title to identify land described with the property in controversy.⁹³ But ownership of land which

reference was made to the said maps for description. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159.

In an action to quiet title, parol evidence is admissible for the purpose of identifying a map or plat offered in evidence as being the one referred to in the deed, and it was incumbent upon plaintiff to produce, or in the event of its loss or destruction, give secondary evidence of the contents of the map referred to in the deed, as without such map there was no sufficient description. *Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

⁹². In an action to quiet title a party's derangement of title is a matter of evidence purely and it is not error to introduce in evidence a prior judgment affecting the property in controversy. *Riverside Land & Irrig. Co. v. Jensen*, 108 Cal. 146, 41 Pac. 40.

Foreclosure Proceedings.—In *Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739, it appeared that the plaintiff obtained his title from the successor of one Herman Huber, deceased, by commissioner's deed on foreclosure sale. He introduced in evidence the record in the foreclosure action, and the deed of the commissioner therein to him, and also a writ of assistance thereafter issued by the court with the return of the sheriff thereon, showing the delivery of the property to him in pursuance of the writ. *Held*, that this evidence was competent, the court saying: "It was a part of the record of the plaintiff's title, showing that he had obtained not only the title, but the possession so far as it could be obtained from the judgment debtor."

Probate Proceedings.—Where a person seeks to quiet title to real estate, and it appears that his title is derived from a deceased person through an executor's deed, he must

not only introduce the deed in evidence, but he must prove the will, the probate thereof, and lawful proceedings ending in the execution of the deed. Recitals in the deed are not competent to establish these facts as against persons not in privity with the grantor. *Miller v. Miller*, 63 Iowa 387, 19 N. W. 251.

Complaint and Answer in Ejectment.—In *Meade v. Black*, 22 Wis. 241, the plaintiff claimed to be in possession of the premises in controversy through one Odell as his tenant, and testified that Odell though he paid no rent, never denied to him that he was his tenant, or set up any claim to the land. *Held*, that the complaint and answer in an action of ejectment then pending by said plaintiff against Odell for the same premises, should both have been admitted in evidence for the defendant to contradict plaintiff's testimony, and as tending to show the nature of Odell's possession.

⁹³. Parol evidence will not be admitted to help out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms; but the rule that the description must be certain and definite and sufficient in itself to identify the land, does not exclude evidence for the purpose of applying the description to the surface of the earth, and thus identifying it with the tract in controversy. If a monument is given as a starting point, evidence may be given to show its location, but if the direction of the course from that monument is not given, evidence will not be received to show what direction was intended. If the land is described by some name or designation, evidence will be received for the purpose of showing that the tract in controversy was well and generally known by that name or designation.

is not founded upon adverse possession cannot be established by parol evidence.⁹⁴

b. *Acts and Declarations Against Interest.* — The acts and declarations of a party to an action to quiet title, which are against his interest therein, are admissible in evidence.⁹⁵

Best v. Wohlford, 144 Cal. 733, 78 Pac. 293.

In *Burton v. Mullenary*, 147 Cal. 259, 81 Pac. 544, the appellant contended that the deed from Burton to respondent was void for uncertainty of description, and said contention was founded on the fact that in the deed the expression "90x450" is used without the use of the word "feet", or any other word to denote the quantity the said figures were intended to express. The lot is described as lying and being in the city and county of Santa Barbara, in the state of California, and then comes this language: "A lot 90x450 on the Northwestern corner of Cola and De la Vine streets," etc., but it was shown by the evidence that Ben Burton at the time of the deed owned a lot on the said corner of Cola and De la Vine streets, 90 feet by 450 feet, and that he did not own any other land in that neighborhood. *Held*, that the description was sufficient to show the lot conveyed, and the deed was not void for uncertainty.

In an action to quiet title, the answer alleged that the plaintiff by a proper deed had conveyed to the defendant "the nineteen acres of land in the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 22, township 6, Range 8, being the same land described in the plaintiff's complaint," and that the defendant is now the owner thereof. The deed to the defendant described the land merely as situate in a certain county, "in the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 22 containing nineteen acres more or less, all in town. 6, North of Range 8 East." *Held*, that parol evidence was admissible to show that at the time of the conveyance, the plaintiff owned only nineteen acres in said section, being the land described in the complaint, and that this was the same land which was embraced in the deed to the defendant. *Keller v. Kel-*

ler, 80 Wis. 318, 50 N. W. 173.

94. *Hamilton v. Beaudreau*, 78 Wis. 584, 47 N. W. 952, was an action to set aside a tax deed as a cloud upon the plaintiff's title to real estate. The complaint alleged that the plaintiff was the owner in fee of the land by virtue of a certain deed. The answer denied the plaintiff's ownership, and asserted title under a tax deed. *Held*, that the deed under which plaintiff claimed, being a quit-claim deed from a person who was not at the date thereof in possession of the land, and the statement of a witness that he knew that the grantor in said deed was, at a time long past, the owner of the land, were not sufficient evidence of plaintiff's ownership to entitle her to a decree, even though the defendant's tax deed was void.

In *Cooper v. Blair* (Or.), 92 Pac. 1074, the defendant sought to prove her ownership of the disputed premises by common reputation, — discussions of the matter among her neighbors. *Held*, to be inadmissible.

Parol Evidence. — Under statutes where title to land may be acquired by adverse possession, parol evidence is of course sufficient to prove it. *Elliott v. Pearl*, 10 Pet. (U. S.) 412; *Alden v. Gilman*, 13 Me. 178; *Crawford v. Galloway*, 29 Neb. 261, 45 N. W. 628; *Tourtelotte v. Pearce*, 27 Neb. 57, 42 N. W. 915; *Farrar v. Fessenden*, 39 N. H. 277; *Miller v. Shaw*, 7 Serg. & R. (Pa.) 136.

95. *Spottswood v. Spottswood*, 4 Cal. App. 711.

Interstate Bldg. and Loan Assn. v. Agricola, 124 Ala. 474, 27 So. 247, was an action to quiet title to land, of which complainant Otto Agricola was in possession as the vendee of Mrs. Emma F. Hamlin. The defendant answering, set up a mortgage upon the land alleged to have been executed to it by Mrs. Hamlin prior to complainant's purchase. Letters written by the complainant to the of-

5. Sufficiency of Evidence. — A. AS TO TITLE. — *a. Conflict of Authority.* — There is some conflict of authority as to the weight of evidence necessary to justify a decree in an action to quiet title. It has been held necessary for the plaintiff to prove in himself a perfect equitable, or a complete legal title.⁹⁶ On the other hand, it has been held that in proof of title by the complainant, he need not go beyond that of making out a presumptive case against the defendant.⁹⁷

ficers of the defendant association, notifying them that he had purchased the mortgaged property, and that he would pay the installments, were held properly admissible as showing a recognition of defendant's claim.

In an action to quiet title to a certain road it is competent evidence to show the acts and declarations of the party dedicating the road, that at the time of such dedication it was his intention to so dedicate it to the public use. *Sussman v. San Luis Obispo County*, 126 Cal. 536, 59 Pac. 24.

The acts and declarations of a predecessor in reference to the ownership of a grantee are competent and amply sufficient to show that he sold the land to the grantee and put him in possession of it. *Bryan v. Torrey*, 84 Cal. 126, 24 Pac. 319.

In an action to quiet title to a strip of land along a changeable stream, the issue being as to where the stream ran in the past, the court said: "We do not think the court erred in excluding evidence offered by appellant of oral declarations of her grantors as to the boundaries of the rancho, . . . because they were not offered against one holding title under the parties who made the declarations and are inadmissible on the ground of hearsay. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159.

^{96.} *Watts v. Lindsey*, 7 Wheat. (U. S.) 158; *Griffin v. Harrison*, 52 Miss. 824; *Huntington v. Allen*, 44 Miss. 654, 663; *Boyd v. Thornton*, 13 Smed. & M. (Miss.) 338.

In *Banks v. Evans*, 10 Smed. & M. (Miss.) 35, 62, 48 Am. Dec. 734, the court said: "He who comes into equity to get rid of a legal title which is alleged to overshadow his own title, must show clearly the validity of his own title, and the invalidity of his opponents."

To maintain an action to quiet title the complainant must show clearly the validity of his own title and the invalidity of his opponent's title. He must prove in himself a perfect equitable or a complete legal title. *Handy, Trustee, v. Noonan*, 51 Miss. 166.

Paramount Source. — Where a plaintiff alleges title in fee simple in himself, and this is denied by the answer, the plaintiff must show a claim of title from the paramount source unless it clearly appears by the pleadings that both parties claim from the same common grantor. *Weeks v. Cranmer*, 17 S. D. 173, 95 N. W. 875.

Strong Proof Required. — Where the cancelation of an instrument is sought on the principle *quia timet*, the complainant to be successful must show a title to the relief free from all reasonable doubt, and it must appear that it is clearly against conscience, that the instrument should be permitted to remain uncanceled. *Shotwell v. Shotwell*, 24 N. J. Eq. 378, 387.

Against Homesteader. — Where a party seeks to quiet title against another who is a qualified homesteader under the United States land law, he must show his connection with the government title to the land or he will be held a mere naked trespasser. *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290.

^{97.} *Loomis v. Roberts*, 57 Mich. 284, 23 N. W. 816; *Hall v. Kellogg*, 16 Mich. 135.

In an action to quiet title, it is not necessary for the complainant to prove title with the same strictness as in an action of ejectment. *Glos v. Randolph*, 138 Ill. 268, 27 N. E. 941.

Good Against Defendant. — In an action to quiet title it is not essential

b. *Common Source of Title*.—In an action to quiet title, where both parties claim title from a common grantor, it is not necessary to prove title in such grantor.⁹⁸

c. *Title by Adverse Possession*.—In an action to quiet title, ownership of the property in controversy may be proved in any manner authorized by law, and proof of all the facts required by

that the complainant should prove a title that would be good against the world; it is sufficient if he shows a title apparently good against the defendant. *Rayner v. Lee*, 20 Mich. 384.

Purchase and Defective Deed. In *Bowen v. Duffie*, 66 Iowa 88, 23 N. W. 277, the plaintiff introduced a deed from one L. to her, the signature to which was neither proved by a proper acknowledgment or otherwise, but she and another as witnesses testified to the purchase of the land by her from L. *Held*, that this was sufficient evidence of plaintiff's title to justify the court in quieting her title as against defendants, if they proved no rights of any kind in the land.

Possession Sufficient in First Instance.—A person in possession of real property by himself or by his tenant, is in a position to bring an action to quiet title thereto; and if the allegations be proved at the trial no further evidence of title on the part of the plaintiff is essential in the first instance. *Horn v. Jones*, 28 Cal. 194.

Title or Possession.—To maintain an action to quiet title, plaintiff must prove either title or possession, even if the defendant has no claim to the property. *Morrill v. Douglass*, 14 Kan. 293.

Record Title and Right of Possession.—Proof that the plaintiff holds the record legal title and that he is entitled to possession, is sufficient to maintain an action to quiet title. *White v. McSorley* (Wash.), 91 Pac. 243.

Possession and Claim of Ownership.—In *Weeks v. Cranmer*, 18 S. D. 441, 101 N. W. 32, the evidence showed that the plaintiff was in actual possession of the premises, claiming to be the owner in fee by virtue of a deed, and certain judicial

proceedings. *Held*, that such possession and claim of ownership was sufficient evidence of title to justify a decree quieting title, as against the defendant who failed to prove color of title.

98. *McGorray v. Robinson*, 135 Cal. 312, 67 Pac. 279.

In an action to quiet title where both parties assert title from a common grantor, and from no other source, it is not necessary for the plaintiff to go back of the common source to prove a title upon which he can recover. It is sufficient if he proves a better title through a common source, than the defendant can show through the same source. *Graton v. Holliday-Klotz Land & Lumb. Co.*, 189 Mo. 322, 337, 87 S. W. 37.

In *Gage v. Cantwell*, 191 Mo. 698, 708, 91 S. W. 119, neither party appeared by the evidence to be in possession of the land in controversy, and both parties claimed title under one E. L. Gage, the plaintiff claiming as his heir at law, and the defendants under a tax sale. Plaintiff introduced a deed to the land from one Cobberly, a record owner, to said E. L. Gage his ancestor, and also a judgment for taxes against him, and a tax sale thereunder to defendants, and evidence showing that E. L. Gage was dead when the suit for taxes was begun. The defendants offered no evidence. *Held*, that the evidence was sufficient to authorize a judgment for the plaintiff, the court saying: "Plaintiffs claim by inheritance through E. L. Gage, and the defendants claim through E. L. Gage by virtue of sale of his interest in this land under the judgment in the tax proceeding, and we see no reason or necessity under the facts of this case to have required the plaintiffs to introduce their chain of title from the government down to E. L. Gage."

law to constitute adverse possession for the statutory period of time, is sufficient.⁹⁹

B. AS TO POSSESSION. — a. *Actual Possession.* — To constitute actual possession of land it is only necessary to prove that the complainant exercised such dominion over it, or put it to such use, as it was reasonably adapted to.¹ Neither a tax deed, nor proof of

99. Orack v. Powelson, 3 Cal. App. 282, 85 Pac. 129; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318.

In Severson v. Gremm, 124 Iowa 729, 100 N. W. 862, the evidence showed that for the period of time prescribed by the statute of limitations, the plaintiff had been in actual and adverse possession of the property, claiming in good faith to have absolute title thereto. *Held*, to support an action to quiet title.

In Glos v. Gerrity, 190 Ill. 545, 60 N. E. 833, it was proved that the appellee claimed to own the lots in controversy under a good and sufficient deed, and so claiming entered into the actual and exclusive possession of them, and paid taxes thereon, built fences, made repairs, etc., and was in such open, actual and exclusive possession under such claim of ownership, prior to and at the time of the institution of the suit. *Held*, to establish a *prima facie* title in the appellee.

In Cooper v. Blair (Or.), 92 Pac. 1074, the plaintiff alleged that he was the owner and in possession of the property in controversy, and that defendant claimed an interest or estate therein adverse to him. The defendant denied plaintiff's ownership and possession, and set up title and ownership in herself. *Held*, that plaintiff was entitled to prove his title in any manner authorized by law, and that proof of adverse possession for the statutory time was sufficient.

To same effect see Joy v. Stump, 14 Or. 361, 12 Pac. 929; Barrell v. Title Guarantee & Trust Co., 27 Or. 77, 39 Pac. 992.

In Page v. Shelby, 108 Mo. 286, 18 S. W. 900, the evidence showed that the plaintiff and his grantors had been in possession of the land in controversy for more than thirty years; that plaintiff's grantor had

bought the land from the patentee, paid the purchase money therefor and received a deed therefor, which was afterwards lost or destroyed without having been recorded. *Held*, that the evidence was sufficient to authorize a decree quieting title in the plaintiff, the court saying: "The policy of the law is to uphold possessions that have continued peaceably for a long time. The possession and the other facts proven in the case are consistent with the theory that a good and sufficient deed was executed by Shelby (the patentee) to Bolling (his grantee). Every reasonable presumption should be indulged in support of this theory in the absence of any evidence tending to weaken it."

In Orack v. Powelson, 3 Cal. App. 282, 85 Pac. 129, the plaintiff proved that by himself and his predecessors in interest he had been in open, notorious, exclusive and adverse possession of the premises in controversy, and every part thereof, and had paid all taxes assessed thereon, for more than ten years next before the beginning of the action, and the trial court so found. *Held*, that title was established in the plaintiff by said evidence, under § 1007 of the civil code of California.

1. Brand v. United States Car. Co., 128 Ala. 579, 30 So. 60; Botsford v. Eyraud, 148 Cal. 431, 83 Pac. 1008; The Niagara Gold Con. M. Co. v. The Bunker Hill Con. M. Co., 59 Cal. 612.

In an action to quiet title, the testimony of the complainant that he was in peaceable possession, and was the owner of the land described in the bill, was held to be sufficient evidence of possession. Southern R. Co. v. Hall, 145 Ala. 224, 41 So. 135.

In Elliot v. Atlantic City, 149 Fed. 849, peaceable possession of the land in controversy was in issue as a jurisdictional fact. It appeared in evidence that the lands were beach

the payment of taxes on property, is sufficient evidence of actual possession.²

b. *Adverse Possession*. — In an action to quiet title where a claim is based upon adverse possession, the elements constituting such possession must be shown by clear and convincing evidence.³

6. Defensive Evidence. — A. DEFENDANT'S POSSESSION. — In those jurisdictions where the plaintiff must be in possession in order

lands, a portion of which was subject to the ebb and flow of tidal waters. The complainants proved that there was a large building upon the land, but two or three years prior to the time they purchased it; that such building stood there for several years, until it was injured by a storm, when for that reason it was removed by its owners. The piles upon which it was constructed existed at the time of the trial. They also proved that after they acquired title they built jetties upon the property with intent to reclaim the submerged portion of the land from the ocean, and the right to maintain them had not been disputed. That the city constructed a board walk over a portion of the land, but removed the same upon notice from the complainants that such act was a trespass. *Held*, that the evidence showed in the complainants all the possession that the lands were capable of, and that such possession was peaceable, the court saying: "I think it entirely proper to consider the buildings which were formerly located upon the land, and which were removed therefrom but two or three years prior to the beginning of the suit, as well as the construction and maintenance of the jetties as evidence of the complainants' possession."

2. Tax Deed. — In *Douglass v. Bishop*, 24 Kan. 749, the possession of the property in dispute by the plaintiff was denied by the defendant. The plaintiff introduced in evidence a tax deed of the land to himself, but failed to prove actual possession. *Held*, that the tax deed did not prove nor tend to prove actual possession of the premises in the plaintiff.

Payment of Taxes. — The payment of taxes on land is not of itself evidence of possession, but in connection with evidence of actual possession

it is admissible to show the extent of such possession. *Southern R. Co. v. Hall*, 145 Ala. 224, 41 So. 135.

3. Spottswood v. Spottswood, 4 Cal. App. 711.

Continuous Possession. — Taxes. In order to prove adverse possession, under the California statute, it must be shown that the successive claimants have paid all taxes levied and assessed on the land; that the possession was continuous and uninterrupted, and either that such possession was protected by a substantial inclosure, or that the land was usually cultivated or improved. *Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739.

In an action to quiet title where the ground upon which title is based is adverse possession, the evidence must show a continuous possession. *McGrath v. Wallace*, 85 Cal. 622, 24 Pac. 793.

Interruptions of Possession. — In an action to quiet title based on adverse possession, periods of vacancy incident to or occasioned by change of possession, or by the substitution of one tenant for another, and which are not of an unreasonable duration, in view of the character of the land and the use to which it is adopted and devoted, do not constitute interruptions of possession, destroying its continuity in legal contemplation, when there is no intention to abandon the possession. *Botsford v. Eyraud*, 148 Cal. 431, 83 Pac. 1008.

Taxes. — In order to prove adverse possession under the statute of California, in an action to quiet title, the party relying on such possession, must prove that he had paid all taxes levied and assessed on the land during the preceding five years, or that no valid assessment has been made. *Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739.

to maintain his action, proof that the defendant is in possession of the property in controversy is a complete defense.⁴

B. CONVEYANCES.—The defendant in an action to quiet title may introduce in evidence conveyances which show a recognition of his title by the plaintiff.⁵ And he may even show that a deed absolute on its face, under which the plaintiff claims title, is in fact a mortgage which has been paid.⁶

4. *Ranch v. Werley*, 152 Fed. 509; *Chandler v. Graham*, 123 Mich. 327, 82 N. W. 814; *Seymour v. Rood*, 121 Mich. 173, 79 N. W. 1100; *Moore v. Shofner*, 40 Or. 488, 67 Pac. 511.

Actual Possession.—Proof that defendant is in possession of the property in controversy, will defeat plaintiff's action to quiet title thereto. *Tinker v. Piper*, 149 Mich. 335, 112 N. W. 913.

Adverse Possession.—In *Crawford v. Galloway*, 29 Neb. 261, 45 N. W. 628, the evidence showed that in 1874 the defendant broke up the land in dispute, and that he raised a number of crops of wheat upon it, and set out a large number of trees upon it, and cultivated it either by himself or a tenant till the action was brought in 1887, and until the trial thereof. *Held*, to constitute a good defense.

5. **Deed and Lease.**—In *Roggen-*

camp v. Converse, 15 Neb. 105, 17 N. W. 361, the plaintiff claimed title by virtue of adverse possession of the property during the statutory time. *Held*, that a deed in fee of the land from the plaintiff to the defendant given more than ten years before the bringing of the action is competent evidence in connection with a parol lease taken by the plaintiff from the defendant, to prove that the plaintiff's possession was not adverse.

6. **Deed a Mortgage.**—In an action to quiet title where the general allegations of plaintiff's title are denied in the answer, the defendant may prove that a deed absolute in form under which plaintiff claims title, is in fact a mortgage made as security for a debt and that as such, it has been fully paid, but such proof must be clear and convincing. *Wakefield v. Day*, 41 Minn. 344, 43 N. W. 71.

TORTS.—See Carriers; Damages; Husband and Wife; Master and Servant; Negligence; Principal and Agent; Railroads; Telegraphs and Telephones.

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I. DEFINITIONS.

By **Towage** is meant the engagement, under contract, express or implied, of one vessel to assist another on navigable waters when such other vessel is not in peril, but only requires acceleration of her speed or progress, or aid in gaining or clearing harbor or wharf.¹ The term is also applied to designate the price paid for towage.

Tug. — Tow. — The vessel providing the aid or assistance is generally known as the tug. The vessel assisted is called a tow.²

Distinction Between Towage and Salvage. — Whether or not a particular service was one of towage, is always a question of fact, to be ascertained from a consideration of all the circumstances, usages and customs, under which the court shall find the service to have been rendered.³

1. "Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in these cases only when the vessel receiving the service is in the same condition she would ordinarily have been in without having encountered any damage or accident." *The Cachemire*, 38 Fed. 518; *The Reward*, 1 W. Rob. (Eng.) 174; *The Princess Alice*, 3 W. Rob. (Eng.) 138; *McConnochie v. Kerr*, 9 Fed. 50; *The Alaska*, 23 Fed. 597, 607; *The H. B. Foster*, Abb. Adm. 222, 11 Fed. Cas. No. 6, 290.

2. **Vessel.** — The word "vessel" includes every description of water craft or other artificial contrivance used as a means of transportation on water. Rev. Stat. U. S. § 3 (U. S. Comp. St. 1901, p. 4); *Warn v. Easton & McMahon Transit Co.*, 2 N. Y. Supp. 620; 17 N. Y. St. 855; *Arnold v. Eastin's Trustees*, 25 Ky. L. Rep. 895, 76 S. W. 855.

3. **Towage and Salvage Distinguished.** — *The H. B. Foster*, Abb. Adm. 222, 11 Fed. Cas. No. 6, 290; *The Athenian*, 3 Fed. 248; *The Plymouth Rock*, 9 Fed. 413.

A tug found a brig about twenty

miles off coast with a signal up for a pilot. The tug took her to port, without injury or exposure to the tug or her crew, within a period of three to five hours time. The service was performed in the daytime and in moderate weather. *Held*, that the service was merely a towage service. *Boggs v. Loutra*, 3 Fed. Cas. No. 1,601.

For a service which was held not to be towage, and compensation therefor denied see *The Alghitha*, 17 Fed. 551.

The brig R., while in distress, was assisted by a tug, the latter vessel agreeing, for a fixed price, to take the former to her destination, and to furnish a second tug if necessary. While engaged in towing the R. the tug's hawser parted, and a signal for assistance was made by the tug, then lying in the vicinity. The dismantled condition of the R., and the presence of dangers of navigation, increased the necessity for assistance, but there was ample time and opportunity for the first tug to have picked the R. up again without the help of the second. *Held*, that the service rendered by the second tug at the

II. MATTERS. ESSENTIAL TO ALLOWANCE OF COMPENSATION.

1. **The Contract of Towage.** — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — In an action to recover compensation for towage services, the burden is on the libellant to prove the contract of towage and its breach on the part of the tow and her owners.⁴

b. *Presumption From Towage Service Rendered.* — While the libellant must show the contract of towage, yet it is held that evidence that a towage service has been rendered will justify the inference of the existence of such a contract.⁵

c. *Form of Contract.* — The proof of the contract of towage may show it to be either oral or written, express or implied.⁶

d. *Authority of Master of Tug.* — In order to establish the authority of the master of a vessel to enter into a contract of towage, it must be made to appear that the usual business of the vessel was to tow for hire.⁷

e. *Authority of Master of Tow.* — In order to bind the owners and vessel towed for an alleged towage service, under a contract entered into by the master thereof, the evidence must show that the service was necessary.⁸

B. **MODE OF PROOF.** — *In General.* — The admission of evidence for the purpose of proving the contract of towage, as well as other matters necessary to enforce the right to compensation for towage services, is governed by the general rules of evidence, at least in so far as concerns the competency, relevancy, etc., of the evidence.⁹

The Mode of Taking the Evidence is the same as in other admiralty proceedings.¹⁰

Witnesses. — Wide latitude is given in admiralty as to the examination of witnesses and the introduction of evidence, the rules in

request of the first was that of ordinary towage, and that the proper compensation was the usual towage charge allowed by the custom of the port to a tug when called upon to assist another in towing. *The Raven*, 27 Fed. 470; *The Queen of the East*, 12 Fed. 165; *The Allie & Evie*, 24 Fed. 745.

4. *The steamer Webb*, 14 Wall. (U. S.) 406.

5. See *Queen of the East*, 12 Fed. 165, holding further that in such case admiralty will compel compensation for such service, taking into consideration the circumstances, usages and customs; and that the burden of proving the absence of a contract will rest upon the tow.

6. See *The Golden Gate*, 57 Fed. 661; *The Viola*, 55 Fed. 829.

7. *The Carl Haasted*, 29 Fed. Cas. No. 17,113; *Kimball v. The Dispatch*, 14 Fed. Cas. No. 7,773.

8. *The Clan Mac Leod*, 38 Fed. 447. See also *The Oceanica*, 144 Fed. 301.

9. See *City of Carlisle*, 39 Fed. 807, 7 L. R. A. 52.

10. For a full treatment of this question, see article "ADMIRALTY," Vol. I, p. 279.

Depositions may be taken under the general rules of the district court, and read in evidence. U. S. Rev. Stat. §§ 863, 864, 865; *The Mabey*, 13 Wall. (U. S.) 738.

Letters Rogatory. — Evidence may be obtained by means of letters rogatory. *Union Bank v. Reichmann*, 9 App. Div. 596, 41 N. Y. Supp. 602.

these matters conforming more nearly to equity than to law, in order that the court may do justice between parties.¹¹

Construction of Towage Contracts. — Towage contracts are construed with reference to maritime usages and customs, and doubtful or incomplete undertakings are supplemented by such usages or customs as obtain or are recognized as established on the waters where made.¹²

2. Lien for Services. — Although a lien exists for towage services, enforceable in admiralty, yet it must first be shown that the service was rendered; proof of an unexecuted contract for such service is not enough.¹³

Presumption. — In the absence of proof that the towage service was rendered on the personal credit of the party contracting therefor,¹⁴ the presumption is in favor of the existence of a maritime lien on the tow for such service when not rendered in the home port of the tow.¹⁵ And the burden of showing that no lien on the tow was intended, but that the service was rendered on the personal credit of the party making the contract is on the tow.¹⁶

III. INJURY TO OR LOSS OF TOW.

1. Negligence, Unskilfulness, Etc. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — In an action to recover damages to a tow alleged to have been caused by the negligence or unskilfulness on the part of the tug, the burden is on the libellant to show the negligence or unskilfulness complained of, or at least to show facts

11. Even where a decision is final and after appeal, Judge Story considered it proper to permit the case to be reopened and allowed evidence to be placed on the record, with the memorandum, however, that it had been brought in after appeal. On appeal to the supreme court, that court ordered further proof to be taken, which was furnished in documentary form. *The London Packet*, 1 Mason 14, 15 Fed. Cas. No. 8,474; s. c. 5 Wheat. (U. S.) 132; *The Winnie*, 137 Fed. 166.

12. *The Raven*, 27 Fed. 470; *The Queen of the East*, 12 Fed. 165; *The Allie & Evie*, 24 Fed. 745; *The Frederick E. Ives*, 25 Fed. 447; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *The Somers N. Smith*, 120 Fed. 569; *In re Moran*, 120 Fed. 556; *The American Eagle*, 54 Fed. 1010; *The Carbonero*, 106 Fed. 329, 45 C. C. A. 314.

13. *The Acadia*, 1 Brown Adm. 73, 1 Fed. Cas. No. 24; *The General Cass*, Brown Adm. 334, 10 Fed. Cas.

No. 5,307; *The W. J. Walsh*, 5 Ben. 72, 30 Fed. Cas. No. 17,922; *The Prince Leopold*, 9 Fed. 333; *The John Cuttrel*, 9 Fed. 777; *The Queen of the East*, 12 Fed. 165; *The Alabama*, 22 Fed. 449; *The Mystic*, 30 Fed. 73; *The Pride of America*, 19 Fed. 607; *The J. W. Tucker*, 20 Fed. 129; *Ward v The Banner*, 29 Fed. Cas. No. 17,149; *The A. R. Dunlap*, 1 Low. 350, 1 Fed. Cas. No. 513; *The J. C. Pfluger*, 109 Fed. 93; *Chamberlain Transfer Co. v. Ashland Bank*, 133 Fed. 725, 66 C. C. A. 555, 70 L. R. A. 353; *The Saratoga*, 100 Fed. 480.

14. *The Saratoga*, 100 Fed. 480; *The Strom*, 53 Fed. 281, 3 C. C. A. 530; *The Sarah Cullen*, 49 Fed. 166, 1 C. C. A. 218.

15. *The Newport*, 114 Fed. 713, 52 C. C. A. 415; *Saylor v. Taylor*, 77 Fed. 476, 23 C. C. A. 343; *The Grapeshot*, 22 Fed. 123; *The John Cuttrel*, 9 Fed. 777.

16. *The Erastina*, 50 Fed. 126.

from which such negligence or unskillfulness may be presumed.¹⁷ And it is further incumbent on the libellant in such case to show that such negligence or unskillfulness was the proximate cause of the injury or loss.¹⁸

b. *Presumptions From Fact of Injury.* — It has been held in some cases that negligence will be presumed from the fact of the injury, and that in such case the burden is then on the tug to show diligence.¹⁹

c. *Mistake of Judgment.* — Merely showing a mistake of judg-

17. *The Brazos*, 14 Blatchf. 446, 4 Fed. Cas. No. 1,821; *The Covington*, 140 Fed. 985, 72 C. C. A. 680; *The Britannia*, 140 Fed. 985, 71 C. C. A. 272; *The Kalkaska*, 107 Fed. 959, 47 C. C. A. 100; *The Thomas Wilson*, 124 Fed. 649; *The Nettie Quill*, 124 Fed. 667; *Richter v. The Olive Baker*, 40 Fed. 904; *Pederson v. John D. Spreckles & Bros. Co.*, 87 Fed. 938, 31 C. C. A. 308; *The Hercules*, 55 Fed. 120; *The Carbonero*, 106 Fed. 329, 45 C. C. A. 314.

18. *The Carbonero*, 106 Fed. 329, 45 C. C. A. 314; *The Hercules*, 55 Fed. 120; *The W. H. Simpson*, 80 Fed. 153, 25 C. C. A. 318; *The Delaware*, 20 Fed. 797; *Wilson v. Sibley*, 36 Fed. 379; *The Lady Wimett*, 92 Fed. 399.

Where the Tow Was Lost Three Days After the termination of the towage, the libellant must show that the loss was proximately caused by negligent towage. *The Mary*, 14 Fed. 584.

The Owners of a Tow Lost in a Squall have the burden of showing negligence of the tug in proceeding before the squall. *The George L. Carlick*, 16 Fed. 703; *The Frederick E. Ives*, 25 Fed. 447.

19. *The Gladiator*, 79 Fed. 445, 24 C. C. A. 32; *The Ellen McGovern*, 27 Fed. 868; *The Taurus*, 91 Fed. 796.

Tow Stranding While Off Course. In *The Kalkaska*, 107 Fed. 959, 47 C. C. A. 100, the facts shown were that, in no storm, with a wind at no time exceeding twenty miles an hour, along a well known coast, and in going a distance of not over one hundred miles, the tug and tows were at least seventeen miles out of

their course; that eventually each of the vessels struck bottom, the tug and one tow getting free, the latter in a leaky condition, and the other tows being wrecked; and it was held that the circumstances of the case cast upon the tug "the burden of establishing some excuse for the deviation from the usual and proper course;" and that it was incumbent upon the steamer to show that she was supplied with fit and accurate compass, that her navigation was in all respects careful and prudent, and that the disaster could not have been avoided in the exercise of due care. See also *The Steamer Webb*, 14 Wall. (U. S.) 406.

Collision With Vessel at Anchor.

Where it appears that the tow was wholly under the control of the tug, and powerless to help herself, and was brought into collision with a vessel at anchor, the occurrence suggests an inference of negligence on the part of the tug, which it devolves on the tug to repel. *The Delaware*, 20 Fed. 797.

In *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83, a steamship was taken in tow by two tugs at her dock at Buffalo under an engagement to take her into Lake Erie through a somewhat difficult channel around the breakwater at Erie Basin, one tug taking her headline and the other her sternline. The steamer was not acquainted with the channel, and it was shown that she promptly obeyed the orders of the tugs, notwithstanding which she was stranded in the channel. It was held that the injury occurred under such state of circumstances as to impose on the tugs the burden of proof to show that they exercised due care.

ment on the part of the tug is not of itself sufficient to establish negligence.²⁰

d. *Knowledge of Route*.—Where the evidence shows a well known and proper course to pursue, and that the tow suffered injury because of deviation from that course, a *prima facie* case of negligence on the part of the tug is made out, rendering her liable in the absence of proof on her part of the exercise of due care.²¹

e. *Control During Navigation*.—The tow is under the control of the tug during navigation, and the tug is responsible for the time and manner of the voyage, but the relations may be modified if it be shown there was an express agreement or a reasonable implication from circumstances; and though the omission of the master of a tug boat to give directions for the conduct of a tow is not negligence on his part, it may be considered as a circumstance bearing on the question of negligence.²²

f. *Use of Ordinary Aids and Appliances*.—The ability of the master of a tug to discover by compass and lights or by other usual means the true course to pursue after damage has resulted, is sufficient evidence of negligence in not using such means before, when the course was uncertain, and the tug will be liable for the loss of the tow under those circumstances.²³

g. *Omission of Usual Means*.—Proof that the usual means adopted in towage, under like circumstances, were not availed of by the tug because in the exercise of the judgment of the master he did not deem their use necessary, is sufficient to charge the tug with responsibility for a resulting injury.²⁴

h. *Competency of Master of Tug*.—While of course it is essential that the master of the tug be competent, this will be presumed until the contrary is shown.²⁵

i. *Manning Tug*.—Proof that there were insufficient seamen to man the vessel, from which there was resulting injury, is sufficient to subject the tug to liability therefor.²⁶

20. *The Packer*, 28 Fed. 156; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *The George L. Garlick*, 16 Fed. 703; *The Wilhelm*, 52 Fed. 602; *The Battler*, 72 Fed. 537, 19 C. C. A. 6; *The Hercules*, 73 Fed. 255, 19 C. C. A. 496; *The E. V. MacCaulley*, 84 Fed. 500; *The Taurus*, 95 Fed. 699; *The Czarina*, 112 Fed. 541.

21. *The Steamer Webb*, 14 Wall. (U. S.) 406; See also *The Tug Mosher*, 4 Biss. (U. S.) 274.

22. *Arctic Fire Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Jutte v. The George Shiras*, 61 Fed. 300, 9 C. C. A. 511; *The Maurice*, 135 Fed. 516, 68 C. C. A. 228.

23. *The E. E. Simpson*, 60 Fed. 452, 9 C. C. A. 66; *Rogers v. Moore*, 60 Fed. 452, 9 C. C. A. 66.

24. *Wood v. Harbor Towboat Co.*, 1 McGloin (U. S.) 121.

25. *Vance v. The Wilhelm*, 47 Fed. 89, *affirmed*, 52 Fed. 602; *The Garden City*, 127 Fed. 298, 62 C. C. A. 182; *The Inca*, 130 Fed. 36.

26. *The Armstrong*, 1 Brown Adm. 130, 1 Fed. Cas. No. 540; *The Victor Brown Adm.* 449, 28 Fed. Cas. No. 16,933.

A tug whose master also acts as pilot and engineer is not properly manned. *The Armstrong*, 1 Brown Adm. 130, 1 Fed. Cas. No. 540.

j. *Equipment, Power, Etc.* — Proof that the tug offered for the services was not properly equipped and of sufficient capacity and power to perform the contemplated service,—in short, was not reasonably fit for the service undertaken, subjects the tug to liability for any resulting damages.²⁷

As regards the adequacy of the tug and as regards seaworthiness of both tug and tow for the particular trip, the question is a practical one for the judgment of competent and skilful navigators, and on these questions the customs of the time and place are competent evidence.²⁸

k. *Abandonment.* — Where a tug abandons her tow during a storm, the burden is upon the tug to show a sufficient excuse for such abandonment.²⁹

B. *MODE AND SUBSTANCE OF PROOF.* — The rules of evidence governing proof of negligence or unskilfulness on the part of the tug are not essentially different from those governing in other actions where those facts are in issue.³⁰

Exercise of Discretion. — A tug is not to be held liable for the loss of a tow, merely because her master, in an emergency, did not do precisely what, after an event, others may think would have been best. If it be shown that he acted with honest intent to do his duty, and exercised the reasonable discretion of an experienced master, the tug should be exonerated.³¹

Contract Exempting Tug From Liability. — Evidence of a contract exempting a tug from responsibility for injuries to the tow, or that the tow assume all the risks of the voyage, will not be received to exempt the tug from liability for damages caused to the tow by the negligence of those in charge of the tug.³²

Abandonment of Tow. — Where there has been an abandonment of the tow, and an action is instituted by the tow for breach of duty against the tug, in determining the liability of the tug, much must be left to the judgment of competent officers, and such judgment when acted upon in good faith, will not be impeached except on a clear preponderance of proof that it was erroneous.³³

27. *The Allie & Evie*, 24 Fed. 745. See also *The Zouave*, 90 Fed. 440; *The E. V. MacCaulley*, 84 Fed. 500; *The Joggins Raft*, 43 Fed. 309; *The Quickstep*, 9 Wall. (U. S.) 665.

28. *The Allie & Evie*, 24 Fed. 745; *The E. V. MacCaulley*, 84 Fed. 500; *The Joggins Raft*, 43 Fed. 309; *The Zouave*, 90 Fed. 440; *The Quickstep*, 9 Wall. (U. S.) 665.

29. *The Clematis*, Brown Adm. 499, 5 Fed. Cas. No. 2,876.

30. See articles "CAPACITY," Vol. II; "NEGLECTANCE," Vol. VIII.

31. *The Hercules*, 73 Fed. 255, 19

C. C. A. 496; *Neall v. Genthner*, 73 Fed. 255, 19 C. C. A. 496; *The Covington*, 128 Fed. 788; *The Britannia*, 140 Fed. 985, 71 C. C. A. 272.

32. *The Syracuse*, 6 Blatchf. 2, 23 Fed. Cas. No. 13,717; *Ulrich v. The Sunbeam*, 24 Fed. Cas. No. 14,329; *Williams v. The Vim*, 29 Fed. Cas. No. 17,744a; *The James Jackson*, 9 Fed. 614; *The Packer*, 28 Fed. 156; *Jones v. The American Eagle*, 54 Fed. 1010; *The Oceanica*, 144 Fed. 301; *The Edmund L. Levy*, 128 Fed. 683, 63 C. C. A. 235; *The Somers N. Smith*, 120 Fed. 569.

33. *The Clematis*, Brown Adm.

2. Lien for Damages. — A lien exists in favor of a tow for damage resulting from the negligence of the tug during the voyage, and *vice versa*.³⁴

Foundation of Action. — The lien for damages in towage is grounded upon the contractual relation existing between the parties, and not upon tort.³⁵

Where both tug and tow are equally negligent, the gross loss will be equally divided between them.³⁶

IV. INJURY TO TUG.

1. In General. — The tow is held to the same degree of care and skill during navigation as is the tug, and to exempt itself from liability for injury the tug may sustain, it must appear that the tow has used that degree of care and skill which ordinarily prudent and intelligent navigators employ under similar circumstances.³⁷

2. Lack of Good Faith. — Evidence of bad faith on the part of the tow in carrying out the contract entered into with its tug, will render the tow liable for any damage the tug may sustain because thereof. Good faith is a requisite on the part of both parties.³⁸

3. Disclosing Defects to Tug. — The craft contracting for towage service should be seaworthy, and any defects known to its commander should be disclosed to the captain of the tug, and if such disclosure is made, or if it be apparent that the vessel is old or weak, the tug will be required to use more than ordinary care and prudence to escape liability for injury or loss during the voyage.³⁹

499, 5 Fed. Cas. No. 2,376; *Cokeley v. The Snap*, 24 Fed. 504; *The Charles Allen*, 23 Fed. 407; *The W. J. Keyser*, 56 Fed. 731, 6 C. C. A. 101; *The Oceanica*, 144 Fed. 301.

34. *The Grapeshot*, 22 Fed. 123; *The Young America*, 30 Fed. 789; *The Daisy Day*, 40 Fed. 603; *The M. Vandercook*, 24 Fed. 472; *The John G. Stevens*, 170 U. S. 113.

35. *Donoghue-Kellogg Mill Co. v. The Wasp*, 86 Fed. 470.

36. *Walsh v. The William W. Wood*, 66 Fed. 601; *The Favorite*, 50 Fed. 569; *The William Kraft*, 33 Fed. 847; *The E. A. Packer*, 22 Fed. 668; *The William Murtagh*, 17 Fed. 259.

37. *Brown v. Cornell Steamboat Co.*, 110 Fed. 780; *The Columbia*, 109 Fed. 660, 48 C. C. A. 596; *The Ravenscourt*, 109 Fed. 660, 48 C. C. A. 596.

38. *Jacobsen v. Lewis Klondike Exp. Co.*, 112 Fed. 73, 50 C. C. A. 121.

39. *The Syracuse*, 18 Fed. 828; *The William Kraft*, 33 Fed. 847; *The Favorite*, 50 Fed. 569; *The Bordentown*, 16 Fed. 270; *Mason v. The Steam Tug William Murtagh*, 3 Fed. 404; *Wilson v. Sibley*, 36 Fed. 379; *The Covington*, 128 Fed. 788; *The Royal*, 138 Fed. 416; *The Somers N. Smith*, 120 Fed. 569; *The Coney Island*, 115 Fed. 751.

TOWNS.—See Municipal Corporations.

TRADE-MARKS AND TRADE NAMES

BY ROSCOE G. CLARK.

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Scope Note. — This article includes evidence in actions relating to unfair competition as well as those concerning trade-marks and trade names.

I. DEFINITIONS.

A Trade-Mark is an arbitrary, distinctive name, symbol or device,

to indicate or authenticate the origin of the product to which it is attached.¹

A Trade Name as used in the expression "trade-marks and trade names" has reference to all business names which are not technically trade-marks.² It is not in the nature of a trade-mark, and of necessity is closely connected with the good-will of a business. It is the designation by which a business is known and addressed by its patrons.³ If a trade name is attached to a chattel, it is designed to show plainly the antecedents of the chattel to which it is attached; in other words, it is not of an arbitrary nature, as is a trade-mark.⁴

Distinguishing Features. — The trade-mark differs from the trade name in this, that the former appeals to the eye while the latter appeals more to the ear.⁵ A trade-mark usually relates chiefly to the thing marketed; while in addition to this the trade name involves the source from which it comes, the individuality of the market, both for protection in trade and for avoiding confusion in business affairs, as well as for securing to him the advantage of any good reputation which he may have gained. The law of trade-mark is designed chiefly for the protection of the public from imposition; that of trade name, for the protection of the party entitled to it. A case, therefore, in regard to trade name is of somewhat broader scope than one relating to a trade-mark.⁶

Unfair Competition in Business is the passing off of one's goods upon the public as and for the goods of another, thereby working a fraud upon the public and also on one's rival in trade. Although the principle underlying unfair competition is somewhat broader than the rules applicable to strict, technical trade-marks, it is not separate and apart from trade-mark law. It lies at the very foundation of trade-mark law and also covers a large field to which some of the technical trade-mark rules do not extend.⁷

II. JUDICIAL NOTICE.

Nearly all of the American states have passed more or less leg-

1. *Sartor v. Schaden*, 125 Iowa 696, 101 N. W. 511.

"A trade-mark is a distinctive name, word, mark, emblem, design, symbol or device, used in lawful commerce to indicate or authenticate the source from which has come, or through which has passed, the chattel upon or to which it is applied or affixed." *Hopkins on Trade-Marks*, (2d Ed.) § 3.

For a collection of judicial definitions, see *Hopkins on Trade-Marks*, (2d Ed.) p. 3, n. 3.

2. *N. K. Fairbanks Co. v. Luckel*,

King & Cake Soap Co., 102 Fed. 327, 42 C. C. A. 376.

3. *Millsbaugh Laundry v. First Nat. Bank*, 120 Iowa 1, 94 N. W. 262.

4. *Cady v. Schultz*, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

5. *N. K. Fairbank Co. v. Luckel*, *King & Cake Soap Co.*, 102 Fed. 327, 42 C. C. A. 376.

6. *Armington v. Palmer*, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

7. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Lawrence Mfg.*

islation relative to the law of trade-marks.⁸ Judicial notice is taken by the courts of the United States of the statutes of the various states.⁹ It follows that trade-mark statutes are judicially noticed by the federal courts. On several occasions the state courts have ruled upon the constitutionality of their trade-mark statutes.¹⁰ On the principle that decisions of state courts will be judicially noticed by the federal courts, decisions relative to trade-mark statutes will also be judicially noticed.¹¹ Judicial notice will be taken by all courts of conventions or treaties with foreign governments.¹² In accordance with this rule judicial notice was taken in a federal case of the convention concerning trade-marks, between the United States and France.¹³

III. PROOF OF OWNERSHIP.

1. Registration. — The registration of a trade-mark under the federal acts of March 3, 1881, and February 20, 1905, is only *prima facie* evidence of ownership,¹⁴ and so certificates of registration may be introduced in evidence only as *prima facie* proof of ownership.¹⁵ The inquiry is always open to the validity of the title to a trade-mark evidenced by registration, and thus where a party registers a trade-mark and afterwards another applies for registration of the same mark, the burden of proving priority is upon the subsequent applicant.¹⁶

Copy of Certificate. — It is further provided in the acts of 1881 and 1905 that copies of certificates of registration shall be evidence in any suit concerning the right to the use of the trade-mark to which the certificate relates.¹⁷

Co. v. Tennessee Mfg. Co., 138 U. S. 537; Brown on Trade-Marks, § 43.

8. See Hopkins on Trade-Marks, (2d Ed.) p. 515.

9. *In re Jordan*, 49 Fed. 238; Gormley v. Bunyan, 138 U. S. 623.

10. *Ruhrstrat v. People*, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30; *White v. Wagar*, 83 Ill. App. 592; *Vogt v. People*, 59 Ill. App. 684; *State v. Berlinsheimer*, 62 Mo. App. 168; *Schmalz v. Wooley*, 56 N. J. Eq. 649, 39 Atl. 539; *Cigar Makers' Protective Union v. Linden*, 3 Ohio Dec. 244; *Com. v. Morton*, 23 Pa. Co. Ct. 386.

11. *Knox v. Columbia Liberty Iron Co.*, 42 Fed. 378.

12. *Ex parte McCabe*, 46 Fed. 363.

13. *La Croix v. Sarrazin*, 15 Fed. 489.

14. For act of 1881, see 21 Stat. 502, 10 Fed. Stat. Ann. 331. For act of 1905, see 33 Stat. 718, 10 Fed. Stat. Ann. 413; *Glen Cove Mfg. Co.*

v. Ludeling, 22 Fed. 823; *United States v. Braun*, 39 Fed. 775; *A. Leschen & Sons Rope Co. v. Broderick & B. Rope Co.*, 123 Fed. 149; *Hennessy v. Braunschweiger*, 89 Fed. 664.

15. *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665.

Certificate of Registration held not to have been conclusive evidence under act of 1870. See *Moorman v. Hoge*, 2 Sawy. 78, 17 Fed. Cas. No. 9,783.

16. *Manitowoc Mfg. Co. v. Dickerman*, 57 O. G. 1720.

And so the fact of registration does not carry with it a presumption of non-infringement so strong as to preclude a preliminary injunction. *Welsbach Light Co. v. Adam*, 107 Fed. 463.

17. See 21 Stat. 503, 7 Fed. Stat. Ann. 331; 33 Stat. 727, 10 Fed. Stat. Ann. 412.

2. Recognition of Right to a Trade-Mark. — A. RES ADJUDICATA.

It is held that where there has been a former adjudication establishing a party's right to a trade-mark after a *bona fide* contest on the merits, the same issues having been presented as in the later suit, such adjudication is evidence of at least persuasive force in the later proceeding.¹⁸

B. INTERLOCUTORY DECREE. — Where in a suit to enjoin the use of a trade-mark in a United States circuit court, evidence is introduced of an interlocutory decree in another circuit court recognizing defendant's right, the decree being interlocutory and liable to be enlarged or contracted on final hearing, the evidence thereof is considered of little weight.¹⁹

C. RIGHT ACKNOWLEDGED BY OTHERS THAN DEFENDANTS. Evidence introduced by plaintiff to the effect that parties other than defendants had acknowledged and acquiesced in plaintiff's claim to the trade-mark under consideration is held to be inadmissible.²⁰

D. SUBMISSION TO INJUNCTIONS. — Where evidence was introduced during a trial showing that complainant had formerly induced certain persons to submit to injunctions and pay costs, such evidence was held to be slight, if any, evidence of plaintiff's right to the trade-mark in question.²¹

18. *Symonds v. Greene*, 28 Fed. 834; *Moxie Nerve Food Co. v. Beach*, 33 Fed. 248; *La Republique Francaise v. Saratoga Vichy Spring Co.*, 99 Fed. 733, decree *reversed*, 107 Fed. 459, 46 C. C. A. 418. This decree was *affirmed* in 191 U. S. 427.

But a former adjudication in Germany adverse to a claimant of a trade-mark was not allowed, in a federal case, to be set up in bar to an application for an injunction in this country on the ground that the relief sought has reference not merely to complainant's right, but to the protection of the American public against imposition. *Hohner v. Gratz*, 50 Fed. 369. See also *City of Carlsbad v. Kutnow*, 71 Fed. 167, 18 C. C. A. 24, *affirming* 68 Fed. 794.

Evidence showing that complainant's predecessors in business formerly sued one of defendants and obtained a decree upholding the former's right to the same trade-mark, which is alleged, in this action, to be infringed, is immaterial where the evidence was introduced for the sole purpose of showing a former proceeding and the outcome thereof. *Myers v. Theller*, 38 Fed. 607.

The word "Pocahontas" had been

used by the complainant as a trade name for coal for fully twenty years, with unbroken acquiescence on the part of the public. It appeared that such trade name had been sustained and its infringement enjoined by the circuit court of another circuit. It was held that a preliminary injunction was properly granted in this case. *Atwater v. Castner*, 88 Fed. 642, 32 C. C. A. 77, rehearing *denied*, 90 Fed. 828, 32 C. C. A. 602.

19. *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220.

20. *Matchett v. Lindberg*, 2 App. Div. 340, 37 N. Y. Supp. 854.

21. *Cellular Clothing Co. v. Maxton*, L. R. App. Cas. (1889) 326. This action was brought for the infringement of a trade-mark. Appellants to show their rights to the trade-mark under consideration introduced evidence showing that others had submitted to injunction suits brought by them. Lord Davey said: "The third class of evidence consists of cases in which the pursuers have induced certain persons to submit to injunctions and pay costs. That does not appear to me to be very strong evidence in favor of the pursuers. Of course, a shop-keeper or a person in that position would

3. Priority of Use. — In order that a party may be entitled to the exclusive right to the use of a mark or device claimed as a trade-mark, it is necessary that it appear from the evidence that such party was the first to use or employ it on like articles of production.²²

A. ADOPTION NOT USE. — Evidence showing a mere adoption of a mark, and a public declaration that the mark so adopted will be used to distinguish goods to be put on the market at a future time creates no right. No title arises until the thing is actually on the market, marked with the particular mark.²³

B. USE ACCOMPANIED BY INTENTION. — It must also appear from the evidence that the use of a mark has been accompanied by an actual intention to acquire property in it as a trade-mark.²⁴

IV. ACTIONS FOR DAMAGES.

1. Plaintiff's Case. — **A. EVIDENCE OF PLAINTIFF'S RIGHT.** — In actions to recover damages for the infringement of a trade-mark or trade name, it is necessary that plaintiff should show his proprietary right to the trade-mark or trade name in question.²⁵

B. INFRINGEMENT. — It is also necessary that plaintiff should show an actual infringement on the part of defendant.²⁶ It has been frequently held that the main test in trade-mark cases of an alleged resemblance between devices is inspection by the court.²⁷ And testimony to the effect that purchasers actually mistook one label for another is also admissible.²⁸

Expert Testimony on Questions of Infringement. — As a rule little weight is given by the courts to expert testimony on questions of infringement.²⁹ But witnesses qualified because of business ex-

hesitate a long time before he incurred the expense, which in the case of a trade-mark or in a patent case is not slight, of defending an action of this character. Probably the value to him of the trade he would lose would not in any way compensate for the risk he would incur. Therefore, as evidence of the fact I do not attach much importance to those cases."

22. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Walton v. Crowley*, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133; *Blackwell v. Armistead*, 3 Hughes 163, 3 Fed. Cas. No. 1,474.

23. *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812.

24. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 8 C. C. A. 215, *affirming* 53 Fed. 262.

25. *Colman v. Crump*, 70 N. Y. 573.

26. *Colman v. Crump*, 70 N. Y. 573.

27. *Collins Chemical Co. v. Capitol City Mfg. Co.*, 42 Fed. 64; *Joseph Dixon Crucible Co. v. Benham*, 4 Fed. 527; *Drummond v. Addison Tinsley Tob. Co.*, 52 Mo. App. 10; *Filley v. Fassett*, 44 Mo. 168; *Bulena v. Newman*, 10 Misc. 460, 31 N. Y. Supp. 449; *Abbott's Trial Ev.* p. 752.

28. *Conrad v. Joseph Uhrig Brew. Co.*, 8 Mo. App. 277.

29. *Popham v. Cole*, 66 N. Y. 69, 6 Jones & S. 274, 14 Abb. Pr. N. S. 206; *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y.) 392.

"What ordinary intelligence might think of facts before the eye, it seems to the writer, should be left to the judgment of ordinary intelligence, with at least as much confidence as to one calling himself an expert."

perience may testify as to the significance of particular trade-marks among traders³⁰ or among consumers.³¹

C. DAMAGES MUST BE SHOWN. — In actions to recover damages for the unlawful use by defendant of plaintiff's trade-mark, the onus lies on the plaintiff of proving damages by loss of custom or otherwise, and if he fails in this he will not be allowed to recover more than nominal damages;³² and it will not be presumed, in the absence of evidence, that the amount of goods sold by the defendant under the fraudulent trade-mark would have been sold by the plaintiff but for the defendant's unlawful use of the plaintiff's mark.³³

It Is Not Necessary To Show Specific Damage in order that a plaintiff may recover a verdict for damages; he may be entitled to recover such damages as the jury, upon the whole evidence, shall be satisfied that he has sustained.³⁴ But in a suit for infringement of a

Radam v. Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990.

"You can always get as much evidence on one side as you can on the other; one set of experts say that the marks are alike, and the other set say they are not; one side say that they are practically indistinguishable in the stamping, and the other side say that if the stamping is carefully and well done they may be distinct; whereas in practice they are particularly well struck, and one must, therefore, have regard not merely to the theory on the subject." *In re Jelley, Son & Jones*, 51 L. J. Ch. (Eng.) 639

As to Who Are Experts. — In *Hostetter Co. v. Comerford*, 97 Fed. 585, where the question arose as to whether a saloon keeper had been palming off bogus bitters in complainant's bottles, witnesses who were not chemists but who had long experience and knowledge of Hostetter's bitters, testified, basing their opinions upon their familiarity with the taste, smell and color of the genuine article. These witnesses were not considered by the court as possessing any expert knowledge. Rehearing denied in 99 Fed. 834. For a similar case, see *Hostetter Co. v. Bower*, 74 Fed. 235. But in *Hostetter Co. v. Gallagher Stores*, 142 Fed. 208, such evidence was held to be competent.

30. *Pollen v. Le Roy*, 30 N. Y. 549.

31. *Wilkinson v. Greely*, 1 Curt. 63, 29 Fed. Cas. No. 17,671; *Johnson*

& *Johnson v. Bauer*, 82 Fed. 662, 27 C. C. A. 374; *Read v. Richardson*, 45 L. T. N. S. (Eng.) 54.

32. *Leather Cloth Co. v. Hirschfield*, L. R. 1 Eq. (Eng.) 299; *Addington v. Cullinane*, 28 Mo. App. 238; *Baker v. Baker*, 115 Fed. 297, 53 C. C. A. 157.

Expert Testimony as to Loss of Custom by plaintiff concurrently with defendant's infringement is admissible for the purpose of showing defendant's liability. In *Shaw v. Pilling*, 175 Pa. St. 78, 34 Atl. 446. The court said: "The plaintiff gave evidence of the falling off of his custom concurrently with defendant's beginning to use the trade-mark, and claimed that the former was the consequence of the latter. It is difficult to see how else he could prove his loss, for he could not follow his customers individually and testify where they went to buy when they ceased to come to him. The inference was for the jury. In the language of the logicians he proved the sequence of the events, and it was for the jury to say whether the deduction from *post hoc* to *propter hoc* was rightly drawn." See also *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 58 Hun 161, 11 N. Y. Supp. 663, affirmed in 139 N. Y. 364, 34 N. E. 904.

33. *Leather Cloth Co. v. Hirschfield*, L. R. 1 Eq. (Eng.) 299.

34. *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723; *Thomson v. Winchester*, 19 Pick.

trade-mark, an accounting will not be ordered where it appears from the evidence that there is no rational rule by which the profits realized by defendant could be estimated.³⁵

D. FRAUD MUST BE SHOWN — BURDEN OF PROOF. — In technical trade-mark cases the question of defendant's intent is an immaterial one; but in unfair competition, cases where the fact of infringement is not clearly shown, the burden of proof is upon complainant to establish by a clear preponderance of proof the fact of fraudulent intent on the part of defendant. Nothing is left to conjecture.³⁶

(Mass.) 214; *Burckhardt v. Burckhardt*, 42 Ohio St. 474.

In *Conrad v. Joseph Uhrig Brew. Co.*, 8 Mo. App. 277, the court said: "This is an action in the nature of an action of deceit, for damages for using what the plaintiff in his petition claimed as his trade-mark. The answer was a general denial. There was a verdict and judgment for plaintiff for \$4,175. It appears that plaintiff had been for many years engaged in the wine and liquor business in St. Louis, on a large scale, under the trade name of C. Conrad & Co. For nearly two years before the institution of this suit he had been putting up an excellent quality of beer, which he had, at great expense, introduced to the trade. . . .

For the purpose of protecting his interests, Conrad employed a lithographer to get up a peculiar label. . . . Defendant manufactured an inferior and cheaper beer. After plaintiff's beer had acquired a reputation, the president of defendant procured from the same engraver a label of the same size, shape, and color, and having the same general appearance and the same peculiar devices of a crown and wreaths. Examination would show that the two labels were not the same; but the retail purchaser would readily take one for the other. . . .

There was testimony to the effect that purchasers did actually mistake one label for the other; and it is evident, from inspection, this must have been the case. The Uhrig label was calculated to deceive. Defendant also put up his beer in bottles of the same color and appearance as those used by plaintiff. . . .

Plaintiff's beer was so popular that his sales gradually rose from \$24,000 the first year to \$96,000 in the six

months immediately preceding the trial. He had spent over \$12,000 in introducing his beer, and several thousand dollars in trying to counteract the injury done to his trade and reputation by the Uhrig beer sold under the simulated label. The Uhrig beer was sold much cheaper, and necessitated, in some cases, a reduction of price on plaintiff's part; its inferior quality also injured the reputation of the C. C. C. beer, as the one was taken for the other.

As to the damages, the facts present a case of fraud on plaintiff and violation of his rights for which the action lies without proof of specific damages; and, the jury having found for plaintiff, he was entitled to such damages as the jury, on the whole evidence, should be satisfied he had sustained. And the damage was not confined to the loss of such actual sales as could be specifically shown to be lost, but the jury might make such inferences as to the loss and injury sustained by plaintiff as they might think warranted by the whole evidence in the case."

³⁵ *Ludington Novelty Co. v. Leonard*, 127 Fed. 155, 62 C. C. A. 269, *affirming* 119 Fed. 937.

³⁶ *Weed v. Peterson*, 12 Abb. Pr. N. S. (N. Y.) 178; *N. K. Fairbank Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233, *reversing* 118 Fed. 96; *Globe-Wernicke Co. v. Brown*, 121 Fed. 90, 57 C. C. A. 344; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, *affirming* 31 Fed. 776.

In *Hostetter Co. v. Bower*, 74 Fed. 235, the court said: "This cause turns solely upon a question of fact. The bill is based upon alleged unfair competition in trade. The defendant, who is a retail liquor dealer, is charged with fraud in selling as the

genuine bitters of the complainant a cheap imitation thereof manufactured by one Emil Becker. It is alleged that he deceives the public by purchasing the spurious article in large quantities and selling it to his customers from bottles which once contained the genuine Hostetter Bitters and still retain the complainant's labels and trade-marks. The charge against the defendant is a serious one. He is accused of perpetrating a petty and contemptible fraud by which, for a paltry reward, he cheated not only the complainant but his own customers as well. The burden is upon the complainant to establish this charge by a clear preponderance of proof. Nothing must be left to conjecture or guesswork. The witnesses called for the complainant are not disinterested; they are paid by the complainant to secure evidence against infringers upon its rights. Although there is nothing in their conduct to warrant the superlative denunciation which has been heaped upon them, it cannot be denied that their testimony must be scrutinized with unusual caution. They say that on several occasions at the defendant's place of business they purchased bogus bitters which were poured from genuine bottles. The defendant concedes the sales, but says that on each occasion he sold the genuine article. The proof that the bitters were spurious is confined to the opinions of the complainant's witnesses who tasted the bitters. Several bottles were produced before the examiner sealed. The seal has not been broken. No analysis of their contents has been made. They may contain imitation bitters and they may contain genuine Hostetter Bitters. The genuine and the counterfeit are alike in appearance and are somewhat similar in taste. The witnesses who give their opinion from taste merely may be mistaken. In short, the complainant's proof is not free from doubt." See also *Hostetter Co. v. Comerford*, 97 Fed. 585.

Actions of this character are based essentially upon fraud. Fraud must be proved; it cannot be inferred from unimportant similarities not calculated to mislead the purchaser. The

action may be maintained where it appears that the defendant is destroying, or attempting to destroy, an honest business by dishonest means. The gravamen of the action is a fraudulent purpose on the part of the defendant to represent to the public that the plaintiff's business is his business and by fraudulent misstatements to deprive the plaintiff of profits which he would otherwise receive. *Kipling v. G. P. Putnam's Sons*, 120 Fed. 631, 57 C. C. A. 295.

Westcott Chuck Co. v. Oneida Nat. Chuck Co., 106 N. Y. Supp. 1016. "Defendant procured some of plaintiff's chucks in the market, took them apart, and proceeded to duplicate them in the chucks which it manufactured and sold. It did not, however, stamp thereon the plaintiff's name or the names of plaintiff's types 'Little Giant Improved' and 'Little Giant Double Grip,' but it placed thereon the date of the year of manufacture, the words 'keep well oiled,' the same numerals as used by plaintiff to indicate the different sizes, and its own corporate name." The court said: "On the question as to whether plaintiff is entitled to an injunction, it may be that it makes out a case when it shows that the defendant by some unfair method has constructed its goods so that they are calculated or liable to deceive or beguile some purchaser thereof be he wholesale or retail dealer or ultimate purchaser into the belief that he is purchasing plaintiff's goods and without showing that such deception has actually occurred. But I cannot think that plaintiff may recover a judgment for damages without proof that some such deception has in fact occurred. There should be little difficulty in finding some purchaser of these thousands of chucks which are claimed to have been improperly sold by defendant who believed when he made his purchase that he was buying plaintiff's article. This voluminous record fails to disclose any evidence, however slight, to the effect that any purchaser was ever deceived or misled into buying the defendant's product as and for that of the plaintiff. In fact, the evidence expressly negatives any such idea.

Fraud Need Not Be Shown Where Fact of Infringement Is Clear. — But it is not necessary that plaintiff should show a guilty knowledge or fraudulent intent on the part of the defendant where the fact of infringement is clearly shown.³⁷

2. Defenses. — Evidence of Defendant's Good Faith. — In unfair competition suits, evidence showing that defendant's use of a trade-mark was in good faith and with no intention of pirating plaintiff's mark is admissible as a defense to plaintiff's action.³⁸

V. INJUNCTION SUITS.

1. In General. — A. SUFFICIENCY OF EVIDENCE AND BURDEN OF PROOF. — a. In Obtaining Jurisdiction. — In suits for injunctions, in order to obtain the jurisdiction of the court it is necessary to show, first, the existence of the trade-mark in question; next, the fact of an imitation, whether a direct imitation, or one with such variations that the court must regard them as merely colorable,³⁹ and thirdly, the fact that the imitations were made without license, or anything that a court of equity could regard as such.⁴⁰

b. Complainant's Proprietary Right. — (1.) In General. — In trade-mark cases the complainant must show an exclusive proprietary right and use under such right;⁴¹ and in order that a party may be entitled to a proprietary right in a phrase or name the evidence must show use under such circumstances as to publicity and length of

Mr. Goodwin, the plaintiff's president and manager, visited many of its customers in various cities, and found among such customers the defendant's chucks. But he in no instance furnishes us with the slightest intimation that any one was deceived." (Chester and Sewell, JJ., *dissenting*.)

37. *McLean v. Fleming*, 96 U. S. 245, 253; *Wotherspoon v. Currie*, L. R. 5 Eng. & Ir. App. 508, 27 L. T. N. S. 393; *LePage Co. v. Russia Cement Co.*, 51 Fed. 941, 2 C. C. A. 555, 5 U. S. App. 112, 17 L. R. A. 354.

38. *Dunn Co. v. Trix Mfg. Co.*, 50 App. Div. 75, 63 N. Y. Supp. 333; *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 93 O. G. 947; *Moet v. Couston*, 33 Beav. (Eng.) 578; *Millington v. Fox*, 3 Myl. & C. (Eng.) 338; *Edelsten v. Edelsten*, 1 De Gex, J. & S. (Eng.) 185.

39. *Kinahan v. Bolton*, 15 Ir. Ch. 75.

"A tradesman, to bring his privilege of using a particular make under the protection of equity, is not bound to prove that it has been

copied in every particular by another. It is enough for him to show that the representations employed bear such a resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by him." *Walton v. Crowley*, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133.

40. *Kinahan v. Bolton*, 15 Ir. Ch. 75.

41. *Diamond Match Co. v. Safe Harbor Match Co.*, 109 Fed. 154; *Actiengesellschaft v. Amberg*, 109 Fed. 151, 48 C. C. A. 264, decree reversed, s. c. 102 Fed. 551; *Postal Tel. Cable Co. v. Netter*, 102 Fed. 691.

St. Louis Mfg. Co. v. Eclipse Carbonating Co., 58 Mo. App. 411. The court said: "As the facts in this record show that plaintiff's assignors had no exclusive right to adopt the words 'New Orleans Mead' at the time he selected them as a trade-mark, he acquired no rights by their subsequent use which the law will protect on that ground."

time as to show an intention to adopt it as a trade-mark for a specific article.⁴²

In an Action To Restrain Unfair Competition in Trade no proprietary interest in the words or device imitated need be shown. It is sufficient that the plaintiff makes it appear in evidence that he is entitled to the good-will of the business, and that this good-will is injured or is about to be injured by the palming off of the business or goods of another as his own.⁴³

42. *Diamond Match Co. v. Safe Harbor Match Co.*, 109 Fed. 154.

A sale of a few dozen bottles, with written labels pasted on them is not sufficient evidence to establish an intentional use and appropriation of the words used as a trade-mark. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 8 C. C. A. 215, *affirming* 53 Fed. 262.

Evidence of sales by a foreign manufacturer in this country of medical preparations to a limited extent upon special orders to supply particular customers is not sufficient evidence as to use, under such circumstances of publicity and length of time, as to show an intention to adopt it as a trade-mark for a specific article. Such evidence is not sufficient to show an intention to acquire title. *Richter v. Reynolds*, 59 Fed. 577, 8 C. C. A. 220, *affirming* *Richter v. Anchor Remedy Co.*, 52 Fed. 455.

43. *Lee v. Haley*, 5 Ch. App. 155, 39 L. J. Ch. 284, 2 L. T. 251, 18 W. R. 242; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Coats v. Merrick Thread Co.*, 149 U. S. 562, *affirming* 36 Fed. 324, 1 L. R. A. 616; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, *reversing* decree 41 Fed. 208; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Buzby v. Davis*, 150 Fed. 275, 80 C. C. A. 163.

In *Shaver v. Heller & Merz Co.*, 108 Fed. 821, 48 C. C. A. 48, *affirming* 102 Fed. 882, the court said: "May a court of equity lawfully enjoin one from using the word 'American' to sell the goods of one manufacturer as those of another to the damage of the latter and the deceit of the purchasers? This is the real issue which this case presents.

. Another proposition of coun-

sel for the appellants is that the appellee has, and can have, no proprietary interest in the word 'American,' or in its exclusive use; and therefore it is entitled to no injunction to restrain its use by another. But an ownership and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin its perpetration. A title to the property about to be injured is sufficient. One gathers the seeds of pernicious weeds, and threatens to sow them on the field of his neighbor. The latter has no proprietary interest in the seeds, but he owns the field and the crop it is producing, and these facts are sufficient to warrant any court in granting him summary relief by injunction against the threatened injury. The appellants scatter throughout the land, for the purpose of deceiving the public and diverting to themselves the trade, custom, and good will of the appellee, words and names which convey the false statements that the goods they are selling were made by the Heller & Merz Company. That company has no property in the words or in the means by which this fraud is committed, but it owns the good will, — the custom, — which the false and fraudulent use of these words and names injures and destroys; and its proprietary interest in this good will is ample to warrant the court in enjoining its destruction by the fraud. The contention of counsel for the appellants here is a confusion of the bases of two classes of suits, — those for infringement of trade-marks, and those for unfair competition in trade. Suits of the former class rest on the ownership of the trade-marks. Suits of the latter class are founded upon the damage to the trade of the com-

(2.) **Where Evidence of Ownership Conflicting.** — A court of equity will not interfere by injunction to restrain the use of a trade-mark where the testimony in regard to the right to the ownership of such trade-mark is conflicting and contradictory, so that it is no easy matter to determine on which side the weight of evidence preponderates.⁴⁴

(3.) **Registry as Evidence of What Was Intended To Be Appropriated.** Registry of a trade-mark in the patent office under the act of 1881 will not prevent the use of another device as a common law trade-mark in domestic markets; but may be evidence of what was really claimed by the complainant.⁴⁵

c. *Nature of Goods Known Only to Manufacturer.* — In all cases involving a trade-mark upon goods, the exact character of which can be known only to the manufacturer, but which are put forth with specific statements to induce the public to purchase them, the burden of proof as to the truth of the statements rests upon the manufacturer.⁴⁶

plaintants by the fraudulent passing of the goods of one manufacturer for those of another. In the former, title to the trade-marks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom — the good will — of a business, and that this good will is injured, or is about to be injured, by the palming off of the goods of another as his."

44. *Witthaus v. Mattfeldt & Co.*, 44 Md. 303; *French v. Alter & Julian Co.*, 74 Fed. 788; *Lies v. Daniel*, 82 Ga. 272, 8 S. E. 432.

45. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 8 C. C. A. 215, *affirming* 53 Fed. 262; *Richter v. Reynolds*, 59 Fed. 577, 8 C. C. A. 220, *affirming* *Richter v. Anchor Remedy Co.*, 52 Fed. 455.

46. In *Moxie Nerve Food Co. v. Modox Co.*, 152 Fed. 493, the court said: "The complainant's affirmative case affords no evidence upon which the court can find that its preparation is in fact what it is represented to be. We are asked to extend protection to the complainant upon presumptions in its favor. . . . A court of equity, when invoked to protect a business, cannot avoid a fair examination of the char-

acter of the business. Of the truth or untruth of certain representations or statements a court may take judicial notice. The ordinary rules as to judicial notice undoubtedly could be properly applied to preparations whose statements were on their face too preposterous or incredible. In many cases, however, the truth or untruth of representations cannot be determined upon the principles of judicial notice. . . . The proprietor of a secret preparation may justly claim protection of a trade secret, but to the extent of his representations to the public, secrecy is waived; and there is no hardship in requiring a complainant who has stated certain things to the public as truths in order to promote the sale of his goods to state the same things as truths to the court, and prove them as truths, in order to secure equitable relief. The right to preserve a trade secret does not carry with it a general right to have one's bare word or unsworn statement accepted in a court of equity, or excuse a failure to prove the truth of what is published to the public. To the extent that a manufacturer of goods chooses to reveal their character and composition to the public — to that extent he waives the right of secrecy in a court of equity. . . . A chancellor should not be required to assume on the

d. *Unfair Competition Cases.*—Unfair competition is not established by proof of similarity in form, dimensions, or general appearances alone of the article concerning which unfair competition is alleged, especially where such similarity consists in constructions common to or characteristic of the articles in question, or where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent the origin of such articles.⁴⁷ But the rule is otherwise where it appears from the evidence that a defendant in an unfair competition suit has simulated complainant's article in unnecessary minor details of structure.⁴⁸

bench what he would not believe without proof when off the bench. Proof should be required from that person within whose knowledge the fact rests. There should be no such technical application of rules concerning presumption or the burden of proof as to relieve a complainant from the obvious duty of satisfying the court that his goods are what they purport to be and what he represents them to be."

In suits to enjoin a trade-mark used in connection with patent medicine, it is held that the statements upon the label or wrapper of the bottle or package do not prove themselves. These statements are mere recitals. They prove what representations are made by the complainant to the public. They do not prove the truth of the representations. These recitals are proof only that they are recitals. *Moxie Nerve Food Co. v. Holland*, 141 Fed. 202; *Moxie Nerve Food Co. v. Modox Co.*, 152 Fed. 493.

⁴⁷. *Marvel v. Pearl*, 133 Fed. 160, 66 C. C. A. 226; *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59; *J. A. Scriven Co. v. Morris*, 154 Fed. 914.

⁴⁸. *National Biscuit Co. v. Ohio Baking Co.*, 127 Fed. 160, *affirmed*, 127 Fed. 116.

In *Scriven v. North*, 124 Fed. 894, *affirmed*, 134 Fed. 366, 67 C. C. A. 348, which was a bill for an injunction against unfair competition for selling and causing the defendant's garments to be sold as Scriven garments, the court said: "There is evidence that confusion has arisen very detrimental to the complainant's business and reputation. The com-

plainants have established a reputation for producing a high grade of goods, and have built up an extensive and valuable good-will, and the defendants can have but one purpose in dressing the goods of their manufacture to look so precisely like the complainant's, and that is to deceptively induce buyers to take an article which looks like the manufacture of the complainant's, but which is made by the defendants. The defendants make their drawers of white jean, and select a buff-colored insertion, which causes them to look precisely like complainant's; and they imprint on the waist-band a stamp which, at a careless glance, is not at once distinguishable from complainant's. These are imitations of the complainant's goods, which, no matter with what motive done, the court cannot enjoin, because, if the complainants have no patent which is infringed, any one may copy the complainants' make of drawers; and the stamp imprinted is one in common use, and, when examined, is different."

The limitations of the right of one person to imitate an article made by another are well illustrated by the case of *Enterprise Mfg. Co. v. Landers, Frary & Clark*, 131 Fed. 240, 65 C. C. A. 587, *affirming s. c.* 124 Fed. 923. The evidence showed that the defendants had not only conformed their goods to complainants' in size and general shape, which was to be expected, but also in all minor details of structure, every line and curve being reproduced and superfluous metal put into the driving wheels to produce a strikingly characteristic effect, while the goods were

e. *Deception of Purchasers.* — (1.) *In General.* — In order to obtain an injunction from a court of equity against an infringer of a trade-mark, it is not necessary to show that any particular person has actually been deceived, where there is a manifest liability to deception,⁴⁹ but unless the similarity is so marked that the court, upon inspection of the labels, is fully persuaded that the public are likely to be imposed upon by the dress of the article, there should be proof of actual deception by purchasers.⁵⁰ It is usually sufficient

so dressed with combinations of color, with decorations reproduced or closely simulated, with style of lettering and detail of ornamentation, that except for the fact that on one mill was found the complainants' name and on the other the defendants', it would be difficult to tell them apart. *Held*, that this was a most aggravated case of unfair trading, and that such reproductions of unnecessary lines and curves and simulations of arbitrary designs and striking combinations of color would be restrained by a court of equity when they were so close as to show an intent to appropriate the trade of a competitor.

49. *England.* — *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185.

United States. — *General Electric Co. v. Re-New Lamp Co.*, 128 Fed. 154; *Postum Cereal Co. v. American Health Food Co.*, 119 Fed. 848, 56 C. C. A. 360, *affirming s. c.* 109 Fed. 898; *Fuller v. Huff*, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; *Collinsplatt v. Fiflayson*, 88 Fed. 693.

Illinois. — *Job Printers Union v. Kinsley*, 107 Ill. App. 654.

Missouri. — *Corset & Brace Co. v. Corset Co.*, 70 Mo. App. 424.

New York. — *McLoughlin v. Singer*, 33 App. Div. 185, 53 N. Y. Supp. 342; *Taendsticksfabriks Aktiebolagat Vulcan v. Myers*, 58 Hun 161, 11 N. Y. Supp. 663, *affirmed*, 139 N. Y. 364, 34 N. E. 904.

Wisconsin. — *Bank of Tomah v. Warren*, 94 Wis. 151, 68 N. W. 549; *Manitowoc Malting Co. v. Milwaukee Malting Co.*, 119 Wis. 543, 97 N. W. 389.

In *Von Mumm v. Frash*, 56 Fed. 830, it appeared that complainants sold a champagne wine under the name of "G. H. Mumm & Co.'s Extra Dry." Defendants also manufac-

tured a champagne and sold it in bottles dressed up very similar to those of complainants' and used on their labels the words "Extra Dry" but not for the purpose of describing any quality of their article, since the testimony showed that this wine had no "dry" flavor. The defendants also used for the purpose of covering the mouth and neck of their bottles a metallic cap of rose color, long used by complainants to identify their wine. This was an injunction suit. Defendant contended that this suit should fail on the ground that there was no evidence of any instance where a person had been defrauded by the method adopted by the complainants in dressing up their manufacture. The court said: "In a case like the present it would be too much to require the complainants to prove instances of such deception. It is not likely that a knave who perpetrates the fraud upon the ultimate consumer will disclose himself to the complainant; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the complainants. Such testimony is unnecessary, where, as here, the proofs warrant the conclusion that the only reason for the dress adopted by the defendants for their product is that it can be successfully used to defraud the ultimate consumer."

50. *Postum Cereal Co. v. American Health Food Co.*, 119 Fed. 848, 56 C. C. A. 360, *affirming s. c.* 109 Fed. 898; *Pfeiffer v. Wilde*, 107 Fed. 456, 46 C. C. A. 415, *affirming s. c.* 102 Fed. 658; *Weyman v. Soderberg*, 108 Fed. 63; *Centaur Co. v. Marshall*, 92 Fed. 605, *affirmed, s. c.* 97 Fed. 785, 38 C. C. A. 413.

In *Van Camp Pack. Co. v. Cruikshanks Bros. Co.*, 90 Fed. 814, 33

to show that there will be a deception or a probability of deception,⁵¹

C. C. A. 280, the court said: "The defendant's use of boxes or cartons similar to the plaintiff's, without more, could not be complained of. It is a common method of packing various articles of merchandise; and even if the plaintiff was the first to apply it to packing catsup he has not thereby obtained a monopoly of its use for that purpose. The plaintiff admits this, but asserts that the defendant has so imitated his boxes and the stamps and letters upon them, as to mislead the public and induce purchasers of his catsup under the belief that it is the plaintiff's. The boxes and their markings are readily distinguishable from the plaintiff's by intelligent persons; and with care ordinary purchasers would probably distinguish them. The question, however, is, do they bear such similarity as is likely to impose on ordinary purchasers, exercising such care only as is commonly used in purchasing such articles? This question cannot be answered with certainty, or safety, from the evidence before us. There is no proof that any one has been so misled. In this state of uncertainty the court was not wrong in denying the motion. As has frequently been said, to justify a preliminary injunction the plaintiff's case must be clear in all respects. Upon the record as at present made up, the plaintiff's is not. The appeal must therefore be dismissed and the order affirmed."

In *Kann v. Diamond Steel Co.*, 89 Fed. 706, 32 C. C. A. 324, which was a suit to restrain the defendants from imitating complainant's trademark used upon packages of an abrasment made by fractured particles or granules of steel to be used in polishing and sawing stone and other substances of that character, the court said: "The burden was on the appellant to show that the use of the symbol and words which marked the German product were calculated to deceive ordinary purchasers and to create confusion in the trade. It was open to it to do this by evidence that the use had actually done so, or by the ocular

demonstration of a comparison of the symbols and words which marked the packages in which the two products were offered for sale. It produced no proof of actual deception, and thus left the question whether or not the dress in which the German product is clothed is calculated to deceive the ordinary purchaser to the arbitrament of the eyes. When they are turned upon the two trade-marks, either simultaneously or successively, the general impression is one of difference and dissimilarity. It is true that the one bears a diamond-shaped figure, and the other a picture of a radiant diamond, but, to the eyes, these present little likeness. It is not by the visual perception, but only through the mental suggestion, that both pictures represent a diamond, and that things which are equal to another are equal to each other, that the hint of likeness is reached, and this is the only suggestion of similarity the two trade-marks contain. It is at least doubtful whether the thought that the two devices represent a diamond, and that, therefore, they must represent the product of the same manufacturer, would ever occur to the ordinary purchaser in the busy marts of trade. He probably recognizes the goods he seeks to buy by the visual impression of the device upon the product, rather than by the name of the thing whose picture is impressed. The pregnant fact that the appellant sold its goods marked with its diamond-shaped figure for more than five years before the German product was introduced, and yet neither the appellant nor any of its customers called it 'Diamond Steel,' or used the word 'Diamond' in connection with its sale, lends strong support to this probability."

51. *England*. — *Merchants Bkg. Co. v. Merchants' Joint Stock Bank*, L. R. 9 Ch. Div. 560; *Singer Mfg. Co. v. Loog*, L. R. 18 Ch. Div. 395. But see *Singer Mach. Mfg. Co. v. Wilson*, 3 App. Cas. 376, *reversing s. c.* 2 Ch. Div. 434.

United States. — *Southern White Lead Co. v. Coit*, 39 Fed. 492; *South-*

or that what the defendant does is calculated to deceive,⁵² and so

ern White Lead Co. *v.* Cary, 25 Fed. 125; *United States v. Roche*, 1 McCrary 385, 27 Fed. Cas. No. 16,180; *Estes v. Worthington*, 31 Fed. 159; *Estes v. Leslie*, 27 Fed. 22, 29 Fed. 91; *Royal Baking Powder Co. v. Davis*, 26 Fed. 293; *Blackwell v. Armistead*, 3 Hughes 163, 3 Fed. Cas. No. 1,474; *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.*, 102 Fed. 327, 42 C. C. A. 376, 92 O. G. 1437, *reversing* 88 Fed. 694; *Little v. Kellam*, 100 Fed. 353.

Georgia.—*Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284.

Illinois.—*Job Printers Union v. Kinsley*, 107 Ill. App. 654.

Kentucky.—*Avery & Sons v. Meikle & Co.*, 81 Ky. 73.

Massachusetts.—*Regis v. Jaynes & Co.*, 185 Mass. 458, 70 N. E. 480.

New York.—*Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 58 Hun 161, 11 N. Y. Supp. 663, *affirmed* 139 N. Y. 364, 34 N. E. 904; *Baeder v. Baeder*, 52 Hun 170, 5 N. Y. Supp. 123; *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Coleman v. Crump*, 70 N. Y. 573; *Ft. Stanwix C. Co. v. William McKinley C. Co.*, 49 App. Div. 566, 63 N. Y. Supp. 704.

"If it is apparent to the court from an inspection of the two articles, or the court is able to see by such inspection that plaintiff's trademark is so simulated as probably to deceive customers or patrons of his trade or business, there is good ground for the court to enjoin. *Liggett & Myer Tobacco Co. v. Hynes*, 20 Fed. 883.

52. England.—*Payton & Co. v. Snelling, Lampard & Co.*, 70 L. J. Ch. 644, App. Cas. (1901) 308, 85 L. T. 287.

United States.—*Atlantic Milling Co. v. Robinson*, 20 Fed. 217, appeal dismissed, *Rowland v. Atlantic Milling Co.*, 136 U. S. 648; *Liggett & Myer Tobacco Co. v. Hynes*, 20 Fed. 883; *Moxie Nerve Food Co. v. Beach*, 33 Fed. 248; *Hutchinson v. Blumberg*, 51 Fed. 829; *Scheuer v. Muller*, 74 Fed. 225, 20 C. C. A. 161; *Potter Drug & Chemical Corp. v. Miller*, 75 Fed. 656; *Devlin v. McLeod*, 135 Fed. 164.

United States.—*Elgin Nat. Watch Co. v. Loveland*, 132 Fed. 41, appeal dismissed 133 Fed. 1021; *Scriven v. North*, 134 Fed. 366, 67 C. C. A. 348, *affirming* as to the respect for which this case is cited *s. c.* 124 Fed. 894; *Cauffman v. Schuler*, 123 Fed. 205; *Enoch Morgan's Sons v. Whittier-Coburn Co.*, 118 Fed. 657; *Draper v. Skerrett*, 116 Fed. 206; *Hostetter Co. v. Couron*, 111 Fed. 737; *Hostetter Co. v. Wholesale Wine & L. Co.*, 107 Fed. 705; *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. 188; *Von Mumm v. Witteman*, 85 Fed. 966, *affirmed*, 91 Fed. 126; *Hiram Walker & Sons v. Hockstaeder*, 85 Fed. 776; *Centaur Co. v. Neathery*, 91 Fed. 891, 34 C. C. A. 118.

Connecticut.—*Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

Illinois.—*Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450; *Job Printers Union v. Kinsley*, 107 Ill. App. 654.

Missouri.—*Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10.

New Jersey.—*Johnson & Johnson v. Seabury & Johnson*, 69 N. J. Eq. 696, 61 Atl. 5.

New York.—*Boker v. Korkemas*, 106 N. Y. Supp. 904; *New York Cab Co. v. Mooney*, 15 Abb. N. C. 152; *Merrimack Mfg. Co. v. Garner*, 4 E. D. Smith 387; *Williams v. Spence*, 25 How. Pr. 366; *Cahn v. Gottschalk*, 14 Daly 542, 2 N. Y. Supp. 13; *Colman v. Crump*, 70 N. Y. 573; *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040.

Pennsylvania.—*Shaw v. Pilling*, 175 Pa. St. 78, 34 Atl. 446.

Wisconsin.—*Listman Mill Co. v. William Listman Mill Co.*, 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; *Oppermann v. Waterman*, 94 Wis. 583, 69 N. W. 569.

"It is apparently so easy for one who honestly seeks to sell his own goods as, his own to dress them up in such a way that they may be recognized as his own, that when he offers them to the public in a dress sufficiently like his neighbor's to deceive the average consumer, courts naturally suspect his motives to be

where the evidence does not show a probability of deception, injunction will be denied.⁵³ And where there is not sufficient evidence

such as his actions indicate." *Cuervo v. Owl Cigar Co.*, 68 Fed. 541.

"The tradesman brings his privilege of using a particular trade-mark under the protection of equity if he proves, or it is apparent or manifest to the court by inspection, that the representation employed bears such a resemblance to his as to be calculated to mislead the public generally, who are purchasers of the article, to make it pass with them for the one sold by him. If the *indicia* or signs used tend to that result, the party aggrieved will be entitled to an injunction." *Liggett & Myer Tobacco Co. v. Hynes*, 20 Fed. 883.

Myers v. Theller, 38 Fed. 607. This suit was brought by the manufacturers of a compound known as "Hostetter's Stomach Bitters" to restrain defendants from marketing a similar compound put up in bottles of the same size and general character as those of complainants' and called "Theller's Celebrated Stomach Bitters." The court said: "The third question of fact is in regard to the Thellers' imitation of the complainants' trade-mark. Arnold Theller told a witness that he had an article of his own known as 'Theller's Stomach Bitters,' in bottles of the same size and general character as the Hostetter bottles; that it could be disposed of as Hostetter's Bitters. A bottle of bitters is produced in evidence, which has the peculiar form, color, round shoulders, and short neck of the Hostetter bottle, having a label containing the words 'Theller's Celebrated Stomach Bitters,' a monogram of the letters 'A. T.' in place of the picture of St. George and the dragon, a black shield below the monogram, which greatly resembles the complainants' shield, and below the shield an imitation of the appearance of the tiny lettering upon the genuine label. A former employe of Arnold Theller, though a very unwilling witness, testified enough to show that Theller's bitters were bottled in these bottles thus labeled. The shape and color of the bottle, the shield, and the gen-

eral appearance of the label, are well and designedly adapted to deceive the ordinary purchaser in the ordinary course of purchasing the article in a small quantity for immediate use. The general effect is to make the purchaser suppose that he is drawing his supply from a Hostetter bottle, while some of the details of the label differ from those of the genuine label. If the oral admission of Theller was not in the case, it would be difficult to conceive why the peculiar shape and the shield and the general style of the label were used, unless the object was to imitate the plaintiffs' trade-mark, and so deceive the purchaser, while at the same time the purchaser is enabled upon careful inspection of the bottle to see that it is an imitation of the genuine article. From the admission of Theller, it is obvious that his purpose was to deceive the public, and the testimony shows that the resemblance was adequate to accomplish the purpose."

Moxie Nerve Food Co. v. Baumbach, 32 Fed. 205. This was a suit to enjoin an infringement of a trade-mark. It appeared from the evidence that the complainant owned and used a trade-mark which consisted of the word "Moxie" printed upon a label used in the sale of a certain beverage. Complainant marketed this beverage in an ordinary champagne bottle, wrapped in a peculiar light brown paper, with the words "Moxie Nerve Food" printed prominently thereon. Defendant manufactured and sold a preparation similar to that of complainants' and similarly put up in a champagne bottle with a similar wrapper and label and called the same "Standard Nerve Food" with the words "Genuine, Beach and Claridge" written across the label. The court held that there was sufficient evidence to show that defendant calculated to deceive the general public and impose upon the unwary and derive advantage from the prestige of the Moxie Nerve Food.

⁵³. *United States*.—*Coats v.*

Merrick Thread Co., 149 U. S. 562, *affirming* 36 Fed. 324, 1 L. R. A. 616; McLean v. Fleming, 96 U. S. 245; Philadelphia Nov. Mfg. Co. v. Rouss, 40 Fed. 585; Philadelphia Nov. Mfg. Co. v. Blakesley Novelty Co., 37 Fed. 365; Sterling Remedy Co. v. Eureka Chemical & Mfg. Co., 80 Fed. 105, 25 C. C. A. 314, *affirming* 70 Fed. 704; Continental Tobacco Co. v. Larus & Bro. Co., 133 Fed. 727, 66 C. C. A. 557; Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496; Cole Co. v. American Cement & Oil Co., 130 Fed. 703, 65 C. C. A. 105; Vacuum Oil Co. v. Climax Refining Co., 120 Fed. 254, 56 C. C. A. 90, petition for writ of certiorari denied, 191 U. S. 574; Allan B. Wrisley Co. v. Iowa Soap Co., 104 Fed. 548, appeal dismissed, 105 Fed. 999, 44 C. C. A. 679; Potter Drug & Chemical Corp. v. Pasfield Soap Co., 102 Fed. 490.

New York.—Morgan's Sons v. Troxell, 89 N. Y. 292, *reversing* 23 Hun 632; Swift v. Dey, 4 Robt. 611; Babbitt v. Brown, 58 Hun 609, 12 N. Y. Supp. 409; Foster v. Webster Piano Co., 59 Hun 624, 13 N. Y. Supp. 338; Keasbey v. Brooklyn Chemical Wks., 61 Hun 627, 16 N. Y. Supp. 318; Siegert v. Abbott, 72 Hun 243, 25 N. Y. Supp. 590; Taendsticksfabriks Aktiebolagat Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040; Merrimack Mfg. Co. v. Garner, 4 E. D. Smith 387.

Pennsylvania.—Brown v. Seidel, 153 Pa. St. 60, 25 Atl. 1064.

Texas.—Radam v. Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990; Alff v. Radam, 77 Tex. 530, 14 S. W. 164.

Wisconsin.—Gessler v. Grieb, 80 Wis. 21, 48 N. W. 1098.

In Wrisley Co. v. Iowa Soap Co., 122 Fed. 756, 59 C. C. A. 54, Sanborn, J., said: "There is no direct evidence in this case that the defendant intended to palm off its soap as that of the plaintiff, and the whole question is whether it so named and dressed its goods that they were calculated to induce a purchaser who was using ordinary care to buy them as the articles made by the complainant. The name which the defendant used did not have the same sound nor convey the same idea as

that which was used by the complainant. Our country is not the old country. Old country linen is not our country's linen. Old country books are not our country's books. And the term 'Our Country's Soap' distinguishes the article which bears this brand from 'Old Country Soap,' rather than identifies it with it. Each of the corporations made and sold its soap in pound packages wrapped in Manila paper. The color of the wrapper of the complainant is blue and buff, and it bears the inscription: 'Allen B. Wrisley's Trade-Mark Old Country Soap Manufactured by Allen B. Wrisley Co., Chicago.' The colors of the defendant's wrapper are red, white, and blue, but the prevailing color is red. Upon this wrapper are printed the words: 'Our Country's Soap Iowa Soap Company, Manufacturers, Burlington, Iowa.' The arrangement of the words and the style of the letters used upon the latter wrapper differ radically from those upon the former, and when the dresses of the two soaps are submitted to the arbitrament of the eyes the decision is instant and irrevocable that they could not deceive any purchaser, who exercised any degree of care, into buying the product of one of these competitors for that of the other."

In Frese v. Bachof, 13 Blatchf. 234, 9 Fed. Cas. No. 5,109, 14 Blatchf. 432, 9 Fed. Cas. No. 5,110, 13 O. G. 635, plaintiffs manufactured and sold a medicinal tea. Defendants manufactured a tea and marketed it in the same size of package as that used by plaintiff, but this was because the quantity was what a purchaser usually desired. The defendant's package was of the same shape as that of plaintiff, but this was because the physical properties of the compound were such as to most readily take that shape in being tied up for sale. The color of the envelopes was nearly the same, but the printed labels were radically different. The court held that as far as this part of the case is concerned there was not sufficient evidence to show a probability of deception, the plaintiffs having no special right in respect to the size, form and color of the packages, the labels upon which

showing that a manufacturer calculated to mislead purchasers as to the origin of goods to which his label was attached, an injunction will not be granted.⁵⁴

were sufficient to distinguish, even to careless observers the one from the other.

Sterling Remedy Co. v. Eureka Chemical & Mfg. Co., 70 Fed. 704, *affirmed*, 80 Fed. 105, 25 C. C. A. 314. This was a suit in equity, brought to enjoin the use of a trade-mark and illegal competition in the sale of a certain medicine for the cure of the tobacco habit. Plaintiffs sold its remedy under the trade-mark designation of "No-To-Bac," while the defendants went under the name of "Baco-Curo." Both medicines were made in the form of tablets, round in one dimension, and of a flattish, oval form in the other. There was considerable difference in volume and weight, those of complainant's being merely five-eighths of an inch across the disc, and the defendant's a little less than half an inch, and the relative weights being as 41 to 28; the complainant's running 28 tablets to the ounce, and the defendant's 41. They were also unlike in smell, color, and consistency; the defendant's tablets having a strong smell of licorice, while the complainant's were nearly, or quite, odorless. The complainant's were of a light grayish hue, while the defendant's were a dark brown, or nearly black. In consistency the defendant's were somewhat harder, but the most characteristic difference was in this: that while the defendant's were entirely plain and smooth, the complainant's had upon every tablet the designation or trade-mark "No-To-Bac" in large raised letters, extending twice across one side, and constituting part and parcel of the tablet itself. There was some other evidence showing a similarity between the boxes in which these remedies were put up; but it appeared that they were manufactured not for the parties to this suit, but for general sale and use. *Held*, that there was not sufficient evidence in the case showing an infringement or unfair competition.

Probability of Deception, Not Possibility, the Criterion.—"It is not

enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence." *Heinz v. Lutz*, 146 Pa. St. 592, 23 Atl. 314. See also *Brown v. Seidel*, 153 Pa. St. 60, 25 Atl. 1064; *Cauffman v. Schuler*, 123 Fed. 205.

⁵⁴ *England*.—*Cheavin v. Walker*, L. R. 5 Ch. Div. 850.

United States.—*Colgan v. Danheiser*, 35 Fed. 150; *E. Regensburg & Sons v. Juan F. Portuondo C. M. Co.*, 142 Fed. 160, 73 C. C. A. 378, *affirming* 136 Fed. 866; *Continental Tobacco Co. v. Larus & Bro. Co.*, 133 Fed. 727, 66 C. C. A. 557; *Davies County Distilling Co. v. Martinoni*, 117 Fed. 186.

New York.—*Boessneck v. Iselin*, 83 App. Div. 290, 82 N. Y. Supp. 164; *Commercial Union Assur. Co. v. Smith*, 2 N. Y. Supp. 296, 18 N. Y. St. 151.

Texas.—*Radam v. Microbe Destroyer Co.*, 81 Tex. 122, 16 S. W. 990.

In Manufacturing Co. v. Trainer, 101 U. S. 51, the court speaking through Justice Field, said: "This is a suit in equity to restrain the defendants, D. Trainer & Sons, from using on ticking manufactured and sold by them the letters 'A. C. A.' in the sequence here named, alleged by the complainant to be its trade-mark, by which it designates ticking of a particular quality of its own manufacture; and to compel the defendants to account for the profits made by them on sales of ticking thus marked. . . . The label used by the defendants is not calculated to mislead purchasers as to the origin of the goods to which it is attached. It does not resemble the device of the complainant. Its border has a different figure; it is square outside and inside. It has within it the words 'Omega' and 'Ring Twist,' as well as the letters 'A. C. A.' Neither the name of the complainant, nor of the place where its goods are manufactured, nor the words 'Power Loom,' are upon it. The two labels

In Unfair Competition Cases the basis of the suit is fraud. Its foundation is unfair, fraudulent competition, and the intent to deceive is an indispensable element in the fraud which warrants the relief sought. This intent and the fraud in which it inheres may be, and generally must be, proved by circumstances, by facts, by sales. But the facts and circumstances which establish it must be such that the fraud and the intent to deceive the public is fairly inferable from them.⁵⁵

Marks Indicating Grade or Quality.—Where the evidence shows in unfair competition suits that marks used by a defendant have for years been understood generally as signifying grade or quality and have been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or of deception practiced on the plaintiff or on the public, the defendant will not be restrained from using such marks.⁵⁶

In Cases of Actual Deception it is further held that even though the evidence shows that purchasers of an article alleged to be the subject of unfair competition were deceived by the general resemblance of the package in which it was sold to that of complainant's package, still an injunction will not be granted where there is no sufficient evidence in the case showing that buyers were deceived

are so unlike in every particular, except in having the letters 'A. C. A.' in their centre, that it is impossible that any one can be misled in supposing the goods, to which the label of the defendants is attached, are those manufactured by the complainant. The whole structure of the case thus falls to the ground. There is no such imposition practiced upon the public and no such fraud perpetrated upon the manufacturers, in attempting to dispose of the goods of one as those of another, as to call for the interposition of a court of equity."

In *Hostetter Co. v. Brunn*, 107 Fed. 707, it was shown that on two occasions defendant's employe had sold to complainant's agents, at the instigation of complainant a certain quantity of bitters, in bulk, which bitters resembled to some extent those sold by complainant. Complainant's agents were advised by defendant's employe to fill bottles which had been used for complainant's bitters and sell the spurious bitters as those of complainant's. Held, that this was not sufficient proof of a course of wrongdoing on the part of defendant which should be enjoined,

since there was contradictory evidence in the case and since it was further shown that defendant repudiated the act of his employe.

55. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, *affirming* 31 Fed. 776; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.*, 104 Fed. 243, 43 C. C. A. 511, *affirming* 92 Fed. 774.

56. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, *affirming* 31 Fed. 776; *Deering Harvester Co. v. Whitman Co.*, 91 Fed. 376, 33 C. C. A. 558, *affirming* 86 Fed. 764; *Stevens Linen Wks. v. William & John Don & Co.*, 121 Fed. 171, *affirmed*, 127 Fed. 950, 62 C. C. A. 582.

In *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. 965, 55 C. C. A. 459, it was held that since there was no evidence in the case showing that the words "standard" or "computing" as applied to scales had acquired a secondary meaning in the trade, as indicating a scale manufactured or sold by complainant, their use by another manufacturer or dealer could not be enjoined as constituting unfair competition, unless it appeared in evidence that they were so used by

by the defendant's use of any feature of the complainant's package which was peculiar to complainant, and which the defendant had no right to use.⁵⁷

(2.) **Expert Testimony.** — (A.) **IN GENERAL.** — Resemblance, as shown by inspection, is the primary test and criterion; proof by experts is seldom resorted to. Where the facts relating to a trade-mark case are before the court, *i. e.*, the trade-marks, the labels, the packages, etc., as presented for sale on the market, it is the province of the court to decide what impression would be made by them upon persons of ordinary intelligence and care. An expert in such a case should not be allowed to decide for him.⁵⁸

(B.) **AS TO PROBABILITY OF DECEPTION.** — Expert opinion evidence to the effect that the similarity between two trade-marks is so great that the purchasing public is likely to be deceived is not in itself

defendant as to show a purpose to deceive purchasers into buying its scales for those of complainant.

57. *Lorillard Co. v. Peper*, 86 Fed. 956, 30 C. C. A. 496; *Continental Tobacco Co. v. Larus & Bros.*, 133 Fed. 727, 66 C. C. A. 557.

In *United States Tobacco Co. v. McGreenery*, 144 Fed. 531, *affirmed* 144 Fed. 1022, 74 C. C. A. 682, the court said: "Of four witnesses called by the complainant to prove deception, Thompson was deceived by the color of the paper and lettering, and by the general appearance of the printing, the tinfoil, the size of the package and other characteristics old in the art. His evidence does not help the complainant. Erb said that he was deceived by the peculiar red color of the package, and at first could recall no other characteristic. Later he said that he noticed the word 'Union,' and that he sought a 'union made' tobacco. Yet he, a union man, and familiar with the 'Central Union' package and its two trade union labels, did not notice the absence of these labels from the Union Leader package which he was buying. I believe his mistake had like cause with Thompson's. Smith was not very familiar with 'Central Union' tobacco, and said that he was attracted to the Union Leader by the word 'Union.' Ihrie's testimony I find hard to believe. He testified that for about a month he had sold Union Leader tobacco more than 100 packages, and largely to those who sought union made to-

bacco, without finding out the difference by himself or through his customers. He had smoked several packages. Yet Thompson, Erb and Smith all discovered their mistake within a few minutes. Evidence of deception is hard to deal with. Even where serious deception exists it may be hard to prove. On the other hand an honest prejudice easily makes deception imaginable where it does not exist. Where deception is claimed and the issue concerns, not the fact of deception, but only its precise cause, the difficulty in dealing with the evidence is increased. That Thompson, Erb and Smith were deceived is plain. They thought they were buying Central Union tobacco while buying Union Leader; but I think the mistake of the two last, like that of Thompson, arose from the color and general appearance of the package, and little, if at all, from the word 'Union.' I find, therefore, no sufficient evidence that buyers were deceived by the defendant's use of any feature of the complainant's label which was peculiar to the complainant, and which the defendant had no right to use."

58. *Payton & Co. v. Snelling, Lampard & Co.*, 70 L. J. Ch. 644, App. Cas. (1901) 308, 85 L. T. 287; *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753; *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783; *Cooper v. State*, 23 Tex. 331; *Turner v. Strange*, 56 Tex. 141; *Houston & T. R. Co. v. McGehee*, 49 Tex. 48;

sufficient evidence of an infringement,⁵⁹ although such evidence is usually held to be competent and often illuminative⁶⁰ and valuable in a doubtful case.⁶¹

(C.) AS TO FRAUD OF MANUFACTURER. — When scientific or technical trade questions are involved, expert evidence is readily admitted to show the fact of fraud on the part of the manufacturer or dispenser.⁶² Where not contradicted, and especially where corrobo-

McKay v. Overton, 65 Tex. 82; Whart. on Ev., § 436.

59. Columbia Mill Co. v. Alcorn, 40 Fed. 676, affirmed, 50 U. S. 460.

The question of infringement is ordinarily more easily determinable in trade-mark cases than in patent cases, because they are less dependent upon the testimony of witnesses. Whether one thing is a colorable imitation of another, is answered most satisfactorily by judicial inspection and comparison of the two, and if the court is convinced by such inspection and comparison that the two things are near enough alike to deceive or mislead the ordinary purchaser, in the exercise of ordinary care and caution, no amount of expert evidence of substantial difference would justify the court in withholding the injunction. Consolidated Fruit Jar Co. v. Thomas, 2 N. J. L. J. 272, 6 Fed. Cas. No. 3,131.

Cope v. Evans, L. R. 18 Eq. 138, 30 L. T. 292, 22 W. R. 450. Plaintiffs used as a trade-mark for their cigars "*Flor Fina Prairie Superior Tabac*." Defendants trademark on theirs was "*Flor de la Prairie*." The court said: "The plaintiffs, not bringing forward any evidence of deception, have produced a witness, a Mr. Hyam Jonas, a tobacco merchant and importer of cigars, who, in an affidavit filed on the 26th of June, 1873, par. 5, says, 'The words "*Flor de la Prairie*" on the defendants' boxes of cigars are, in my judgment and belief, in substance, as a brand, the same as "*Flor Fina Prairie*" on the plaintiffs' boxes of cigars; and I say that if two brands, as substantially the same or so nearly identical as those in question, could be legally used by different traders, considerable loss and damage would be sustained by the person who first commenced to use the brand, and whose cigars commanded an exten-

sive sale, and the public generally would be misled and defrauded by having inferior goods sold under a brand or name which could or would not be practically distinguished from the brand which had acquired repute in the trade or estimation with the public.' Five other witnesses depose to the same effect. I observe upon these affidavits that the witnesses do not say that they individually would be misled by the defendants' boxes having thereon the word '*Prairie*' as it is thereon; their statements as to the public being misled are only statements of the opinion of the witnesses. . . . I cannot, upon this evidence for the plaintiffs, say that I am satisfied that the use of the word '*Prairie*' on the defendants' boxes, as it has been used thereon, will cause their goods to be sold for those of the plaintiff."

60. N. K. Fairbanks Co. v. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554, reversing 71 Fed. 295.

In Williams v. Brooks, 50 Conn. 278, 47 Am. Rep. 642, the plaintiffs offered the testimony of several persons who were or had been wholesale dealers in hairpins, as experts for the purpose of proving that the defendants' ounce packages of hairpins so closely resembled those of the plaintiffs' as to mislead an ordinary purchaser and consumer. The committee before whom the case was brought received this evidence notwithstanding defendants' objections. Held, no error.

Admissibility Questioned. — The propriety of admitting this sort of evidence was questioned in Radam v. Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

61. Celluloid Mfg. Co. v. Read, 47 Fed. 712.

62. In re Worthington & Co., 14 Ch. Div. (Eng.) 8, 49 L. J. Ch. 646;

rated by the circumstances, such evidence is sufficient,⁶³ and it is always valuable.⁶⁴ And so, too, where the question as to the habits and customs of the purchasing public have a bearing upon the probability of their being deceived, the opinion of witnesses familiar with the trade and the habits of the customers is of weight, and, when corroborated by evidence of instances of actual deception, should

Williams v. Brooks, 50 Conn. 278; *Celluloid Mfg. Co. v. Read*, 47 Fed. 712.

In *Van Hoboken v. Mohns & Kaltenbach*, 112 Fed. 528, an expert gauger's evidence was admitted as to the variance in alcoholic proof between complainant's gin and that alleged to have been sold by defendant under complainant's trade-mark.

In *Mitchell v. Henry*, L. R. 15 Ch. Div. (Eng.) 181, 43 L. T. 186, plaintiffs had registered a trade-mark for worsted goods, described as "a white selvage on each side of the piece, having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage." A specimen was on view at the Patent Office Museum. That specimen was undyed and the selvage was white, and the mottled line nearly in the middle of the selvage, when the piece was dyed black the selvage became dark gray. Defendants sold goods dyed black, the selvage in which was dark gray, with a mottled thread of white, red and yellow running along the inner border of the selvage. The white of the mottled thread in the process of dyeing became gray, and the yellow a dusky olive. Plaintiffs complained of this as an infringement. The Master of the Rolls dismissed an interlocutory motion for an injunction. On appeal *Thesiger, L. J.*, said: "With great respect for the Master of the Rolls, I cannot come to the same conclusion as that which he has arrived at merely by looking at the exhibits themselves. In the first place, although it is perfectly true that the selvage of the dyed goods is not anything approaching to what may be called a pure white selvage, yet at the same time I cannot say whether it is not such as might reasonably be described by the trade generally, and not by the particular manufacturers in the trade residing

at Bradford as a white selvage. Secondly, although it is perfectly true that the defendants are using a mottled thread made up of three distinct colors instead of, as the plaintiffs are doing, using a mottled thread made up of two distinctive colors, yet I cannot say by the evidence of my own eyes whether or not, under the circumstances in which the threefold mottled thread is being used, and with reference to the purchasers to whom the goods with the mark on them would be sold, and, looking also to the possible complement of colors and the thickness of threads used in those colors, it might not be said by anybody, even an expert, as regards these matters, that the threefold thread used by the defendants was a colorable imitation of the twofold thread used by the plaintiffs. At all events, it appears to me that that must be a matter of evidence, and evidence of experts."

63. *Hostetter Co. v. Comerford*, 97 Fed. 585, motion for rehearing *denied*, 99 Fed. 834; *Hostetter Co. v. Bower*, 74 Fed. 235. In both of these cases the subject of infringement was a certain beverage or a patent medicine known as "Hostetter's Bitters." There was a strong conflict of evidence as to whether the bitters sold were, in fact, Hostetter's Bitters, and under these circumstances Judge Coxe held that the evidence, as it stood, did not preponderate in favor of complainant, and added that if a chemical analysis had been made and proved, that would have settled the question.

64. In *Hostetter v. Gallagher Stores*, 142 Fed. 208, evidence for complainant on the part of witnesses of large experience and knowledge of Hostetter's Bitters, that, judging of the liquid sold, by the senses, they were confident that it was not Hostetter's Bitters, was held to be competent evidence, and, since not con-

be controlling unless the dissimilarity between the two marks is of such a character as to exclude any probability of deception.⁶⁵

(3.) Inferences From Circumstances. — The fact that defendants had used a form of label which was not imitative of complainant's but adopted one that was, after a former infringer of complainant's trade-mark came into defendant's employ, suggests an inference that the alteration was made for the purpose of deception.⁶⁶ From the fact that most of defendant's corporators were officers, stockholders and employes of the plaintiff corporation, and that one after another they resigned their offices or positions, and sold out their stock and secretly organized and put in operation a rival company, which bought the entire property of a similar corporation in a neighboring town, and located themselves permanently in the same town with the plaintiffs and assumed a name so nearly like that of the plaintiffs as to induce the belief that the two companies were the same, the intention to deceive the plaintiffs and thereby benefit themselves at the expense of injuring plaintiffs may be legitimately inferred.⁶⁷

Fraud as to Place of Manufacture. — Where manufacturers at one place mark their goods as manufactured at another, it will be inferred that such marking was for the purpose of inducing trade which would otherwise go to manufacturers at such other place, and was therefore fraudulent.⁶⁸

(4.) Sufficient That Public Likely To Be Deceived. — In an application for relief by injunction against the pirating of a trade-mark, it is not necessary to show that skilled persons would be deceived by the two articles under consideration;⁶⁹ it is sufficient that the evidence show that the general purchasing public would be likely to be deceived by the alleged imitation.⁷⁰

(5.) Articles Distinguishable on Close Inspection. — Nor is it necessary that the evidence should show that the two trade-marks in question are indistinguishable side by side or upon close inspection; it is sufficient evidence where it is shown that ordinary persons proceeding with ordinary caution would be likely to be deceived.⁷¹ It

tradicted, sufficient to establish the fact.

^{65.} *Drummond v. Addison Tinsley Tob. Co.*, 52 Mo. App. 10.

^{66.} *Scheuer v. Muller*, 74 Fed. 225, 20 C. C. A. 161. See also *Lorillard Co. v. Peper*, 86 Fed. 956, 30 C. C. A. 496.

^{67.} *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278. See also *Brown v. Braunstein*, 86 App. Div. 499, 83 N. Y. Supp. 798.

^{68.} *Southern White Lead Co. v. Cary*, 25 Fed. 125; *Southern White Lead Co. v. Coit*, 39 Fed. 492.

^{69.} *White v. Miller*, 50 Fed. 277; *Goodman v. Bohls*, 3 Tex. Civ. App. 183, 22 S. W. 11; *Popham v. Wilcox*, 14 Abb. Pr. N. S. (N. Y.) 206.

^{70.} *Shrimpton v. Laight*, 18 Beav. (Eng.) 164; *White v. Miller*, 50 Fed. 277; *Goodman v. Bohls*, 3 Tex. Civ. App. 183, 22 S. W. 11.

^{71.} *England*. — *Seixo v. Provezende*, L. R. 1 Ch. App. Cas. 192.

United States. — *Cantrell & Cochran v. Butler*, 124 Fed. 290; *National Biscuit Co. v. Swick*, 121 Fed. 1007; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. 823.

Massachusetts. — *Lawrence Mfg.*

is even held that the right to relief depends only upon such a degree of resemblance as is calculated to deceive the careless and unwary.⁷²

f. *Proof of Intent.* — While as a rule it is necessary to show that the purchasing public have been deceived as to a trade-mark, or are likely to be deceived; when proof of infringement is clear it is not necessary in such cases that the evidence show a fraudulent intent on the part of a defendant in order that an injunction may be obtained against him for pirating plaintiff's goods.⁷³

Co. v. Lowell Hosiery Mills, 129 Mass. 325.

New York. — Taendsticksfabriks Aktiebolaget Vulcan v. Myers, 58 Hun 161, 11 N. Y. Supp. 663, affirmed in 139 N. Y. 364, 34 N. E. 904; Electro-Silicon Co. v. Levy, 59 How. Pr. 469.

Texas. — Goodman v. Bohls, 3 Tex. Civ. App. 183, 22 S. W. 11.

In *Godillot v. American Groc. Co.*, 71 Fed. 873, the court said: "The material facts of the present case are these: Nearly forty years ago the plaintiff, Alexis Godillot, Jr., devised and adopted as a trade-mark a monogram composed of the letters 'A' and 'G' tastefully combined. Thereafter this trade-mark was constantly used in the United States by the plaintiff, and by others acting under him, upon and in connection with the sale of groceries, food products and kindred articles. . . . Before the commencement of this suit the defendant adopted, and began using in its business, a monogram trade-mark composed of the letters 'A' and 'G' and 'Co.' . . . I think that there is substantial identity between the two trade-marks, within the meaning of the authorities. To say the very least, an unsuspecting purchaser would probably be misled. It may be, indeed, that, when the two monograms are laid side by side for inspection, they are distinguishable from each other. But, as we have seen, this is not the true test of infringement. If it were, then no trade-mark would be safe from piracy. The comparatively small letters 'Co.' in the defendant's trade-mark, to the eye of a casual observer, might well be taken to be part of the ornamentation. There is no good reason for such a close imitation of the plaintiff's trade-mark, and no justification therefor."

72. *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658; *Colman v. Crump*, 70 N. Y. 573; *McCann v. Anthony*, 21 Mo. App. 83.

73. *England.* — *Taylor v. Taylor*, 23 Eng. L. & Eq. 281.

United States. — *Devlin v. Peek*, 135 Fed. 167, affirmed in 144 Fed. 1021, 73 C. C. A. 619; *Fairbank Co. v. Luckel, King & Cake Soap Co.*, 102 Fed. 327, 42 C. C. A. 376; *Devlin v. McLeod*, 135 Fed. 164; *General Electric Co. v. Re-New Lamp Co.*, 128 Fed. 154; *Bissell Chilled Plow Wks. v. T. M. Bissell Plow Co.*, 121 Fed. 357.

Connecticut. — *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278.

Illinois. — *Job Printers Union v. Kinsley*, 107 Ill. App. 654.

Massachusetts. — *Fox Co. v. Glynn*, 191 Mass. 344, 8 N. E. 89.

New York. — *Colman v. Crump*, 70 N. Y. 573; *Curtis v. Bryan*, 2 Daly 312.

"Positive proof of fraudulent intent is not required when the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled, through the unwarranted use of the device, to sell the simulated article for the one which is genuine." *McLean v. Fleming*, 96 U. S. 245.

No matter how vague may be a resemblance, if it be sufficient to mislead the public it is unlawful, and when unexplained it is the duty of the court to infer intent, and to hold that the resemblance was adopted for the purpose of deception. *Consolidated Fruit Jar Co. v. Thomas*, 2 N. J. L. J. 272, 6 Fed. Cas. No. 3,131.

In *Cahn v. Gottschalk*, 14 Daly 542, 2 N. Y. Supp. 13, the opinion of the referee was approved by the court. An extract from the referee's

Burden of Proof.—It is presumed that defendant had wrongful intentions,⁷⁴ and the burden rests upon him to show that there is either no property in the term or symbol, arising from priority of use of the article to which it has been applied, or that no deceit or injury can result from the imitation.⁷⁵

Proof of Intent Alone Not Sufficient.—Although it satisfactorily appears from the evidence to a court of equity that a new form of package was devised by a defendant with an intention of simulating plaintiff's package, the further use of such package will not be enjoined unless it also clearly appears from the evidence that the similarity is of such a character as to convey a false impression to the minds of the public and to deceive the ordinary purchaser.⁷⁶

opinion is as follows: "The plaintiffs have been accustomed to place upon the head of each barrel of the Maryland Club whiskey a copy of their filed trade-mark, printed upon white paper about six inches square. The plaintiffs' initials, 'C. B. & Co.,' form a part of this design. Below this, and occupying rather more than half the barrel-head, are the words 'Maryland Club Rye Whiskey.' The defendant paints his barrel-heads yellow, and stencils thereon in black, the words, 'Maryland Jockey Club Rye Whiskey,' in such a way that the words 'Maryland' and 'Whiskey' form a circle around the barrel-head in letters an inch and one-half high; the word 'Club' appears in letters two and a half inches high; and the word 'Jockey' is printed in letters seven-eighths of an inch high. No dealer's name, or place of manufacture, is indicated on the defendant's barrel-head. The barrel-heads are not likely to be mistaken for each other by any one who examines them with any attention. On the other hand, a person who knew the plaintiffs' whiskey from its name, but was not acquainted with the form in which its trade-mark appears upon the barrel, might readily suppose that the defendant's barrel contained Maryland Club whiskey. There is no proof that any one has been deceived by the defendant's acts; but, when a trade-mark consists of words, it is not necessary to show that fraud has been accomplished or even intended. The words cannot be used by another in any form when applied to similar articles. *Hier v. Abrahams*, 82 N. Y.

519. It may be said that this case is an illustration of the justice of this rule. The plaintiff and the defendant both sell whiskey in barrels to dealers, who sell it by the glass or the bottle. Often only the first purchaser will see the barrel-head, while the consumer knows the brand of whiskey only from the labels upon the bottle, or from signs put in the barroom. Although the man who purchases whiskey by the barrel may not himself be deceived, he will be willing to buy an article which, by reason of its name, will satisfy his customers' demands for plaintiffs' whiskey, and the plaintiff thus be injured. Clearly, then, it is possible, in such a case, to obtain all the benefits of an infringement by an adoption of the words of a trade-mark, with or without slight alterations, and it makes no difference in result whether or not the form in which the trade-mark appears on the original package is simulated."

74. *Sterling Remedy Co. v. Go-rey*, 110 Fed. 372; *Messerole v. Tynberg*, 4 Abb. Pr. N. S. (N. Y.) 410, 36 How. Pr. 14; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. 765; *Bolen & Byrne Mfg. Co. v. Jonasch*, 29 Misc. 99, 60 N. Y. Supp. 555.

75. *Messerole v. Tynberg*, 4 Abb. Pr. N. S. (N. Y.) 410, 36 How. Pr. 14; *Pidding v. How*, 8 Sim. (Eng.) 477; *Barrows v. Knight*, 6 R. I. 434.

76. *Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869, 23 C. C. A. 554, *reversing s. c.* 71 Fed. 295; *Postum Cereal Co. v. American Health Food Co.*, 119 Fed. 848, 56 C. C. A. 360, *affirming* 109 Fed. 898; *G. W. Cole Co. v. American Cement & Oil*

g. Proof of Pecuniary Injury. — In an action to enjoin the infringement of a trade-mark, it is not necessary for the plaintiff to show any actual pecuniary injury. The injury necessary to sustain the action is implied in the act of the defendant in wrongfully appropriating the name of the plaintiff.⁷⁷

h. Unnecessary To Show Imitation of Entire Trade-Mark. — In order to maintain a prayer for an injunction it is not necessary that the evidence should show that the whole of a trade-mark has been imitated.⁷⁸

i. Evidence of One Sale. — Evidence showing one sale only of an article alleged to be an infringement may not be sufficient evidence *per se* to show an infringement;⁷⁹ but it may, in connection with other proof, be persuasive evidence of other sales, and convincing proof of an intention to sell whenever the opportunity of doing so, without detection, is presented.⁸⁰

Co., 130 Fed. 703, 65 C. C. A. 105; *G. W. Cole v. Cole's Many-Use Oil Co.*, 147 Fed. 930; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 32 C. C. A. 324, 61 U. S. App. 22.

In *Centaur Co. v. Marshall*, 97 Fed. 785, 38 C. C. A. 413, the court said: "Moreover, the intent is only material when the effect of the means used to accomplish it is doubtful. When, as in this case, it clearly appears that the dress used will not deceive, the purpose with which it is used furnishes no sufficient ground for an injunction. A wrong done or threatened, and the consequent injury or probable injury to the complainant, are indispensable elements of every cause of action. Neither actual nor probable 'injury,' in the legal sense of that word, results from the use of a trade dress that is not calculated to mislead the public or to deceive purchasers, and hence one of the essential elements of a good cause of action is wanting. The intention on the part of an alleged infringer to induce purchasers, through the use of a simulated trade-mark or dress, to buy his goods under the belief that they are another's, furnishes no ground for relief, unless the similarity between the two trade-marks is of a character 'to convey a false impression to the public mind, . . . and to mislead and deceive the ordinary purchaser.'" See also *United States Tobacco Co. v. McGreenery*, 144 Fed. 531, *affirmed*, 144 Fed. 1022, 74 C. C. A. 682.

⁷⁷. *Roy Watch-Case Co. v. Camm-Roy Watch-Case Co.*, 28 Misc. 45, 58 N. Y. Supp. 979.

⁷⁸. *Braham v. Bustard*, 11 W. R. (Eng.) 1061, 9 L. T. 199, 1 Hen. & M. 447; *Atlantic Milling Co. v. Robinson*, 20 Fed. 217, appeal dismissed, *Rowland v. Atlantic Milling Co.*, 136 U. S. 648.

⁷⁹. *Byam v. Bullard*, 1 Curt. 100, 4 Fed. Cas. No. 2,262; *Lever Bros. v. Pasfield*, 88 Fed. 484.

⁸⁰. *De Florez v. Reynolds*, 14 Blatchf. 505, 7 Fed. Cas. No. 3,742.

In *Lever Bros. v. Pasfield*, 88 Fed. 484, the court said: "Whether the English predecessors of complainant, or the Milwaukee firm, were the first to use the word 'Sunlight' in connection with soap, is immaterial, since complainant is the owner of all the rights of both concerns in that particular use of the name. It is undoubtedly a good trade-mark, and the use of the name 'American Sunlight' in connection with soap is plainly an infringement. Indeed, the only point which is urged with any force by defendant's counsel is the fact that only one actual sale is shown, and that to an emissary of the complainant, who persuaded defendant to put up and sell the goods, and bill them under the infringing designation. It is not the law, however, that relief in equity will be denied when the only actual sale proven is one to complainant's detective. . . . The testimony of the defendant himself, especially in regard to

B. DEFENSES. — a. *What Is a Defense.* — (1.) **Trade-Marks Easily Distinguishable.** — Where the evidence shows that the trade-marks in question are easily distinguishable, such evidence will be sufficient to maintain a defense to a suit for an injunction.⁸¹

(2.) **Trade Names Applied to Different Lines of Business.** — Where the evidence shows that the trade name alleged to be an infringement is applied to a business distinctly different from that of plaintiff's, such evidence will sustain a defense to a suit for an injunction,⁸² especially where it appears that defendant has had no intention of infringing plaintiff's name.⁸³

(3.) **Fraud on Part of Plaintiff.** — (A.) **AS TO INGREDIENTS OF ARTICLE MARKETED.** — Where the evidence shows that plaintiff in an injunction suit has been guilty of fraud, having deceived the public as to the ingredients of an article placed on the market, the doctrine: "He who seeks equity must present himself in court with clean hands applies," and plaintiff will be denied relief; such evidence of fraud constituting a defense to plaintiff's action even though defendant is guilty of the piracy or infringement complained of.⁸⁴ This rule is applicable in patent medicine cases where representations are made on the bottle, package or wrappers thereof as to qualities, which representations are shown to be false, and the silence of the complaining party in such cases cannot be accounted for as due to a desire to preserve a trade secret, because the requirements as to proof extend only to what has already been stated to the public in the representations referred to.⁸⁵ But this defense is available

the letter produced by complainant; his careful qualification of his answers with the phrase, 'I do not remember;' the circumstances attending the sale, and his own admissions as to what he said and did; his careful preservation of the infringing labels and die, satisfy me that, unless restrained by injunction, he will continue to sell his soap under the infringing trade-mark whenever what he may think a safe chance to do so presents itself. Against this threatened injury complainant should be protected by an injunction, but there is not proof sufficient to warrant a decree for an accounting."

^{81.} *Bradbury v. Beeton*, 39 L. J. Ch. N. S. (Eng.) 57, 21 L. T. 323; *Frese v. Bachof*, 13 Blatchf. 234, 9 Fed. Cas. No. 5,109, injunction made perpetual, 14 Blatchf. 432, 9 Fed. Cas. No. 5,110, 13 O. G. 635.

^{82.} *Commercial Union Assur. Co. v. Smith*, 2 N. Y. Supp. 296, 18 N. Y. St. 151.

^{83.} *Commercial Union Assur. Co.*

v. Smith, 2 N. Y. Supp. 296, 18 N. Y. St. 151.

^{84.} *Uri v. Hirsch*, 123 Fed. 568; *Hilson Co. v. Foster*, 80 Fed. 896.

Fraud on the part of plaintiff must be proved; it cannot be presumed. *A. Bauer & Co. v. Siegert*, 120 Fed. 81, 56 C. C. A. 487.

^{85.} *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 102 O. G. 623, reversing 102 Fed. 334, 42 C. C. A. 383, which affirmed 95 Fed. 132.

Memphis Keeley Inst. v. Leslie E. Keeley Co., 155 Fed. 964. In the lower court an injunction was granted restraining the appellants from claiming that they had a right to, and were in fact administering Keeley remedies at the Memphis Keeley Institute. This appeal was taken from that decree. The court said: "The main ground upon which appellants claim that the decree of the lower court should be reversed, is that the appellee did not come into that court with clean hands, and therefore was not enti-

in flagrant cases only, and not where the evidence respecting the

tled to the relief it sought and that was granted to it. . . . The alleged fraudulent misrepresentations relied on are quite numerous. The main one is that gold is the principal ingredient and effective agent in said remedies. We will limit our consideration to this alleged fraudulent misrepresentation, because we are constrained to hold that the claim of appellants in regard thereto is made good by the evidence. It is not disputed that appellee represents to the public that gold is the principal ingredient and effective agent in its remedy. So distinct, repeated and emphatic has been and is its representation to this effect that it must be held that its business has been built up and is being maintained by this representation. . . . The sole question at issue in regard to this representation is as to whether it is a misrepresentation and fraudulent; *i. e.*, intended to mislead and deceive the public. If it is untrue and known to be so, the rest follows. The record contains positive evidence to the effect that it is untrue and known to be so."

In *Moxie Nerve Food Co. v. Modox Co.*, 152 Fed. 493, the court said: "The defendants contend that the complainant has been guilty of such false representations to the public that, under the principles set forth in *Worden v. The California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282, it is barred from the right to seek the aid of a court of equity. . . . The complainant's evidence at best shows that Moxie is a mild evacuant and diuretic, with some tonic effect due possibly in part to bitter principles contained in it. The defendants' evidence, on the other hand, establishes affirmatively a very strong probability that the statement that Moxie is a preparation of a plant corresponding to the complainant's description of it is pure fiction, and that it contains no nerve food or curative agent other than a small amount of bitters, such as gentian or cinchona. The possibility that there are other ingredients which have escaped chemical analy-

sis, and that there may be an ingredient which in any respect conforms to the descriptions of its origin and nature, is altogether too remote for consideration in the practical administration of equity. . . . In considering this case, I have not lost sight of the fact that a very large part of the demand for Moxie is based upon its merits as a mere beverage without regard to its curative virtues; and I have carefully considered whether it might not be possible to protect this undoubtedly legitimate part of the business, while denying protection to what may be termed the medicinal part of the business. Such separation, however, is impractical, for if the plaintiff 'has thought fit to mix up that which may be true with that which is false, . . . unless he establishes his title at law, the court cannot interfere on his behalf.' See *Worden v. California Fig Syrup Co.*, 187 U. S. 530, 23 Sup. Ct. 165 (47 L. ed. 282). The silence of the complaint, on the vital issues, in the face of the strong evidence that its statements to the public are mere fiction and misrepresentation, cannot be satisfactorily accounted for as due to a desire to preserve a trade secret, for proof is required only of what already has been stated to the public. The bill will be dismissed."

In *Moxie Nerve Food Co. v. Modox Co.*, 153 Fed. 487, a preliminary injunction was granted; but this bill presented a case substantially different from that in which an injunction was formerly denied.

But in *Siebert v. Gandolfo*, 149 Fed. 100, 79 C. C. A. 142, reversing *s. c.* 139 Fed. 917, where it appeared from the evidence that complainants represented "Angostura" bitters as not containing any "intoxicating ingredients," it was held that such a representation was not so false and fraudulent as to deprive complainants of relief in a suit to enjoin unlawful competition, the statement that the bitters contained no intoxicating ingredients being construed as referring to the herbs and simples of which it was composed.

defense is conflicting, or where the defendant is guilty of the same imposition upon the public as plaintiffs.⁸⁶

Fraud Must Be of Substantial Nature. — Where the evidence shows that a statement made in a trade-mark as to the ingredients of a commodity is false from a chemical standpoint but not from a practical one, such evidence introduced by defendant will not be sufficient to constitute a defense to an application for an injunction.⁸⁷

86. *Smith v. Woodruff*, 48 Barb. (N. Y.) 438. This was an appeal from an order dissolving an injunction restraining the defendant from manufacturing and selling a perfume called "Sweet Opoponax of Mexico." The court said: "The only plausible defense arises from the allegation of the defendant, that the plaintiffs are as wicked as he is, in that they attempt to impose upon and defraud the public, while he attempts only to defraud the plaintiffs."

But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happens to be. The present case does not, in my opinion, upon the present evidence, come within the rule sought to be invoked. It is said that the plaintiffs, in connection with their label, put forth a puff, in which it is stated that 'The Opoponax is a native flower from Mexico, of rare and very rich fragrance, from which this extract is distilled,' etc. On the part of the defendant, several perfumers make affidavit that they have examined the perfume of the plaintiffs; that they can tell, approximately, the ingredients from which it is made; and that it is not distilled from the flower of opoponax, but is a compound of several well known tinctures, or essential oils, combined with pure spirits. Others state that there is a resinous gum in the market, of a disagreeable odor, but no flowers of opoponax. The plaintiffs, and their chemists, swear that the said opoponax is used in the preparation, distillation and manufacture of the said perfume, and that the perfume is made from it. Several perfumers also made affidavit that it is not possible for any perfumer to tell the ingredients of the plaintiffs' perfume. Under this contradictory state of the evidence, the principle sought by the counsel

for the defendant to be here applied is not available to him."

Where the evidence showed that the wrappers in which a medicine was placed on the market contained an erroneous statement that the compound was purely vegetable, if the same wrapper truthfully gave the formula in accordance with which it was made, such is not sufficient evidence of fraud as to defeat the right of the manufacturer to relief from unfair competition. *Centaur Co. v. Robinson*, 91 Fed. 889. See also *California Fig Syrup Co. v. Clinton E. Worden & Co.*, 86 Fed. 212, 95 Fed. 132.

87. In *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. 205, the trade-mark alleged to have been infringed asserted "that the Moxie nerve food contains not a drop of medicine, poison, stimulant or alcohol, but is a simple sugar cane like plant," etc. This suit was brought to restrain defendants from marketing a similar preparation put up in similar form to that of complainants. Defendants claimed that this suit should be dissolved on the ground that the evidence showed that complainants' preparation actually contained alcohol. The court said: "The claim of defendants that the Moxie nerve food contains alcohol I think is wholly unfounded, although it is true that one witness claims to have found a little more than a teaspoonful in one quart bottle, while others found very much less. It is admitted that alcohol is used to cut the flavoring oils, but it is proven that such alcohol passes off to a great extent, if not entirely, in the evaporation incident to its manufacture. It is also proved by a preponderance of testimony that the amount used in the flavoring is too little to be perceptible, while others claim—that is to say, some of the chemists state—that while chemically speaking it does contain alcohol,

(B.) AS TO PLACE OF MANUFACTURE. — So also where it appears from the evidence that complainant in an injunction suit has by the form of a trade-mark deceived the purchasing public as to the place of manufacture of his product, he will be denied an injunction restraining a defendant from an infringement even though defendant is guilty of the infringement complained of.⁸⁸

(C.) AS TO FACT OF REGISTRATION. — Where, in an action brought to restrain an infringement, it appears that the plaintiffs have themselves been guilty of attempting to mislead the public by a statement upon their labels that their goods are protected by a trade-mark secured by registration, which statement is shown to be false, the plaintiffs have been guilty of fraud to the extent that they will be refused an injunction.⁸⁹

(D.) AS TO PROTECTION UNDER PATENT OR COPYRIGHT LAWS. — In actions brought to enjoin the use of a trade-mark, if it appears from the evidence that a false statement has been made by plaintiff as part of the trade-mark that the article to which it is applied is, at the time of sale, protected by a patent or copyright, such evidence will constitute a defense to the action.⁹⁰ *But not so* where the word

yet practically speaking it does not. I do not think that the charge of defendant that it contains alcohol is well founded. It is true that alcohol exists in many substances. I have heard it claimed that it existed in rainwater; and yet, even if it does, I suppose it would be practically true that rainwater contains no alcohol, there being no trace of it that is brought or capable of being brought to the senses by its use."

In *Cahn v. Gottschalk*, 14 Daly 542, 2 N. Y. Supp. 13, the referee's opinion, approved by the court, continuing from the extract as quoted in note 87, *ante*, was as follows: "I think, therefore, that the defendant is shown to have infringed the plaintiffs' trade-mark, and they are entitled to an injunction, unless they have come into court with unclean hands and guilty consciences, and must therefore be denied equitable relief. 'The cases where such relief has been refused are summarized by Judge Earl in *Hennessy v. Wheeler*, 69 N. Y. 271, 275, as "cases where the trade-mark is used to deceive or impose upon the public, or where it is used upon a spurious, worthless, or deleterious compound, or where the business in which it is used is carried on systematically in a dishonest and fraudulent way." It is con-

tended that the words "Pure Old Rye Whiskey," forming part of the registered label, contained a false statement, because the whiskey is, as one of the plaintiffs testified, "mixed" or "blended" in Baltimore. The proof fails to show that this mixing or blending is anything more than a combination of different whiskeys, and no reason is shown for believing that the result of such a combination may not truthfully be called pure.'" Injunction granted.

88. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523, 11 Eng. Reprint 1435, 35 L. J. Ch. 53, 11 Jur. (N. S.) 513, 12 L. T. 742; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

89. *Brown v. Doscher*, 66 Hun 626, 20 N. Y. Supp. 900, 49 N. Y. St. 196.

90. *Preservaline Mfg. Co. v. Heller Chemical Co.*, 118 Fed. 103; *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394, 46 Atl. 199.

In *Cheavin v. Walker*, 5 Ch. Div. (Eng.) 850, the court said: "It is a falsehood to represent that the patent is still subsisting. Above the inscription there is a medallion, consisting of the royal arms, surrounded by a circular band or garter, containing the words 'By Her Majesty's Royal Letters Patent.'

"Pat." is used in connection with a date in such a way as to naturally indicate the date of registry of the trade-mark and not the fact of protection under a patent.⁹¹ And where the evidence shows that words indicating the protection of a patent are used in such a way as to indicate that the machinery by which the trade-marked article was made was patented and not the article itself, no false statement has been made.⁹² Evidence showing that a party used in connection with his trade-mark the word "Copyrighted" is not sufficient evidence of fraud to defeat the owner's right to the use of such trade-mark, since the act of Congress in regard to copyrights does not apply to names or trade-marks,⁹³ and even though it did, it is held that the rule should be the same.⁹⁴

(4.) **Prior Use.** — Where a suit is brought for the infringement of a trade-mark, and the defendant as a defense sets up a prior right, by use, to the trade-mark in question, it is incumbent upon him to establish such prior use at least satisfactorily.⁹⁵

That appears to me to be a representation that the patent is an existing patent, and on that ground alone I think that plaintiff ought not to succeed in the action." See also *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, 11 Eng. Reprint 1435, 35 L. J. Ch. 53, 11 Jur. (N. S.) 513, 12 L. T. 742; and *New York Card Co. v. Union Card Co.*, 39 Hun (N. Y.) 611.

91. "As part of the plaintiffs' registered label there appeared, in very small letters, the words, 'Pat. Aug. 13th, 1872.' It is claimed that this must be taken as a false affirmation that the whiskey was patented. I do not think it amounts to this. As used upon the barrels of whiskey, it is almost impossible that it could suggest to any one this idea. The words were not used in such a way as naturally to indicate the existing or present protection to the whiskey of a patent, as in *Card Co. v. Card Co.*, 39 Hun 611. The words seem to indicate the date of registry of the trade-mark, and not to have been used for the purpose of deceiving the public; and this explanation, which is consistent with truth and honesty, is the most reasonable, and the court will not, for the mistaken use of these words upon a label, refuse the plaintiff's relief." *Cahn v. Gottschalk*, 14 Daly 542, 2 N. Y. Supp. 13.

92. *Cochrane v. McNish*, App. Cas. (1896) 225, 74 L. T. 109, 65 L. J. C. P. 20.

93. *Wormser v. Shayne*, 111 Ill. App. 556.

For the act showing the application of the copyright law, see 3 U. S. Comp. Stat. 1901, p. 3406, and § 3 of an act passed in 1874, amendatory of the copyright law.

94. *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. 556.

95. In *Kathreiner's Malzkaffee Fabriken v. Pastor Kneipp Med. Co.*, 82 Fed. 321, 27 C. C. A. 351, a party in America was alleged to have infringed upon a trade-mark unquestionably belonging to another in foreign countries. The defendant claimed to have anticipated the plaintiff in the use of the mark in the market. It was held that the burden of proof was upon such alleged infringer to show with accuracy and detail the times of its earlier sales. In the absence of such evidence the court held that it would not be over-critical in respect to the date of the first occupancy of the American market by the proprietor of the genuine article. See also *Schuster Co. v. Muller*, 28 App. D. C. 409.

Where the evidence produced upon the question is conflicting, evasive, and almost valueless, resting largely upon the unreliable memories of interested witnesses, who contradict themselves at every turn, the defense is not made out. *Raymond v. Royal Bkg. Powder Co.*, 85 Fed. 231, 29 C. C. A. 245, affirming *s. c.* 70 Fed. 376.

(5.) **Abandonment.**—Evidence showing an abandonment of the right to the use of a trade-mark is admissible for the purpose of barring an action for its infringement.⁹⁶ An abandonment may be implied from the attending circumstances.⁹⁷ To establish a defense of abandonment, it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon.⁹⁸

b. *What Is Not a Defense.*—(1.) **Immediate Purchasers Not Deceived.**—It is no defense to a suit for an injunction restraining the use of a trade-mark that the evidence shows that the immediate purchasers were not deceived, it appearing that they were not the consumers. Deception, referred to in trade-mark cases, relates to

See also *Schuster Co. v. Muller*, 28 App. D. C. 409.

96. *Ford v. Foster*, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. N. S. 219, 20 W. R. 311, 818; *Actiengesellschaft v. Amberg*, 109 Fed. 151; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 93 O. G. 940, *reversing* decree, 91 Fed. 536, 33 C. C. A. 291; *Saxlehner Co. v. Nielsen*, 179 U. S. 43, 93 O. G. 948, *reversing* decree, 91 Fed. 1004, 34 C. C. A. 690.

Where the evidence shows that one has recognized and permitted the limited use by another of his trade-mark, which use does not appear to have misled anybody, such evidence is not sufficient to defeat the owner's right to prevent others from using it. *Tetlow v. Tappan*, 85 Fed. 774.

97. *Taylor v. Carpenter*, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785; *Old Times Distillery Co. v. Casey*, 20 Ky. L. Rep. 994, 47 S. W. 610; *Carlsbad v. Schultz*, 78 Fed. 469; *Filley v. Child*, 16 Blatchf. 376, 9 Fed. Cas. No. 4,787; *Wormser v. Levy*, 12 N. Y. Supp. 558, 35 N. Y. St. 78; *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, 57 Fed. 938, 6 C. C. A. 647, 17 U. S. App. 145; *Tygert-Allen Fertilizer Co. v. J. E. Tygert Co.*, 191 Pa. St. 336, 43 Atl. 224.

In *Coats v. Merrick Thread Co.*, 149 U. S. 562, the evidence showed that a thread manufacturer had submitted to an alleged imitation of his spool heads without protest for twelve years. It was held that his right to relief from an infringement therefrom was thereby waived.

98. *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 93 O. G. 940, *reversing* decree, 91 Fed. 536, 33

C. C. A. 291; *Saxlehner v. Nielsen*, 179 U. S. 43, 93 O. G. 948, *reversing* decree, 91 Fed. 1004, 34 C. C. A. 690. In this it was held that the laches of an owner of a trade-mark in the word "Hunyadi" was sufficient to defeat his rights therein where it appeared from the evidence that through a period of twenty years of inaction he had permitted the use of the word by infringers in this country who had, under licenses from the Hungarian government, been using it until the name had become generic as indicative of the whole class of medicinal waters for which it was used.

In *Actiengesellschaft v. Amberg*, 109 Fed. 151, 48 C. C. A. 264, which was a suit to enjoin the use of a certain box and label, the court said: "This defense—the only substantial one in the present case—was not sustained in accordance with this rule. No acts were shown which can fairly be said to indicate even a practical abandonment, and that the evidence as a whole would not warrant the inference of an actual intent to abandon is, in our opinion, entirely clear. The appellant has not, it is true, proceeded against all persons who have violated the right it now seeks to maintain; but it did obtain a final judgment against one of them in 1883, and about five or six years before this suit was brought it threatened to proceed against others, who thereupon desisted from doing the acts complained of. These facts are not disputed, and their necessary effect is, we think, to repel the assumption of an intent to abandon."

the ultimate purchaser and if he was deceived it is immaterial as to whether or not a mere "middleman" was.⁹⁹

(2.) **Public's Benefit.**—Although it appears from the evidence that defendant's goods are of equal or superior quality to those of plaintiff, this will not constitute a defense to an application for an injunction. It is held that such evidence will rather strengthen plaintiff's case since defendant's superior article will be the more apt to be used by plaintiff's customers, thereby injuring him the more. The question of advantage or disadvantage to the public is not taken into consideration in injunction suits.¹

(3.) **Ignorance.**—The fact that a party was ignorant of the infringing nature of a trade-mark used is not a defense to an application for an injunction restraining its use. The owner of a trade-mark is entitled to protection against ignorant as well as malicious infringers,² and so, little weight can be given by a court to mere denials by a defendant of any intent to infringe. The court will deduce his intent from his acts.³

(4.) **Unlikelihood of Deception.**—No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied, on labels, capsules, or otherwise, by trade names, designations, descriptions or other accessories, not forming part of it, as to render

99. *Southern White Lead Co. v. Cary*, 25 Fed. 125; *Southern White Lead Co. v. Coit*, 39 Fed. 492.

1. *Pillsbury v. Pillsbury-Washburn F. M. Co.*, 64 Fed. 841, 12 C. C. A. 432; *Cleveland Stone Co. v. Wallace*, 52 Fed. 431; *Taylor v. Carpenter*, 11 Paige (N. Y.) 292; *Shaver v. Shaver*, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Partridge v. Menck*, 2 Sandf. Ch. (N. Y.) 622; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129.

City of Carlsbad v. Thackery & Co., 57 Fed. 18. Complainant, a city in Bohemia, had manufactured salts by evaporating the water of certain springs of that city and placed them on the market under the name of "Carlsbad Sprudel." Defendant, a corporation doing business in the city of Chicago, by combining in certain proportions certain chemical elements, manufactured a more or less perfect imitation of complainant's salts and sold them under the name of "Carlsbad Sprudel (artificial)." It appeared from the evidence that

these artificial salts manufactured by defendant were in fact better than those made by complainant owing to the fact that the natural spring waters vary from time to time in the proportions of mineral constituents. It was held that this could not avail defendant as a defense, since complainant had the right to the benefit of the good will and trade it had established for its own product, and if defendant could produce a better article it should be required to do so on the credit of its own name, and not on the good name of the complainant.

2. *Moet v. Couston*, 33 Beav. (Eng.) 578; *Millington v. Fox*, 3 Myl. & C. (Eng.) 338; *Edelsten v. Edelsten*, 1 De Gex, J. & S. (Eng.) 185; *Cuervo v. Landauer*, 63 Fed. 1003; *Low v. Fels*, 35 Fed. 361; *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 93 O. G. 947.

3. *Walter Baker & Co. v. Baker*, 77 Fed. 181, appeal dismissed, 83 Fed. 3, 27 C. C. A. 396, demurrer to supplemental bill overruled, 89 Fed. 673.

it unlikely that the public has been deceived. Such a showing, while it may affect the nature or measure of the relief to be granted, cannot defeat a suit for infringement.⁴

(5.) **No Sales.** — It is no defense to a suit brought to restrain the infringement of a trade-mark that it appears in evidence that no sales had been made of the article bearing the trade-mark, the use of which is sought to be enjoined, where it appears that sales would have been made but for complainant's suit.⁵

(6.) **Promises To Desist.** — Where it appears from the evidence that the defendant has promised not to repeat the illegal appropriation of a trade-mark, such evidence will not constitute a defense to an application for an injunction.⁶

(7.) **Actual Discontinuance.** — Where it appears that a defendant has actually ceased using the trade-mark, the use of which is sought to be enjoined, this will not relieve him of the liability of an injunction. But the contrary has been held⁷ in cases where the evidence indicated that the defendant acted in good faith.⁸

(8.) **Fictitious Name.** — Although a fraudulent and deceptive trade-mark is not to be protected by injunction, yet the fact that a trade-mark bears a fictitious name as the name of the manufacturer of the article does not affect the owner's right to protection, where it is shown that it is not used with any fraudulent intent and does not in fact deceive the public.⁹

4. *Bass, Ratcliff & Gretton v. Christian Feigenspan*, 96 Fed. 206.

5. *Cuervo v. Landauer*, 63 Fed. 1003.

6. *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599.

7. *Frese v. Bachof*, 13 Blatchf. 234, 9 Fed. Cas. No. 5,109; injunction made perpetual, 14 Blatchf. 432, 9 Fed. Cas. No. 5,110, 13 O. G. 635; *Hutchinson v. Blumberg*, 51 Fed. 829; *Burnett v. Hahn*, 88 Fed. 694; *Ricker & Sons v. Leigh*, 74 App. Div. 138, 77 N. Y. Supp. 540; *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599.

"A preliminary injunction against the defendants having been granted in this case, the defendants subsequently changed the style of their boxes, substituting blue boxes for the enjoined black ones. By this change, however, the defendants did not escape infringement of the plaintiffs' rights. *Potter Drug & Chemical Corp. v. Miller*, 75 Fed. 656.

8. *Dodge Mfg. Co. v. Sewall & Day Cordage Co.*, 142 Fed. 288.

9. In *Dale v. Smithson*, 12 Abb.

Pr. (N. Y.) 237, which was an action to restrain the use of the plaintiff's trade name, "*Thomas Nelson & Co.*," the court said: "It is, however, insisted that the adoption of the fictitious name of *Thomas Nelson & Co.*, and printing it upon the label in such a manner as to induce the public to believe that the thread is manufactured by them is such a fraud and deception as will not be countenanced by a court of equity protecting the party who contrived it. The answer to this view is, 1st. The use of the name was not with any fraudulent intent, but, as is stated by Mr. Dale, it arose from the fact that his Christian names were *Thomas Nelson*; and it is quite obvious that it was used for purposes of identification, and with about the same object as if, instead, he had adopted some familiar emblem, figure or picture by which the thread might be designated, and become generally known in the market. Second. The public is not in fact deceived, as it is shown that no such firm exists as *Thomas Nelson & Co.*, who are known to be manufacturers of

(9.) **Fraud as to Immaterial Matters.**—Where a party has a lawful property in a trade-mark or trade name, his right to protection against infringement is not defeated by evidence showing that he has sought to deceive the public by false representations where such false representations were with respect to immaterial matters,¹⁰ especially is this true where the trade-mark or trade name itself does not contain any misrepresentations.¹¹ And even though the trade-mark does contain a misstatement of fact, if it is substantially true relief will be granted against its infringement.¹²

(10.) **Laches.**—It is no defense to a suit for an injunction for infringing a trade-mark that defendant shows a mere delay on the

thread; and the label does not pretend to hold out that any particular manner of manufacturing the thread is followed by which this pretended firm are enabled to furnish a better quality than any one else. Apart from the use of this fictitious firm name, it is not claimed that the label is false in any other respect; and under the circumstances shown in this case, I think it would be gross injustice to deny the plaintiffs protection in the use of a trade-mark to which their title has been so clearly established."

10. *Tarrant & Co. v. Johann Hoff*, 76 Fed. 959, 22 C. C. A. 644.

11. In *Wormser v. Shayne*, 111 Ill. App. 556, the evidence showed that complainant used a label in connection with his hats, around which in circles appeared the names of several cities, in the center of which were the words "The Model;" below these words the word "trade-mark," and below these words, "10 stores." It was contended by defendant that the words "10 stores" were misrepresentations precluding relief. The court said: "We do not regard the circumstance that the complainant claimed by his labels, etc., that he had ten stores, when he had only seven, as precluding relief, nor do we so regard any of the other circumstances relied on by appellee's counsel. Our conclusion is that the complainant, on proof of the facts averred in his bill, will be entitled to relief, by injunction restraining the defendant from using the words, 'The Medal,' to designate men's one dollar hats, and that the affirmative defense of the defendant is insufficient to preclude such relief."

12. In *Gluckman v. Strauch*, 99

App. Div. 361, 91 N. Y. Supp. 223, the court said: "The court also finds as matter of fact that the defendants have manufactured and sold cigarette papers put up in imitation of the plaintiffs with the actual intention to deceive, and that they have actually deceived the public, thereby inducing persons to purchase the defendants' cigarette paper as the product of the plaintiffs. Here, therefore, is a clear and precise finding of gross fraud on the part of the defendants. But it is urged that the plaintiffs are not entitled to relief in this action because of alleged false representations as to a material fact printed upon the label which they seek to have protected. On that label the following words appear: 'Gluckman & Son, Sole Manufacturers, Paris.' In connection with that statement or representation, the trial court found that the cigarette papers of the plaintiffs were manufactured in Paris specially for the plaintiffs, on their special order, and that no other person or firm can procure the said paper, and that each separate sheet contains a watermark as follows: *Gluckman & Son, Pour la gloire, papier Français.*" . . . It has been determined by the court below that the plaintiffs were not entitled to protection or their trade-mark because they had made a false representation, and that it consisted only in the assertion that they personally manufactured their cigarette papers. In view of all the findings, it is apparent that that is an immaterial consideration. In the first place, the papers are manufactured in Paris, so that as to their place of origin the statement was true. In the second place, each sheet bears

part of plaintiff in bringing suit.¹³ Especially is this true where the evidence shows fraud on the part of defendant.¹⁴ But while evidence showing a delay of long standing on the part of the injured party is no bar to an injunction suit, yet it precludes the party delaying from any right to an account for past profits.¹⁵ But a preliminary injunction will not be granted to restrain unfair competition, where the evidence is conflicting and where it appears that complainant had known of the purposes and practices of the defendant for some time before commencing suit, during which time they were active competitors in business, since for this reason it is fair to as-

upon it the watermark of the plaintiffs, and each sheet is made exclusively for the plaintiffs, and no other person than the plaintiffs can by any possibility be furnished with those papers. Therefore they are the absolute proprietors. Now, they merely have said 'Sole Manufacturers.' If the statement had been, 'Manufactured solely and exclusively for Gluckman & Son,' it would have been more exact. But they are the absolute owners and possessors of all that is manufactured, and have the sole proprietorship of the manufactured article, made at the place designated on the label; and it is straining the equitable rule with respect to misrepresentation, to the vanishing point of equity, to say that there is fraud and deception in the use of the words, which the court below has found fatal to the maintenance of the plaintiffs' right."

13. *Hoyt v. Hoyt*, 2 Pa. Co. Ct. 152, bill dismissed, 143 Pa. St. 623, 22 Atl. 755; *Consolidated Fruit Jar Co. v. Thomas*, 2 N. J. L. J. 272, 6 Fed. Cas. No. 3,131; *Bissell Chilled Plow Wks. v. T. M. Bissell Plow Co.*, 121 Fed. 357; *Rahtjen's American Comp. Co. v. Holzapfel's Comp. Co.*, 101 Fed. 257, 41 C. C. A. 329.

In *Fullwood v. Fullwood*, L. R. 9 Ch. Div. (Eng.) 176, where the single question involved was the effect of delay in prosecuting for an infringement of a trade-mark, and where the defendant set up as a defense to an application for an injunction, that the plaintiff had known all the material facts stated in the pleadings for a period of at least two or three years before the action was brought, the court held that this was no defense, and that, where an injunction is sought in aid of a legal

right, mere lapse of time was no bar to granting it. The injunction is treated as always a matter of course, if it appears that the legal rights exist.

Effect of Statutes of Limitations.

Mere delay to seek relief for the invasion of a trade-mark, with knowledge of the wrong, though competent evidence for the purpose of disproving the existence of the right claimed, does not constitute a bar to an action to restrain the infringement, unless extended to the period prescribed in the statute of limitations. *Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. C. 150, 5 S. E. 907; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. (Eng.) 176, 47 L. J. Ch. N. S. 459, 38 L. T. N. S. 380, 26 W. R. 435.

In *Kentucky* an action to enjoin the illegal appropriation and use of a trade-mark is within the statute of limitations which reads as follows: "An action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued." *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21.

In *Louisiana* the ten years' prescription of the statute is not, it is held, applicable to a suit to enjoin the infringement of a trade-mark and labels. *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111.

14. *Sanders v. Jacobs*, 20 Mo. App. 96.

15. *Menendez v. Holt*, 128 U. S. 514; *McLean v. Fleming*, 96 U. S. 245; *Bissell Chilled Plow Wks. v. T. M. Bissell Plow Co.*, 121 Fed. 357; *Rahtjen's American Comp. Co. v. Holzapfel's Comp. Co.*, 101 Fed. 257, 41 C. C. A. 329.

sume that the complainant will not suffer material injury by being required to wait until the controversy is heard upon its merits.¹⁶

2. Where Owners Have or Use Same Name. — A. IN GENERAL. The right to use one's own name in his business is established by an unbroken line of authority; and while the effect of the use in good faith may affect the trade of others, it results in an injury without a remedy.¹⁷ But where a suit is brought against a party using his own name in connection with his business, but whose name is the same as that of complainant's, if the complainant's business is a well established one less evidence is required of him to show an infringement on the part of defendant than would be the case if the defendant had used upon his goods a name other than his own.¹⁸

B. GOODS OF ONE REPRESENTED AS THOSE OF OTHER. — But where two persons of the same name engage in the manufacture of the same article, each one calling it by his own name, if the evidence shows that the later manufacturer represented his product as that of the first manufacturer, the later manufacturer will be enjoined from so doing.¹⁹ And where a party used a certain trade name in his business, another using the same name, although his own, will be restrained therefrom, it appearing from the evidence that it was the purpose of defendant to obtain the benefit of the

16. *C. O. Burns Co. v. W. F. Burns Co.*, 118 Fed. 944; *Edward & John Burke v. Bishop*, 144 Fed. 838, 75 C. C. A. 666.

17. *McLean v. Fleming*, 96 U. S. 245; *Meneely v. Meneely*, 62 N. Y. 427; *Gilman v. Hunnewell*, 122 Mass. 139; *Rock Springs Distillery Co. v. Monarch*, 15 Ky. L. Rep. 866, 22 S. W. 1028.

18. *Walter Baker & Co. v. Baker*, 77 Fed. 181, appeal dismissed 83 Fed. 3, 27 C. C. A. 396, demurrer to supplemental bill overruled, 89 Fed. 673; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. 643; *Stuart v. F. G. Stewart Co.*, 91 Fed. 243, 33 C. C. A. 480, reversing *s. c.* 85 Fed. 778.

19. *Burgess v. Burgess*, 3 De Gex, M. & G. (Eng.) 896; *s. c.* 17 Eng. L. & Eq. 257; *Hoyt v. Hoyt*, 2 Pa. Co. Ct. 152; bill dismissed, 143 Pa. St. 623, 22 Atl. 755; *Chickering v. Chickering & Sons*, 120 Fed. 69, 56 C. C. A. 475; *Arnheim v. Arnheim*, 28 Misc. 399, 59 N. Y. Supp. 948.

Holloway v. Holloway, 13 Beav. (Eng.) 209. Plaintiff had for some years made and sold pills and ointments under the name of "Holloway's pills and ointment." The

wrappers and pamphlets contained extravagant representations as to the universal curative effects of those medicines. The defendant commenced selling pills and ointment under a similar description of "H. Holloway's pills and ointment." The pill-boxes and pots were similar in form to, and the labels and wrappers were copied from, those used by plaintiff. The plaintiff brought this bill for an injunction. The evidence showed that defendant had employed a printer to make pamphlets to be used as direction papers around his pills and ointment and that he had furnished the printer with direction papers used by plaintiff as models, expressing his wish that his direction papers should be as nearly similar to those of plaintiff's as possible, without being actual copies, in order that they might pass with the public as the identical pamphlets or direction books used by plaintiff. Held, that an injunction should be granted to prevent the continuance of the fraud. See also *Rock Springs Distillery Co. v. Monarch*, 15 Ky. L. Rep. 866, 22 S. W. 1028.

advertising and standing of complainant's business, and it further appearing that the two fields of patronage conflicted.²⁰

Deception Improbable. — And where two manufacturers are of the same name and each calls his product by that name, if the evidence shows that the later manufacturer so used the name that there could be no likelihood of deception on the part of ultimate purchasers an injunction will not be granted,²¹ although the later manufacturer undoubtedly knew that his trade name could and would be used by dishonest dealers to deceive their customers.²²

C. NOT NECESSARY TO SHOW FRAUDULENT INTENT. — An injunction may be granted in suits of the above character although the evidence does not show a fraudulent intent on the part of defendant to pirate the good will of the plaintiff's business in cases where the

20. *Arnheim v. Arnheim*, 28 Misc. 399, 59 N. Y. Supp. 948.

Ball v. Best, 135 Fed. 434. This was a bill to restrain the defendant from using a part of complainant's trade name. Complainant was the owner of a business in New York. His trade name was "Best & Co. Liliputian Bazaar." Defendant, the son of a former proprietor of the New York business had established a similar business in Chicago; using the name "A. S. Best & Co." On his sign it appeared that he had placed the words, "Liliputian Outfitters" and "Formerly with Best & Co. of New York." As to whether defendant had infringed complainant's trade name, the court said: "Formerly it would have been assumed, in the absence of most positive proof, that a party might carry on his own business under his own name in Chicago, notwithstanding the fact that parties had established business under the same name in New York, since there could be no presumption that the business interests of the two cities could be so intimate as to extend the good-will of such a business as that before the court all the way from New York to Chicago. It is not a light thing to restrain a man from the full benefit of his name, nor would a court of equity consider such a course in any case even now, in the absence of fraud or actual damage. It is apparent in this case that defendant shaped his business and presented the same to the public with

the intention of getting the benefit of complainant's standing and business prestige. The only basis upon which a contrary conclusion could be arrived at would be positive evidence to the effect that the two fields of patronage did not conflict. But it is in evidence that complainant is a manufacturer and dealer, and that he does a large mail-order business, as does also defendant. It hardly needs saying that the proficiency of the mails at this date is such that every nook and corner of the nation as well as of Manitoba is as accessible as were places 50 miles away from New York a few years ago. It cannot be otherwise than that the advertising and canvassing of these two rival concerns pass and repass each other innumerable times in their journeys to the centers of trade as well as to the homes of the people — mute contestants for the favor of supplying the wants of each customer. I am clear that under the facts in this case the court must hold that the use of the name of Best & Co. by defendant, even with its present prefix, especially in connection with the word 'Liliputian,' is a fraud upon complainant's business rights."

21. *Duryea v. National Starch Mfg. Co.*, 79 Fed. 651, 25 C. C. A. 139; *Rogers v. Wm. Rogers Mfg. Co.*, 70 Fed. 1019, 17 C. C. A. 575; *International Silver Co. v. Rogers* (N. J. Eq.), 63 Atl. 977.

22. *Rogers v. Wm. Rogers Mfg. Co.*, 70 Fed. 1019, 17 C. C. A. 575.

name is used under such circumstances that it will in all probability result in deceiving and misleading the purchasing public.²³

3. Names of Literary Publications Infringed. — **A. WHAT MUST BE SHOWN.** — *a. Similitude.* — In actions brought to restrain the use of a name or device on a literary publication, it is necessary that the evidence should show that the name used by defendant is so similar to that used by plaintiff as to mislead persons of ordinary intelligence and cause them to purchase defendant's publication for that of plaintiff.²⁴

b. Intent To Deceive. — The publisher of a literary publication has a property right in its name which will be protected by a court of equity against infringement by the use by another of the same name either alone or in connection with other words as the name of a similar publication; but it is essential to the right to obtain an injunction in such cases that it should appear from the evidence that the adoption of the name by defendant was with an intent to deceive, or that its use by him was calculated to deceive persons of ordinary intelligence and care and cause injury to complainant thereby.²⁵ But such proof is held unnecessary, although admissible,

²³. *Tarrant & Co. v. Hoff*, 76 Fed. 959, 22 C. C. A. 644, 33 L. R. A. 250; *Jameson v. Dublin Distillers' Co.*, (1900) 1 L. R. Ir. 43.

²⁴. *Bradbury v. Beeton*, 39 L. J. Ch. N. S. (Eng.) 57, 21 L. T. 323, 18 W. R. 33.

²⁵. In *Harper & Bros. v. Lare*, 103 Fed. 203, 43 C. C. A. 182, *affirming* 93 Fed. 989, the court said: "The bill charges unfair competition in trade and violation of certain alleged copyrights. The appellant has on the market for sale a book entitled on its outside cover 'Farthest North, Nansen,' which consists of an English translation of an account of the recent Norwegian polar expedition conducted by Dr. Fridtjof Nansen, composed by him in the Norwegian language, and of the report of Otto Sverdrup relating to the drifting of the steamer *Fram*, composed by the latter in the Norwegian and translated into the English language. The appellees publish and sell a book entitled on its outside cover 'The "Fram" Expedition. Nansen in the Frozen World. Including earlier Arctic Explorations,' containing part of the same or of substantially the same literary matter found in the appellant's book, also portraits and pictorial illustrations similar to those made use of by the

appellant, and accounts of sundry arctic expeditions prior to Dr. Nansen's polar voyage. The book of the appellees so differs from that of the appellant in cover, outside title and title page that no one of ordinary intelligence seeing both of them could confound the two. . . If it were true that the appellees had practiced fraud or deception in palming off their book as the book of the appellant an injunction would undoubtedly lie against such unfair and fraudulent conduct, but it would by no means follow that the injunction should be so broad as wholly to suppress the publication and sale of a book which the appellees would have a right to put on the market by fair and proper means. On the evidence, however, we are not satisfied that the appellees have practiced fraud or deception in the sale of their book. Certainly the prospectus they use in selling their book on subscription and which is exhibited by their canvassing agents is not calculated, in the absence of fraudulent representations, to mislead any one into the belief that he is subscribing for or purchasing the appellant's book. We think that the charge of unfair competition by the appellees has not been sustained."

where infringement is clearly established of a valid duly registered trade-mark.²⁶

c. *Purchasing Public Deceived*. — It is necessary that the evidence should show that the purchasing public have been deceived, or are in danger of being deceived, before a court of equity will grant an injunction restraining a party from infringing the name of another's publication.²⁷ And where it sufficiently appears from the evidence that a party is attempting to simulate the name of a literary work of another for the purpose of deceiving purchasers, and that thereby the public are liable to be deceived, relief will be granted.²⁸

d. *Plaintiff's Injury*. — Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, it is necessary that the plaintiff should show not only that the assumption of the name by the defendant is calculated to deceive the public, but also that it is probable that plaintiff will be injured by such deception.²⁹

B. DEFENSES. — Evidence to the effect that defendant did not intend to infringe the name of complainant's publication is no defense to an application to restrain the issuing or marketing of such publication.³⁰

26. In *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 594, reversing s. c. 119 Fed. 221, which was an injunction suit, it appeared that complainant and its predecessor had for 15 years published a monthly periodical called "Comfort." The defendant published a monthly paper circulating, in part at least, in the same territory as the complainant's paper and covering a somewhat similar field. He called his paper "Home Comfort." The court said: "This is enough to justify the relief prayed for. It is of no moment that the proof fails to show deception, confusion or injury to any marked extent. Such proof is unnecessary where infringement of a valid trade-mark is clearly established. The defendant is using the complainant's property and, as he is acting without color of right, the complainant is entitled to have that use discontinued. If the defendant's contention be correct that actual damage must be proved before an injunction can issue, it follows that if to-morrow a new infringer should commence the publication of a paper with a Chinese copy of the complainant's trade name on its title page, the court would be powerless to grant relief until the

infringement had been carried on long enough to cause actual, provable damage. Equity is not so helpless and impotent. It is the policy of the law to arrest the pirate before he actually makes off with the plunder."

27. *Osgood v. Allen*, 1 Holmes (U. S.) 185; *Commercial Advertiser Assn. v. Haynes*, 26 App. Div. 279, 49 N. Y. Supp. 938.

28. In *Estes v. Leslie*, 29 Fed. 91, the name "Chatter-book" was printed upon the cover of defendant's books. This fact was held to be sufficient evidence of an imitation of the name "Chatter-box," which by association, when used upon books of a juvenile character, points "distinctively" to the "origin or ownership" of the books to which it was applied to warrant an injunction restraining the use by defendant of the name "Chatter-book" upon the books which were represented by the exhibits in the case, the same being books of a juvenile character, of the general appearance, style, and manner of cover of complainant's books.

29. *Borthwick v. Evening Post*, L. R. 37 Ch. Div. (Eng.) 449.

30. *Clement v. Maddick*, 1 Giff. (Eng.) 98, 5 Jur. (N. S.) 592.

VI. CRIMINAL AND PENAL ACTIONS.

1. Nature and Sufficiency of Evidence. — A. OWNERSHIP. — In order to convict under a statute prohibiting the counterfeiting of a trade-mark, the prosecution must show an exclusive property right in the person alleged in the indictment or information to be the owner and his capability of appropriating the alleged trade-mark as such,³¹ and that if the trade-mark was ever valid it has not been abandoned by acquiescence in its use by others.³²

B. IDENTITY OF TRADE-MARK COUNTERFEITED. — In a prosecution for counterfeiting a trade-mark, evidence is admissible to establish the identity of the trade-mark counterfeited.³³

31. *People v. Molins*, 10 N. Y. Supp. 130.

In *State v. Berlinsheimer*, 62 Mo. App. 168, the court said: "The information in this case charges the defendant with unlawfully and knowingly selling cigars in boxes, bearing a counterfeit or imitation of the label or trade-mark of the Cigar Makers' International Union of America, an association of workingmen; and that the label so used by defendant was intended to represent the cigars contained in the boxes sold by him as those of said Cigar Makers' International Union of America. . . . It is one of the indispensable prerequisites to a valid trade-mark that it should point out the true origin or ownership of a vendible commodity to which it is affixed. That the label in the present case does not have this property, appears from the conceded facts, since these show that the 'association or union of workingmen' claiming it does not own or manufacture any goods to which it is attached. It is true the individual members of that order are engaged, either for themselves or others, in the manufacture of such goods, but this does not meet the requirement of the law that the owner of the trade-mark must affix it to his goods as a designation. As the 'association or union of workingmen' adopted the said label as a trade-mark without owning or dealing in any goods to which it must be attached, no title to it as a trade-mark accrued. *Schneider v. Williams*, 14 Atl. Rep. 812; *Cigar Makers' Protective Union v. Conhaim*, 41 N. W. Rep. 943; *Tobacco Company v. Tobacco Company*, *supra*. For this rea-

son the conviction of defendant for counterfeiting a recorded trade-mark cannot be sustained."

Contra. — But in *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200, the court in construing this same statute held that it was not necessary, to warrant a conviction under the statute, to show a proprietary right in the person alleged to be the owner in the information. The court said: "While all statutes pertaining to crimes and their punishments should be strictly construed, and nothing left to intendment, they should not be so construed as to thwart the evident will and intention of those who enacted them, when that intention is plainly and fairly deducible from the law itself. When that is done in this case we can but conclude that the purpose and intent of the legislature was to amend the law so as to protect and that it does protect labels as trade-marks when adopted by associations or unions of workingmen to make known and distinguish goods, wares, and merchandise, manufactured or prepared by them, from those manufactured or prepared by other persons, unions or associations. . . . Our conclusion is that the act not only embraces technical trade-marks but that it includes any label, symbol or advertisement which may be, or has been adopted by any 'association or union of workingmen' as a trade-mark, in accordance with its provisions, hence our disapproval of the case last cited."

32. *People v. Molins*, 10 N. Y. Supp. 130.

33. In *People v. Krivitzky*, 168 N. Y. 182, 61 N. E. 175, affirming 70

C. VIOLATION OF STATUTE. — In criminal actions and in actions to recover for a penalty it is necessary that plaintiff should establish that the defendant himself has clearly violated the statute which gives to the plaintiff a right to a recovery,³⁴ and where such a viola-

N. Y. Supp. 173, 15 N. Y. Crim. 441, the court said: "It is argued that there was error in admitting certain testimony of the witness Pincoffs as to the use, ownership, and genuineness of the alleged trade-mark, upon the ground that it was based upon information received from other persons, and that it came within the prohibition of the rule against hearsay evidence. That the objections raised such a question is quite doubtful, but, if they did, there would be no force in the point. Pincoffs' testimony, in each of the instances referred to, was as to the facts observed by him in Cognac, France, with respect to the bottling of the brandy, the use of a uniform label upon the bottles, its identity with the label upon the same goods in the office of the agent in New York, and the difference from the label printed by the appellant. The probative force of the testimony was for the court, but it was competent for the witness to testify to any fact within his knowledge or observation which was relevant to establish that the label produced by the prosecution as the one counterfeited by the appellant was the genuine one adopted by Mantell & Co., and usually affixed by them to their articles of merchandise as a trade-mark."

34. In *Higgins v. Dakin*, 86 Hun 461, 33 N. Y. Supp. 890, plaintiff who was a member of the Cigar Makers' International Union of America brought this action against defendant under ch. 219 of the Laws of 1893 of New York which provided as follows: "Any person who shall hereafter use, manufacture, display or keep for sale any counterfeit or colorable imitation of any label, mark, name, brand or device adopted by any union or association of workmen or women, and intended by them to designate the products of the labor of members of such union or association of workmen or women, and copies of which have been filed in the office of the secretary of state,

as provided by ch. 385 of the Laws of 1889 shall be subject to a penalty of two hundred dollars. . . ." The court said: "Under the plaintiff's complaint, the question to be determined was, did the defendant 'use, sell, and expose for sale certain counterfeit or colorable imitations of the said label or device so adopted by said union?' The evidence given by the plaintiff to establish an affirmative solution of the question was given by Thomas Marsh, who testified that on the 15th of August, at his store, he purchased of the defendant two hundred and fifty '5th Avenue' and two hundred and fifty 'Agnes Booth' cigars. . . . In the course of the witness' cross-examination he said: 'I bought the goods from Heert & Co., and from them I received these cigars. I knew at time the cigars I was purchasing; I was purchasing them made, and I purchased them as union-made. He did not deliver me any cigars. I knew at time the cigars I was purchasing; I was purchasing them of Heert & Co. Heert & Co. afterwards sent the cigars to me, and I paid Heert & Co. for the cigars. I cannot say that defendant displayed union label to me. I do not remember that defendant ever delivered package with union label on. I supposed he was acting as agent. "Agnes Booth" has no label on. To my best recollection, I asked Dakin if the "5th Ave." cigars were union-made, and he said "Yes, they would have the blue label on." I cannot say that defendant exhibited blue label to me.' . . . We think the evidence was insufficient to establish that the defendant manufactured, displayed, kept for sale, or used 'any counterfeit or colorable imitation of any label.' . . . There is no evidence to indicate that the defendant did not send forward an order for goods to be shipped to the purchaser with just the label he represented, or that he forwarded an order for goods not union-made. Inasmuch as this

tion is established, a recovery of the statutory penalty will be adjudged.³⁵

D. INTENT TO DEFRAUD. — In an indictment charging a printer with counterfeiting a trade-mark by printing copies of the labels used by the owner of the trade-mark, evidence showing that he was found in possession of counterfeits of other labels and that he put on the labels the name of the printer of the original, was held admissible as showing his guilty knowledge or fraudulent intent.³⁶

In Illinois it was held that evidence to the effect that two strangers had told defendant that he was acting so as to render himself liable under a penal trade-mark statute was not sufficient proof of a guilty knowledge on the part of defendant.³⁷

2. Burden of Proof. — **A. IN GENERAL.** — In a prosecution under a penal statute to prevent the counterfeiting of trade-marks, it is incumbent on the prosecution to show guilty knowledge on the part of the defendant, *i. e.*, an intention to defraud some person or persons, or some body corporate.³⁸ But the rule is otherwise where the statute under which the prosecution is instituted does not make

is an action to recover for a penalty, evidence should be required of the plaintiff to establish that the defendant himself has clearly violated the statute which gives a right to a recovery."

35. *People v. Hilfman*, 61 App. Div. 541, 70 N. Y. Supp. 621, 15 N. Y. Crim. 456; *People v. Krivitsky*, 168 N. Y. 182, 61 N. E. 175, *affirming* 60 App. Div. 307, 70 N. Y. Supp. 173, 15 N. Y. Crim. 441; *Bell v. Gibson*, 77 App. Div. 472, 75 N. Y. Supp. 753.

36. *People v. Molins*, 10 N. Y. Supp. 130. The charge of the court in part was as follows: "In respect to what are the real facts in this case, there is no doubt that this man, according to his own testimony, was engaged in the business of furnishing a very large amount of spurious labels; and that would have a bearing upon the question whether he had those spurious labels in his possession knowing that they were spurious, with a fraudulent intent. It is just like the case of a man having a large quantity of counterfeit money in his pocket. If he was found with one counterfeit bill, endeavoring to pass it, that evidence would not be sufficient to warrant a jury in convicting him of knowing that that was a counterfeit bill; but if, when he is informed that it is a counterfeit, he

goes into another place of business, and offers to pass the same bill there, and when he is arrested, and in his possession is found a large quantity of the same character, why, the law authorizes the jury to infer and conclude a guilty knowledge on his part; and it is so in this case. If this man was found with one or two labels, — a small quantity of these labels, — it probably would not be evidence to justify you in coming to the conclusion that he knew that they were false and forged and counterfeit labels. But when you take into consideration the fact that there was found in his possession a large number of those counterfeit labels, and that he was selling them in the way it was claimed by the prosecution, secretly, that he received an order to print them, and that he furnished a large quantity in pursuance of that order, why, of course, it must necessarily have a great bearing on the question of his guilty knowledge."

37. *Vogt v. People*, 59 Ill. App. 684.

38. *Vogt v. People*, 59 Ill. App. 684; *Watkins v. Landon*, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236; *Low v. Hall*, 47 N. Y. 104; *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 509, 29 L. R. A. 200,

such knowledge or intent an ingredient in the offense prohibited. In these instances it is not necessary to be proved.³⁹

B. RULE IN MASSACHUSETTS. — In Massachusetts it is provided by statute that in prosecutions against unlawful traffic in bottles, the onus is upon the defendant to show that the act in question was innocently performed by him.⁴⁰

C. RULE IN ENGLAND. — *In England* it is not required in a criminal prosecution under Merchandise Marks Act of 1887 that proof of a fraudulent intent should be made.⁴¹

3. Defenses. — Lawful Use or Possession. — Burden of Proof. Where a penal statute makes it unlawful for any person to traffic in bottles which have on them the marks of the owner or manufacturer of the liquors contained therein, unless said bottles have been purchased by such person from the owner, or unless the owner's written consent has been obtained to deal in them, and where it is further provided that the possession of such bottles by one not the manufacturer or owner is presumptive evidence that such possession is unlawful, in a prosecution against a person for unlawfully trafficking in bottles it is incumbent upon the defendant to show that he purchased the bottles of the owners or had their written consent to deal in them.⁴²

39. *Bulena v. Newman*, 10 Misc. 460, 31 N. Y. Supp. 449; *Cigar Makers' International Union of America v. Goldberg*, 70 N. J. L. 488, 57 Atl. 141.

40. Rev. Laws of 1902, ch. 72, § 17.

41. *Wood v. Burgess*, L. R. 24 Q. B. Div. (Eng.) 162.

42. *People v. Bartholf*, 66 Hun 626, 20 N. Y. Supp. 782.

TRANSACTIONS WITH DECEASED PERSONS.

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Scope Note. — This article includes and is confined to a discussion of the testimonial competency of parties or interested persons, for or against representatives, survivors or successors in title or interest of persons deceased or incompetent.

I. COMMON LAW AND STATUTORY MODIFICATIONS.

1. Generally. — At common law parties and interested persons were incompetent witnesses generally, in all actions and proceedings.¹ But statutes have everywhere been passed either completely or partially removing these common law disabilities.²

2. Statutes. — A. COMPLETE REMOVAL OF INCOMPETENCY. — In a few states the testimonial incompetency of parties and interested persons has been completely removed by statute,³ although in some of these jurisdictions corroboration of the testimony of such witnesses against the estate of a deceased or incompetent person is required,⁴ or the otherwise hearsay statements of the decedent are made competent for the representative.⁵

1. See article "PARTIES AND PERSONS INTERESTED AS WITNESSES," Vol. IX.

2. General enabling statutes were passed in England in 1843 (Stats. 6, 7, Vict. ch. 85) and in 1851 (Stats. 14, 15, Vict. ch. 99), and shortly thereafter by the Congress of the United States and the legislatures of the several states. But in the United States exceptions were made in one form or another in the case of the testimony of parties and interested persons in actions against the representatives of an estate. *Cockley Mill. Co. v. Bunn*, 75 Ohio St. 270, 79 N. E. 478.

3. Alaska. — § 1033 Carter's Ann. Codes; *Corbus v. Leonhardt*, 114 Fed. 10, 51 C. C. A. 636.

Hawaii. — § 1947, Rev. Laws 1905.

Louisiana. — See Merrick's Civ. Code, Vol. II, art. 2281.

Rhode Island. — Gen. Laws 1896, c. 244, § 35.

4. In New Mexico the disqualification of interest and parties so far as respects the matter involved in this article is concerned has been wholly removed. But § 2082 Comp. Laws N. M., provides: "In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision

therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." See *Byerts v. Robinson*, 9 N. M. 427, 54 Pac. 932.

Canada. — In some of the provinces of Canada similar statutes are in force. See B. C. Stat. 1900, ch. 9, § 4; *Newf. Con. Stat.* 1892, ch. 57, §§ 26, 27; N. S. Rev. Stat. 1900, ch. 163, § 35; *Ont. Rev. Stat.* 1897, ch. 73, §§ 10, 11, amended by Stat. 1900, ch. 17, § 13, P. E. I. Stat. 1889, ch. 9, § 11. As applying and interpreting these statutes, see *Chesley v. Murdock*, 2 Can. Sup. 48; *Confederation L. Assn. v. O'Donnell*, 2 Russ. & C. 570; *Birdsell v. Johnson*, 24 Grant 202; *McDonald v. McKinnon*, 26 Grant 12; *Halloran v. Moon*, 28 Grant 319; *Tucker v. McMahon*, 11 Ont. 718; *Radford v. MacDonald*, 18 Ont. App. 167; *Green v. McLeod*, 23 Ont. App. 676.

5. Oregon. — The Oregon statute removes completely the disqualification of interest and parties (*Bellinger & Cotton's Ann. Stat.* 1905, § 723, subsec. 2) but provides "that when a party to an action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased concerning the same subject

B. PARTIAL REMOVAL OF INCOMPETENCY. — In most states, however, the statutes contain exceptions, as set out in the notes.⁶ These

in his own favor may also be proven." See *Grubbe v. Grubbe*, 26 Or. 363, 38 Pac. 182.

Massachusetts Rev. Laws, ch. 175, § 67, provides that if a cause of action brought against an executor is supported by oral testimony of a promise made by the testator, evidence of the statements made by the testator and evidence of his acts and habits tending to show the probability of the making of such promise is admissible. *Cogswell v. Hall*, 185 Mass. 455, 70 N. E. 461; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802; *National Granite Bank v. Tyndale*, 179 Mass. 390, 60 N. E. 927; *Huebener v. Childs*, 180 Mass. 483, 62 N. E. 720. See also Mass. Stat. 1898, ch. 535, Rev. L. 1902, ch. 175, § 66, providing that the declaration of a deceased person shall not be excluded as hearsay if it appears to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant; and as applying this statute, see *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 67 N. E. 249; *Boyle v. Columbian Fire Ins. Co.*, 182 Mass. 93, 64 N. E. 726; *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956; *O'Driscoll v. Lynn & B. R. Co.*, 180 Mass. 187, 62 N. E. 3; *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581; *Stocker v. Foster*, 178 Mass. 591, 60 N. E. 407; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802.

The Statute of Connecticut (Rev. of 1888, § 1094) provides that in suits by or against representatives of deceased persons, declarations of the deceased relevant to the matter in issue may be received as evidence. It was held, in a controversy as to the title to a piece of land, where each party claimed under a deed from the deceased, that his declarations that he did not give a deed to one of the parties was not admissible. *Lockwood v. Lockwood*, 56 Conn. 106, 14 Atl. 203.

6. **United States, Texas, Arizona, Arkansas, Delaware, North and South Dakota.** — § 858 U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p.

659) provides: "In the courts of the United States no witness shall be excluded . . . in any civil action because he is a party to, or interested in, the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and in admiralty."

The Arizona statute, § 2536 Rev. Stat. 1901, is the same, with an added provision extending the section to "all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

The Texas statute, art. 2302, Sayles' Civ. Stat. 1897, is the same as that of Arizona, except that the phrase, "or required to testify thereto by the court," is omitted.

In Arkansas, § 2914, Sandf. & H. Dig. 1894, is the same as the United States statute, except that it stops with the phrase, "by the opposite party."

In Delaware (Rev. Stat. 1852 as amended to 1893, ch. CVII, p. 798), the exception to the enabling statute is the same as in Arkansas.

North and South Dakota. — In § 7253 Rev. Code North Dakota 1905, and § 6491 Grantham's Ann. Stats. South Dakota 1899, the exception to the enabling act is the same as in Arkansas except that "heirs at law or next of kin" are substituted for "guardians," and there is an additional provision: "But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall

statutes are in form a general and complete removal of the testimonial incapacity of parties and interested persons in all civil actions

be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, then the other party shall be a competent witness, as to any and all matters to which the testimony so taken relates."

Alabama Code 1896, § 1794, provides: "In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with or statement by the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed, or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness, or has been taken and is on file in the cause. No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another."

California, Idaho and Montana. § 1880 Cal. Code Civ. Proc.; § 4405 Idaho Codes Ann. 1901, and § 3162 Mont. Code Civ. Proc. as amended by Laws 1897, p. 245, provide: "The following persons cannot be witnesses: . . . 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

District of Columbia Code, § 1064

(31 Stat. at L., p. 1357, ch. 854), provides: "If one of the original parties to a transaction or contract has, since the date thereof, died, or become insane or otherwise incapable of testifying in relation thereto, the other party thereto shall not be allowed to testify as to any transaction with, or declaration or admission of, the said deceased or otherwise incapable party in any action between said other party or any person claiming under him and the executors, administrators, trustees, heirs, devisees, assignees, committee, or other person legally representing the deceased or otherwise incapable party, unless he be first called upon to testify in relation to said transaction or declaration or admission by the other party, or the opposite party first testify in relation to the same, or unless the transaction or contract was made or had with an agent of the said deceased or otherwise incapable party, and said agent testifies in relation thereto, or unless called to testify thereto by the court." *Jones v. Slaughter*, 28 App. D. C. 43.

The Georgia Code, Vol. II, § 5269, removes the disqualification of parties and interest, "except as follows:

1. Where any suit is instituted or defended by a person insane at time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person.

2. Where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested.

3. Where any suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with

and proceedings, except actions by or against the representatives of deceased or incompetent persons. The exceptions vary greatly

a deceased or insane officer or agent of the corporation.

4. Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if as a party to the cause he would for any cause be incompetent.

5. No agent or attorney at law of the surviving or sane party, at the time of the transaction testified about, shall be allowed to testify in favor of a surviving or sane party, under circumstances where the principal, a party to the cause, could not testify; nor can a surviving party or agent testify in his own favor, or in favor of a surviving or sane party, as to transactions or communications with a deceased or insane agent under circumstances where such witness would be incompetent if deceased agent had been principal.

6. In all cases where the personal representative of the deceased or insane party has introduced a witness interested in the event of the suit, who has testified as to transactions or communications on the part of the surviving agent or party with a deceased or insane party or agent, the surviving party or his agent may be examined in reference to such facts testified to by said witness." § 5270 provides: "There shall be no other exceptions allowed under the foregoing paragraphs."

Until 1889 the statute in Georgia was wholly different from the above, being similar to that of Missouri and Vermont, merely disqualifying the surviving party to the contract or cause of action in issue and on trial.

Illinois and Colorado.—The Illinois Statutes, ch. 51, § 2 (Hurd's Rev. Stat. 1905, p. 1034, Starr & Curtis's Ann. Stat. 1896) provide: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or

distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases namely:

"*First*—In any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority.

"*Second*—When, in such action, suit or proceeding, any agent of any deceased person, shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.

"*Third*—Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction.

"*Fourth*—Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

"*Fifth*—When in any such action, suit or proceeding, the deposition of

in their wording and considerably in their force and effect, some being much broader than others; nor have the courts been entirely

such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency."

§ 3 provides: "Where in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

§ 4 (as amended by Laws 1899, p. 216, Jones & Ad. Suppl. 1902, p. 608) provides: "In any action, suit or proceeding, by, or against any surviving partner or partners, joint contractor or contractors, no adverse party, or person adversely interested in the event thereof, shall by virtue of section 1 of this act, be rendered a competent witness, to testify to any admission or conversation, by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness, as to any admission or conversation between himself and such agent, unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only except where the conditions are such, that under the pro-

visions of sections 2 and 3 of this act, he would have been permitted to testify, if the deceased person had been a principal and not an agent."

§ 7 provides: "In any civil action, suit or proceedings, no person who would, if a party thereto, be incompetent to testify therein under the provisions of section 2 or section 3, shall become competent by reason of any assignment or release of his claim, made for the purpose of allowing such person to testify."

In Colorado the statute (§§ 4816-4819 Mill's Ann. Stat. 1891) is the same as in Illinois, except that § 4818, corresponding to § 4 of the Illinois statute, omits the latter half of § 4, beginning with the words "and in every action, suit," etc.

Indiana.—Burns' Ann. Stat. Indiana 1894, § 506, provides: "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate: *Provided, however,* That in cases where a deposition of such decedent has been taken, or he has previously testified as to the matter, and his testimony or deposition can be used as evidence for such executor or administrator, such adverse party shall be a competent witness for himself, but only as to any matters embraced in such deposition or testimony."

§ 507, provides: "In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor."

uniform in their construction of provisions substantially similar. While the statutes are similar in a general way, especially those

§ 508, provides: "When in any case an agent of a decedent shall testify on behalf of an executor, administrator, or heirs, concerning any transaction, as having been had by him, as such agent, with a party to the suit, his assignor or grantor, and in the absence of the decedent; or if any witness shall, on behalf of the executor, administrator, or heirs, testify to any conversation or admission of a party to the suit, his assignor, or grantor, as having been had or made in the absence of a deceased; then the party against whom such evidence is adduced, his assignor, or grantor, shall be competent to testify concerning the same matter. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness, in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent on behalf of the principal to such contract, against the legal representatives or heirs of the decedent, unless he shall be called by such heirs or legal representatives. And in such case he shall be a competent witness only as to matters concerning which he is interrogated by such heirs or representatives. When, in any case, a person shall be charged with unlawfully taking or detaining personal property, or having done damage thereto, and such person by his pleading shall defend on the ground that he is executor, administrator, guardian, or heir, and as such has taken or detains the property, or has done the acts charged, then no person shall be competent to testify who would not be competent if the person so defending were the complainant; but when the person complaining cannot testify, then the party so defending shall also be excluded."

§ 509 (in part) provides: "When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded."

§ 510 provides: "In all cases in which executors, administrators, heirs, or devisees are parties, and one of the parties to the suit shall be incompetent, as hereinbefore provided, to testify against them, then the assignor or grantor of a party making such assignment or grant voluntarily shall be deemed a party adverse to the executor or administrator, heir or devisee, as the case may be: *Provided, however,* That, in all cases referred to in sections two hundred and seventy-six (276), two hundred and seventy-seven (277), two hundred and seventy-eight (278), and two hundred and seventy-nine (279), of said act — said sections being numbered in the revised statutes of 1881 four hundred and ninety-eight, four hundred and ninety-nine, five hundred, and five hundred and one — any party to such suit shall have the right to call and examine any party adverse to him as a witness, or the court may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion shall be renewable (reviewable?) on appeal."

§ 511, provides: "In all actions by an executor or administrator on contracts assigned to the decedent, when the assignor is alive and a competent witness in the cause, the executor or administrator and the defendant or defendants shall be competent witnesses as to all matters which occurred between the assignor and the defendant or defendants, prior to notice of such assignment."

Iowa. — Ann. Code 1897, § 4604, provides: "No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased,

of certain states, yet there are so many differences in their phraseology and substance that the value of the cases from one state as

insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence."

Florida.—§ 1095 Rev. St. Florida 1892, is the same as the foregoing Iowa statute, except that the word "personal" is omitted before "transaction or communication," and the word "deceased" is inserted before "person" in the phrase "devisee or survivor of such person."

West Virginia.—The West Virginia Code 1899, ch. 130, p. 875, § 23 is the same as that of Iowa with the addition of the following: "Provided, however, That where an action is brought for causing the death of any person by wrongful act, neglect or default under chapter one hundred and three of the code, the physician sued shall have the right to give evidence in any case in which he is sued; but in this event he can only give evidence as to the medicine or treatment given to the deceased, or operation performed, but he cannot give evidence of any conversation had with the deceased."

Kansas and Oklahoma.—Dassler's § 5218 Gen. Stat. Kansas 1905, (Code Civ. Proc. § 322) provides: "No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in

action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death in behalf of his executors, administrators, heirs at law, next of kin, assignee, surviving partner or joint contractor, the other party or the assignor shall be competent to testify as to any and all matters to which the testimony so taken relates."

Oklahoma has taken this statute verbatim. § 4509, Rev. Stat. Oklahoma 1903 (Code Civ. Proc. § 311).

Kentucky.—Carroll's Kentucky Codes 1895, § 606, subdivision 2, provides: Subject to the provisions of subsection 7 of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless—*a.* The infant or his guardian shall have testified against such person, with reference to such statement, transaction or act; or, *b.* The person of unsound mind shall, when of sound mind, have testified against such person, with reference thereto; or, *c.* The decedent, or a representative of, or some one interested in, his estate, shall have testified against

precedents in another state is considerably impaired. In order that the cases may be understood and properly applied the existing

such person, with reference thereto; or, *d.* An agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person, with reference thereto, or be living when such person offers to testify, with reference thereto."

Kentucky statutes 1903, § 4838, provides: "No person shall, on account of his being an executor of a will, be incompetent as a witness for or against the will."

Maine.—Rev. Stat. Maine, 1903, § 112, provides: "The five preceding sections do not apply to cases, where, at the time of taking testimony, or at the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or an administrator, or is made a party as heir of a deceased party; except in the following cases:

I. The deposition of a party, or his testimony given at a former trial, may be used at any trial after his death, if the opposite party is then alive, and in that case the latter may also testify.

II. In all cases in which an executor, administrator or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact admissible upon general rules of evidence, happening after the decease of the testator, intestate or ancestor; and in reference to such matters the adverse party may testify.

III. If the representative party is nominal only, both parties may be witnesses; if the adverse party is nominal only, and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he is not excluded from testifying, if called by either party; and in an action

against an executor or administrator; if the plaintiff is nominal only, or having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record is excused or excluded from testifying.

IV. In an action by or against an executor, administrator or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto.

V. In actions where an executor, administrator or other legal representative is a party, and the opposite party is an heir of the deceased, said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator or other legal representative.

VI. In all actions brought by the executor, administrator or other legal representative of a deceased person, such representative party shall not be excused from testifying to any facts admissible upon general rules of evidence, happening before the death of such person, if so requested by the opposite party. But nothing herein shall be so construed as to enable the adverse party to testify against the objection of the plaintiff when the plaintiff does not voluntarily testify."

Maryland.—Pub. Gen. Laws of Maryland, art. 35, § 3, as amended by Acts 1902, p. 718, ch. 495; Acts 1904, p. 1168, ch. 661, provides: "In actions or proceedings by or against executors, administrators, heirs, devisees, legatees or distributees of a decedent as such, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator, intestate, ancestor or party so incompetent to testify, either personally or through an agent since dead, lunatic or insane, unless called to testify by the opposite party, or unless the testimony

statutes of the United States and of the several states have been set out in full below. They are arranged alphabetically except that

of such testator, intestate, ancestor or party incompetent to testify shall have already given in evidence, concerning the same transaction or statement, in the same cause, on his or her own behalf or on behalf of his or her representative in interest; . . . provided, however, this section shall not apply to pending cases nor in anywise affect the present rights of litigants therein."

Under the code of 1888 a party to the suit was incompetent to testify when an original party to a contract or cause of action was dead or insane, and when an executor or administrator was a party to a suit, excepting as therein provided for. That was materially changed by the act of 1902, p. 718, ch. 495, and the only changes made by the act of 1904 in the act of 1902 were inserting after "administrators," "heirs, devisees, legatees or distributees of a decedent as such," and adding the word "ancestor" after "intestate," *Smith v. Humphreys*, 104 Md. 285, 65 Atl. 57.

Michigan.—Comp. Laws 1897 (ch. 282, § 101), § 10,212, provides: "That when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner, and not within the knowledge of any one of the surviving partners. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have

been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees or personal representatives of a deceased person against a corporation (or its assigns), shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person: Provided, That whenever the words 'the opposite party' occur in this section it shall be deemed to include the assigns or assignees of the claim or any part thereof in controversy; and provided further, That whenever the deposition, affidavit or testimony of such deceased party taken in his lifetime shall be read in evidence in such suit or proceeding that the affidavit or testimony of the surviving party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit or testimony."

Act 239, Pub. Acts 1901, as amended by Act. No. 30, p. 36, Pub. Acts 1903, provides that no person who shall have acted in the making or continuing of a contract with any person who may have died shall be a competent witness in any suit involving such contract. See *Albring v. Ward*, 137 Mich. 352, 100 N. W. 609.

Rev. Laws of Minnesota, 1905, § 4663, provides: "It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and

states having statutes which are identical or practically identical have been grouped. In some of the states the statutes have under-

then only in respect to the conversation or admission to which such testimony relates."

Mississippi. — Ann. Code of Miss., § 1740 provides: "A person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent. But such person so interested shall be permitted to give evidence in support of his claim or defense against the estate of a deceased person in the course of administering the estate."

Missouri. — Ann. Stat. 1906, § 4652, removes the disqualification of interest and parties, "Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator. Provided, further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther." (See Vermont Statute, *infra*.)

Nebraska. — Cobbe's Ann. Stat.

of Nebraska, § 1314, provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

Nevada. — § 3474 Cutting's Comp. Laws Nevada, provide: "No person shall be allowed to testify under the provisions of sections three hundred and seventy-six and three hundred and seventy-seven, when the other party to the transaction is dead, or when the opposite party to the action, or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proven transpired before the death of such deceased person; provided, that when such deceased person was represented in the transaction in question by any agent who is living, and who testifies as a witness in favor of the representative of such deceased person, in such case the other party may also testify in relation to such transaction, and nothing contained in this Act shall affect the laws in relation to attestation of any instrument required to be attested; and provided further, that when husband or wife is insane and has been so declared by a commission of lunacy, or in due form of law, the other shall be a competent witness to testify as to any fact which transpired before or during such insanity, but the privi-

gone numerous changes, some of them quite recent, which must be

lege of so testifying shall cease on the restoration to soundness of the insane husband or wife, unless upon the consent of both, in which case they shall be competent witnesses."

New Hampshire. — Pub. Stat. 1901, ch. 224, §§ 16-19, provides: "When one party to a cause is an executor, administrator, or the guardian of an insane person, neither party shall testify in respect to facts which occurred in the lifetime of the deceased or prior to the ward's insanity, unless the executor, administrator, or guardian elects so to testify, except as provided in the following section. When it clearly appears to the court that injustice may be done without the testimony in such case, he may be allowed to testify; and the ruling of the court, admitting or rejecting his testimony, may be excepted to and revised. When either party of record is not the party in interest, and the party whose interest is represented by the party of record is an executor, administrator, or insane, the adverse party shall not testify, unless the executor, administrator, or guardian of the insane person elects to testify himself, or to offer the testimony of such party of record. In an action brought by an indorsee or assignee of a bill of exchange, promissory note, or mortgage against an original party thereto, the defendant shall not testify in his own behalf if either of the original parties to the bill, note, or mortgage is dead or insane, unless the plaintiff elects to testify himself or to offer the testimony of an original party thereto."

New Jersey. — P. L. 1900, p. 362, § 4, provides: "In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity, provided this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies

to any transaction with or statement by her testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate which are pertinent to the issue." But for the law previous to the revision of 1900, see Gen. Stat. N. J., Vol. II, p. 1397, §§ 3 and 4.

New York. — Bliss' New York Ann. Code, § 829, provides: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

§ 830 provides: "Where a party has died since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other

constantly borne in mind in considering and comparing the cases.

legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him. The testimony of any witness who has died or become insane after a former trial or hearing of a contested proceeding, a special proceeding or an action may be read upon a subsequent trial or hearing, by any party to such action or proceeding, subject to legal objections."

North Carolina.—§ 1631, Rev. Stat. North Carolina, 1905, is identical with § 829 of the New York Code as above set out.

Pennsylvania.—2 Purdon's Digest, 1905, Page 1494, § 29, provides as follows: "In any civil proceeding before any tribunal of this commonwealth, or conducted by virtue of its order or direction, no liability merely for costs nor the right to compensation possessed by an executor, administrator or other trustee, nor an interest merely in the question on trial, nor any other interest, or policy of law, except as is provided in section five of this act, shall make any person incompetent as a witness."

Page 1495, § 34(e). "Nor where any party to a thing or contract in action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on record, who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of such party or the adjudication of his lunacy, unless the proceeding is by or against the surviving or remaining partners, joint promisors or joint promisees of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors or joint promisees and the other party on the record, and between such surviving or remaining partners, promisors or promisees and the persons having an

interest adverse to them, in which case any person may testify to such matters; or, unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record, any title to the premises in controversy at the time the suit was brought, and also pays into court the costs accrued at the time of his disclaimer, or give security therefor, as the court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be a *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between the parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses."

Page 1498, § 36. "Any person who is incompetent under clause (e) of section five by reason of interest, may nevertheless be called to testify against his interest, and, in that event, he shall become a fully competent witness for either party; and such person shall also become fully competent for either party, by a release or extinguishment, in good faith, of his interest, upon which good faith the trial judge shall decide as a preliminary question."

Page 1499, § 37. "In any civil proceeding, whether or not it be brought or defended by a person representing the interests of a deceased or lunatic assignor of anything or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witnesses shall not be concluded by his testimony; but such person so cross-examined shall become thereby a fully competent witness for the other

C. PURPOSE AND POLICY OF STATUTES. — In spite of the differ-

party as to all relevant matters, whether or not these matters were touched upon in his cross-examination; and also, where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such other person having an adverse interest, is cross-examined under this section, his co-plaintiffs or co-defendants shall thereby become fully competent witnesses on their own behalf, as to all relevant matters, whether or not these matters were touched upon in cross-examination."

Page 1502, § 43. "Hereafter in any civil proceeding before any tribunal of this commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead or may have been adjudged a lunatic, and his right thereto or therein may have passed either by his own act or by the act of the law, to a party of the record who represents his interest in the subject in controversy, nevertheless any surviving or remaining party to such thing or contract, or any other person whose interest is adverse to the said right of such deceased or lunatic party, shall be a competent witness to any relevant matter, although it may have occurred before the death of such party or to the adjudication of his lunacy; if and only if such relevant matter occurred between himself and another person who may be living at the time of the trial and may be competent to testify and who does so testify upon the trial, against such surviving or remaining party or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person."

Ohio and Wyoming.—2 Bates' Ann. Ohio Stat. (Everett's Ed.) § 5242, provides: "A party shall not testify where the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heirs, grantee,

assignee, devisee, or legatee of a deceased person, except:

1. To facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died.

2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.

3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.

4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions.

5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued.

6. If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries; that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county. Whereupon the book shall be competent evidence, and such book may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness.

7. If a party, after testifying orally, die, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters.

8. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein.

Nothing in this section contained

ences in phraseology and construction all the statutes have a com-

shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied."

In Wyoming the statute (§ 3680 Rev. Stat. 1899) is identical with that in Ohio, except in subd. 2, the clause "and the agent is competent to testify as a witness" is changed to "and the agent testifies."

South Carolina Rev. Stat. 1902, Code Civ. Proc., § 400, provides as an exception to the general removal of the disqualification of interest and parties, "That no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who, previous to such examination, has had such an interest, however the same may have been transferred to, or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination, deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination, or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committee, shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased or insane person or lunatic, in regard to such transaction or communication (however the same may have been perpetuated or made competent,) shall be given in evidence on the trial or hearing

in behalf of such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing."

Tennessee. — § 5596, Shannon's Code removes the disqualification of parties and interested persons, but § 5597 provides: "It shall not be lawful for any party to any action, suit, or proceeding in any court of this state to testify as to any transaction or conversation with, or statement by, any opposite party in interest, if such opposite (party) is incapacitated or disqualified to testify thereto, by reason of idiocy, lunacy, or insanity, unless called by the opposite side, and then (only) in the discretion of the court."

§ 5598 is identical with the statute in Arkansas, *supra*.

§ 5565, Shannon's Code of Tennessee, provides that where the defendant and plaintiff are both executors or administrators, the account book of the defendant's testator or intestate may be given in evidence against the book of the plaintiff's testator or intestate as to such matters as shall have been proved thereby in accordance with the preceding sections relating to the use of account books. And § 5566 provides that § 5598, *supra*, shall not be construed as repealing or modifying, or in any manner affecting § 5565.

Utah. — § 3412, Utah Rev. Stat. 1898, provides that neither parties nor interested persons shall be disqualified as witnesses, but § 3413 provides that certain persons cannot be witnesses, to wit, subsec. 3: "A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding claims or opposes, sues or defends as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee,

mon general purpose, namely, to prevent one party to the transaction

or devisee of any deceased person, or as guardian, or assignee, or grantee, directly or remotely, of such heir, legatee, or devisee as to any statement by, or transaction with, such deceased, insane, or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent, or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing. suing or defending in such action, suit, or proceeding."

Vermont Stat. 1894, § 1236, removes the disqualification of interested persons.

§ 1237 provides: "In actions, except actions of book account, where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor except to meet or explain the testimony of living witnesses produced against him as to facts or circumstances taking place after the death or insanity of the other party; or upon a question which the testimony of the party afterward deceased or insane has been taken in writing or by a stenographer in open court, to be used in such action and is used therein."

§ 1238 provides: "When an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to acts and contracts done or made since the probate of the will, or the appointment of the administrator, and to meet or explain the testimony of living witnesses produced against him, as to facts or circumstances taking place after the death of the other party."

§ 1239 provides: "In actions of book account, and when the matter in issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are and when

made, and no further, except to meet or explain the testimony of living witnesses produced against him as to facts or circumstances taking place after death of the other party." (See Missouri Statute, *supra*.)

Virginia. — § 3345, Pollard's Ann. Code Virginia, 1894, removes the disqualification of parties and interested persons with certain qualifications, the principal of which is as follows: § 3346, "Where one of the original parties to the contract or other transaction, which is the subject of investigation, is incapable of testifying by reason of death, insanity, infancy, or other legal cause, the other party to such contract or transaction shall not be admitted to testify in his own favor or in favor of any other person whose interest is adverse to that of the party so incapable of testifying, unless he be first called to testify in behalf of such last mentioned party; or unless some person, having an interest in or under such contract or transaction, derived from the party so incapable of testifying, has testified in behalf of the latter or of himself as to such contract or transaction; or unless the said contract or transaction was personally made or had with an agent of the party so incapable of testifying, and such agent is alive and capable of testifying."

§ 3346a imposes the same disqualification upon the spouse of a witness disqualified under § 3346.

§ 3347 provides: "But where any of the original parties to the contract or other transaction which is the subject of investigation, are partners or other joint contractors, or jointly entitled or liable, and some of them have died or otherwise become incapable of testifying, the others, or such of them as there may be, with whom the contract or transaction was personally made or had, or in whose presence and with whose privacy it was made or had, shall not, nor shall the adverse party, be incompetent to testify because some of the partners or joint contractors, or of those jointly entitled or liable, have died or otherwise become incapable of testifying."

§ 3348 provides: "And where

in question from testifying where the other by reason of death or

such contract or transaction was personally and solely made or had with an agent of one of the parties thereto, and such agent is dead or otherwise incapable of testifying, the other party shall not be admitted to testify in his own favor or in favor of a person having an interest adverse to the principal of such agent, unless he be first called to testify on behalf of said principal or some person claiming under him, or the testimony of such agent be first read or given in evidence by his principal or other person claiming under him, or unless the said principal has first testified."

§ 3349 provides: "If an original party to such contract or transaction, with whom it was personally and solely made or had, or his agent, be examined as a witness orally or in writing, at a time when he is competent to testify, and he afterwards die or become otherwise legally incapable of testifying, his testimony may be proved or read in evidence, and in such case the adverse party may testify as to the same matters."

Washington.—§ 5991, Ballinger's Ann. Codes and Stats. of Washington removes the disqualification of parties and interest, "Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years; Provided further, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action."

Wisconsin.—§ 4069, Sanborn & Berryman's Ann. Stat. 1899, as amended by laws 1901, ch. 181, San-

born & Sanborn's Supp., p. 1292, provides: "No party in his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person or with a person then insane in any civil action or proceedings in which the opposite party derives his title, or sustains his liability, to the cause of action from, through or under such deceased person, or such insane person, or in which such insane person is a party prosecuting or defending by guardian unless such opposite party shall first be examined or examine some other witness in his behalf concerning some transaction or communication between the deceased or insane and such party or person, or unless the testimony of such deceased person given in his lifetime or of such insane person be first read or given in evidence by the opposite party, and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates."

§ 4070 provides: "No party, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through or under whom such adverse party derives his interest or title, when such agent is dead or insane, or otherwise legally incompetent as a witness unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates."

disability cannot.⁷ At common law parties and interested persons were disqualified because their testimony was deemed untrustworthy. Many courts seem to regard the exceptions to the enabling statutes as a survival of the common law and as based upon the danger of perjured testimony.⁸ The view apparently sanctioned by other courts, and the one which would seem to be more in harmony with the spirit of the enabling acts themselves, is that the exceptions are made for the purpose of equalizing the undue advantage which one party to a transaction with a person since deceased or incompetent would otherwise have, in the matter of evidence, in an action where such transaction was in question.⁹ The latter view is most con-

7. *Alabama*.—Dudley *v.* Steele, 71 Ala. 423; Harwood *v.* Harper, 54 Ala. 659; Dismukes *v.* Tolson, 67 Ala. 386; Kumpe *v.* Coons, 63 Ala. 448; Louis *v.* Easton, 50 Ala. 470.

Arkansas.—Hamby *v.* Wall, 48 Ark. 133, 2 S. W. 705; McRae *v.* Holcomb, 46 Ark. 306.

Indiana.—Durham *v.* Shannon, 116 Ind. 403, 19 N. E. 190.

Ohio.—Stevens *v.* Hartley, 13 Ohio St. 525.

West Virginia.—Owens *v.* Owens' Admr., 14 W. Va. 88.

"The want of opportunity to assist in the preparation of the cause by the decedent is not the sole ground for excluding the testimony of the survivor, nor by any means the principal ground. The prime reason is found in the inability of the party to oppose his statements, his testimony, to that of the surviving adversary." Quick *v.* Brooks, 29 Iowa 484; citing Watson *v.* Russell, 18 Iowa 79; Bradley *v.* Kavanagh, 12 Iowa 273; Romans *v.* Hays, 12 Iowa 270; Shafer *v.* Dean, 29 Iowa 144. To the same effect, see Zane *v.* Fink, 18 W. Va. 693.

8. Griswold *v.* Edson, 32 Minn. 436, 21 N. W. 475; Brown *v.* Bell, 58 Mich. 58, 24 N. W. 824; Rothchild *v.* Hatch, 54 Miss. 554; Stuart Bros. *v.* Altman, 8 Tex. Civ. App. 657, 28 S. W. 461; McCrary *v.* Rash, 60 Ala. 374.

In Harris *v.* Bank of Jacksonville, 22 Fla. 501, 1 So. 140, the reason for the disqualification is stated thus: "What the living knows or would testify is excluded because what the dead would testify if living cannot be or is not given in evidence; or be-

cause his representative or assignee is not himself so acquainted with the facts of it as to encourage him to go upon the stand; this is the underlying principle of the exclusion: as one is not confronted by the other the former is restrained from saying anything. The temptation to misrepresentation and perjury in such cases, however superior many might prove to it, was doubtless thought by the Legislature to be too great to permit the survivor to speak; the interest of those claiming under the deceased, if not the ordinary principles of fairness, was thought to demand the protection of such silence unless and until they should themselves elect to testify as to the transaction, or to introduce the deceased's testimony as to it."

9. *Illinois*.—Merrill *v.* Atkin, 59 Ill. 19; Smith *v.* Billings, 76 Ill. App. 454, affirmed, 177 Ill. 446, 53 N. E. 81.

Iowa.—Dysart *v.* Furrow, 90 Iowa 59, 57 N. W. 644; Bradley *v.* Kavanagh, 12 Iowa 273.

Kansas.—Wills *v.* Wood, 28 Kan. 400.

Maryland.—Keyser *v.* Warfield, 103 Md. 161, 63 Atl. 217; Horner *v.* Frazier, 65 Md. 1, 4 Atl. 133.

Missouri.—Banking House *v.* Rood, 132 Mo. 256, 33 S. W. 816; Coughlin *v.* Haeussler, 50 Mo. 126; Miller *v.* Wilson, 126 Mo. 48, 28 S. W. 640.

New York.—Hard *v.* Ashley, 117 N. Y. 606, 23 N. E. 177; Cole *v.* Sweet, 187 N. Y. 488, 80 N. E. 355.

North Carolina.—Bonner *v.* Stotesbury, 139 N. C. 3, 51 S. E. 781.

Pennsylvania.—Karns *v.* Tanner, 66 Pa. St. 297.

sistently set forth in those statutes disqualifying the surviving party to the contract or cause of action in issue and on trial, which is held to apply notwithstanding the decedent's representative or successor is not a party to or interested in the action.¹⁰ In some cases both the foregoing reasons have been given.¹¹

The Wisdom or Policy of these exceptions to the general removal of the common law disabilities of witnesses is sometimes questioned.¹²

"A party to an action, suit or proceeding, where the adverse party sues or defends as the executor, administrator, etc., is not rendered incompetent by reason of his being a party or interested in the result of the litigation, but because to allow him to do so would be to give him an advantage over his adversary, the theory of the statute, being, that inasmuch as the deceased *cannot* speak the living should not be allowed to do so." *Smith v. Billings*, 177 Ill. 446, 53 N. E. 81; *Butz v. Schwartz*, 135 Ill. 180, 25 N. E. 1007.

In *McDonald v. Harris*, 131 Ala. 359, 31 So. 548, the court quotes at length from *Wood v. Brewer*, 73 Ala. 262, as to the purpose of the disqualifying statute, to the effect that the intention was to prevent the living suitors from testifying to matters as to which the deceased, if living, could also testify.

The disqualifying statute "rests on the ground, not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground, that the other party to the action has no chance, even by the oath of a relevant witness to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." *McCanless v. Reynolds*, 74 N. C. 301, *quoted* with approval in *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275.

10. See *infra*, IX, 2.

11. *In re Miller's Estate*, 31 Utah 415, 88 Pac. 338; *Owens v. Owens*, Admr., 14 W. Va. 88; *Seabright v. Seabright*, 28 W. Va. 412; *Cheatham v. Bobbitt*, 118 N. C. 343, 24 S. E. 13; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156.

12. *In Cockley Mill. Co. v. Bunn*,

75 Ohio St. 270, 79 N. E. 478, the court says that the exception to the general enabling statutes is based on the theory that if an interested party were permitted to testify against the estate of a decedent as to transactions with the latter, there would be a great temptation to fraud and perjury. "That the exceptions are equally indefensible with the original rule is pointed out by Prof. Wigmore in his learned work, *Wigmore on Evidence*, § 578, where the whole matter is treated, and he well says of these exceptions: 'As a matter of policy, this survival of a part of the now discarded interest qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it incumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.'"

In *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930, the court says: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can

II. NATURE AND EXTENT OF DISQUALIFICATION.

1. Generally. — It is the witness who is incompetent and not the subject-matter of his testimony,¹³ although the objection must be directed to the particular matters as to which he is disqualified.¹⁴ Under most of the statutes the incompetency is only partial, being confined to certain specified matters,¹⁵ though in some states the statutes have been held to disqualify the witness as completely as at common law.¹⁶ Where the statute totally disqualifies the witness in the class of actions specified, it is the nature of the action and not the character of the witness' testimony which determines his competency.¹⁷

2. Construction of Statutes. — A. GENERALLY. — Whatever may be the form of the statutes, whether the disqualifying portions are mere provisos or exceptions to the portion removing the common law disabilities, or independent sections, they are generally construed as enabling acts which are designed to remove rather than to create incompetency.¹⁸ In construing the statute the court can-

contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods — the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."

13. *McDonald v. Young*, 109 Iowa 704, 81 N. W. 155; *Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. 531. And see *infra*, XI, 1. But see *Harnett v. Holdrege* (Neb.), 97 N. W. 443; *Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727.

The statute "has nothing to do with the question of competency or admissibility of the testimony, but relates solely to the competency of the person or party as a witness." *Hubbell v. Hubbell*, 22 Ohio St. 208.

A stipulation permitting the taking and using of depositions subject to objections to competency, relevancy and materiality of the evidence contained therein is a waiver of the in-

competency of the witness. "The personal disqualification of a witness is not raised by general objection to his evidence as incompetent, irrelevant and immaterial." *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220, 86 S. W. 263.

14. See *infra*, XI, 1.

15. *Cole v. Sweet*, 187 N. Y. 488, 80 N. E. 355; *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103, holding that a general objection to the competency of the witness is therefore insufficient.

The effect of the exceptions to the general rule, as provided in the statute, is not to render a witness incompetent generally, but only incompetent upon certain specified subjects, namely: "transactions and communications," had with the deceased in his lifetime. Any party may testify to any fact pertinent to the issue, if it does not come within the exceptions as provided in and by the statute. *Belote v. O'Brian's Admr.*, 20 Fla. 126.

16. See *infra*, IX, 2.

17. *Duncan v. Gerdine*, 59 Miss. 550.

18. *Maryland.* — *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133; *Johnson v. Johnson*, 65 Atl. 918.

Missouri. — *Kuhn v. Germania Ins. Co.*, 71 Mo. App. 305; *Southern Com. Sav. Bank v. Slattery's Admr.*, 166 Mo. 620, 66 S. W. 1066.

not be guided by its ideas of the justice or injustice of the statute.¹⁹

B. SPIRIT AND PURPOSE CONSIDERED. — In construing the statute its spirit and purpose as well as its language must be considered.²⁰ However, where the letter of the law is clear the court must

Vermont. — Lytle v. Bond's Estate, 40 Vt. 618.

Virginia. — Goodell v. Gibbons, 91 Va. 608, 22 S. E. 504; Reynolds v. Callaway, 31 Gratt. 436.

West Virginia. — Crothers v. Crothers, 40 W. Va. 169, 20 S. E. 927.

Wisconsin. — Curtis Bros. & Co. v. Hoxie, 88 Wis. 47, 59 N. W. 581.

The purpose of the enabling act with its exceptions is not to restrict the admissibility of evidence, but on the contrary to enlarge the competency of witnesses. Rinehart v. Buckingham, 34 Iowa 409; Robinson v. Dibble's Admr., 17 Fla. 457.

19. Rairdon v. Sampson, 67 N. J. L. 346, 51 Atl. 696.

In *Greenlee v. Mosnat* (Iowa), 111 N. W. 996, the court says that although this statute frequently prevents the establishment of meritorious claims against the estates of deceased persons, "with the general policy of the statute we have nothing to do. The legislature has seen fit to fix a rule of evidence for our guidance, which in some cases works injustice, but which it must be presumed on the whole tends to the promotion of justice. The rule may be a hard one in individual cases, but it is not for us to abrogate it on that account." But see *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930.

The disqualification is not a newly created one but merely the continuance of an antecedent common law disqualification; hence in applying the disqualifying statute it must be applied as it was at common law without regard to more modern ideas as to the propriety or justice of the exclusion. See *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084.

20. *Alabama.* — Drew v. Simmons, 58 Ala. 463; Boykin v. Smith, 65 Ala. 294.

Georgia. — Bigham v. Coleman, 71 Ga. 176.

Illinois. — Butz v. Schwartz, 135 Ill. 180, 25 N. E. 1007.

Indiana. — Clift v. Shockley, 77

Ind. 297; Wiseman v. Wiseman, 73 Ind. 112; Ketcham v. Hill, 42 Ind. 64; Peacock v. Albin, 39 Ind. 25; Durham v. Shannon, 116 Ind. 403, 19 N. E. 190.

Iowa. — Watson, Admr. v. Russell, 18 Iowa 79 (holding that a statute providing that no person shall testify when the adverse party is the executor, etc., does not disqualify the defendant in an action by the administrator of a trustee, the beneficiary of the trust being alive and competent, since the statute was intended to apply only to where the real party in interest was dead).

Missouri. — Miller v. Wilson, 126 Mo. 48, 28 S. W. 640; Orr v. Rode, 101 Mo. 387, 13 S. W. 1066.

New Jersey. — Smith v. Burnet, 34 N. J. Eq. 219.

New York. — Holcomb v. Holcomb, 95 N. Y. 316.

Pennsylvania. — Karns v. Tanner, 66 Pa. St. 297.

"This, like the other remedial statutes, has a spirit that extends beyond the mere letter, and it is the duty of the courts to so construe such statutes as to effectuate the objects of the law makers, as gathered from the enactment." *Whitmer v. Rucker*, 71 Ill. 410.

"This court has not regarded the letter of the statute in putting a construction upon it. On the contrary it has rather sought so to construe it as to give effect to the obvious intention of the legislature in its enactment." *Goodwin v. Goodwin*, 48 Ind. 584, citing *Ketcham v. Hill*, 42 Ind. 64; *Peacock v. Albin*, 36 Ind. 25.

In construing a statute, its purpose to prevent an interested person from testifying to transactions which only the decedent could rebut must be considered. *O'Connor v. Slatter* (Wash.), 89 Pac. 885.

"The spirit and purpose of this provision of the Code is equality to prevent undue advantage; and that purpose should be kept in view when border questions arise, and lines of

be governed thereby, even though in so doing it violates to some extent what may be regarded as the spirit of the law.²¹

Since the statutes embody two somewhat inconsistent purposes, namely, the general purpose to remove the common law disability while at the same time providing protection to the estates of deceased and incompetent persons,²² the courts are not in entire accord in the construction placed upon the law. In some jurisdictions it is held that the disability will not be extended beyond the terms of the statute;²³ in others, the greater emphasis is placed upon the

distinction are to be drawn." *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

21. Where a witness is competent within the letter of the law, the court will not hold him incompetent merely on the ground that it would be unfair and therefore contrary to the spirit of the law to allow one person to the issue to testify and not the other. *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562. See also *Bellows v. Litchfield*, 83 Iowa 36, 48 N. W. 1062; *Rairdon v. Sampson*, 67 N. J. L. 346, 51 Atl. 696.

"The statutes should be liberally construed in favor of competency, but not so as to embrace actions or persons expressly excepted." *Hess v. Gourley*, 89 Pa. St. 195.

The Terms of the Statute, when they are clear and unambiguous, must be followed regardless of what the court may think of the policy of the statute. *McDonald v. Harris*, 131 Ala. 359, 31 So. 548 (*holding* that the representatives of the estate and those interested in it were equally incompetent with the adverse party under the statute).

Contra.—*Sykes v. Bates*, 26 Iowa 521, *holding* a witness competent on the ground of necessity, although the letter of the law was thereby violated.

22. "The primary object of the statute is to remove the common law disability of an interested party to testify. The exception is intended to avoid the injustice that would arise in admitting the testimony of one party when the other is dead. In case that injustice does not exist in any case, the exception would not apply." *Brim v. Fleming*, 135 Mo. 597, 37 S. W. 501.

23. *United States.*—*Hobbs v. McLean*, 117 U. S. 567.

Georgia.—*New Ebenezer Assn. v. Gress Lumb. Co.*, 89 Ga. 125, 14 S. E. 892.

New Jersey.—*Rairdon v. Sampson*, 67 N. J. L. 346, 51 Atl. 696.

South Carolina.—*Colvin v. Phillips*, 25 S. C. 228; *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680.

South Dakota.—*Witte v. Koepen*, 11 S. D. 598, 79 N. W. 831 (*holding* that a statute disqualifying parties merely could not be extended to include interested witnesses).

Tennessee.—*Rielly v. English*, 9 Lea 16.

Texas.—*Hicks v. Patterson*, 1 White & W. Civ. Cas. § 349.

"The office of a proviso is to restrain or modify the enacting clause of a statute . . . and the maxim in interpretation of statutes, is that when the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not come fairly within its terms. In short a proviso covers special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." *McRae v. Holcomb*, 46 Ark. 306; *Stanley v. Wilkerson*, 63 Ark. 556.

"The tendency of the later decisions is that such statutes are to be literally and strictly construed. All doubts should be resolved in favor of admitting and against restricting the evidence." *Carroll v. Chipman*, 8 Kan. App. 820, 57 Pac. 979.

The statute being a statute of exclusion "must as such be strictly construed. Nothing may be included under its provisions but what is

purpose to protect estates and the statute is broadly interpreted in accordance with this purpose to cases which may not be strictly within its letter,²⁴ and some courts hold that the disqualifying statute is a beneficial one and ought not to be limited or narrowed by construction.²⁵ The court will not, however, enforce the mere letter

clearly and unmistakably expressed in its terms." *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797.

"The exceptions mentioned in the statute will not be extended by implication to a class of persons not named, although the reason for embracing them was equally as strong as those which existed for including the persons expressly designated." *Wootters v. Hale*, 83 Tex. 563, 19 S. W. 134.

In Ohio, where, subsequent to the general enabling statute, various successive enactments have been made reviving certain of the disqualifications of a party, "cautiously confined, in each instance, to a particularly specified circumstance," it is held that the subsequent disqualification should be strictly construed. *Cockley Mill Co. v. Bunn*, 75 Ohio St. 270, 79 N. E. 478.

Where by statute the witness is only disqualified as against an executor, administrator or guardian, the courts have no authority to add other exceptions to the enabling act; hence in an action against a legatee to recover for services rendered his testator, the plaintiff is a competent witness as to transactions with the decedent. *Miller v. Steele*, 153 Fed. 714, (citing *White v. Wansey*, 116 Fed. 345, 53 C. C. A. 634; *Smith v. Au Gres*, 150 Fed. 257, 80 C. C. A. 145; *Hobbs v. McLean*, 115 U. S. 567); *Goodwin v. Fox*, 129 U. S. 601.

24. *Alabama*. — *Carpenter v. Stiggins*, 40 So. 216; *Drew v. Simmons*, 58 Ala. 463; *McCrary v. Rash*, 60 Ala. 374; *Keel v. Larkin*, 72 Ala. 493; *Boykin v. Smith*, 65 Ala. 294; *Key v. Jones*, 52 Ala. 238; *Goodlett v. Kelly*, 74 Ala. 213.

Illinois. — *Berdan v. Allan*, 10 Ill. App. 91.

Indiana. — *Kibler v. Potter*, 11 Ind. App. 604, 39 N. E. 525; *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243; *Larch v. Goodacre*, 126 Ind. 224, 26 N. E. 49.

North Carolina. — *Bryant v. Morris*, 69 N. C. 444. See *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. 27 (in which a witness was disqualified against the surety of a principal since deceased, because of the spirit of the statute, where the strict letter of the law apparently would not have disqualified him, the statute merely disqualifying the witness against one deriving title or interest from the decedent).

Liberal Construction in Favor of Estate. — The statute should not be confined to its mere words to permit a claimant to establish his claim against the estate. *Northrip's Admr. v. Williams*, 30 Ky. L. Rep. 1279, 100 S. W. 1192. See *Ewing v. White*, 8 Utah 250, 30 Pac. 984.

The letter of the statute must yield to its reason and spirit which aims at placing the parties on an equality. *Orr v. Rode*, 101 Mo. 387, 13 S. W. 1066.

The disqualifying exception should be liberally construed to prevent the evils at which it was aimed. "Our court in view of the great difficulty, which exists, to find language, which would under all circumstances effect the object, which the legislature apparently had in view, has construed the language actually used in the statute-law liberally with a view to suppress the evil, which this exception to the removal of these common law disabilities was designed to avoid. Thus the words 'personal transactions' or communication between such witness and a decedent have been given a broad interpretation." *Seabright v. Seabright*, 28 W. Va. 412-460.

"Under the decisions of this court the statute has been construed liberally, in order to carry out the purpose of placing the parties upon an equality." *Ess v. Griffith*, 139 Mo. 322, 40 S. W. 930.

25. *Holcomb v. Holcomb*, 95 N. Y. 316.

of the exclusion contrary to its spirit and purpose.²⁶ Where the reason for the disqualification ceases the rule should not be applied.²⁷

Exception to Exception.—Where an exception is made to the disqualifying portion of the statute it will be liberally construed to include all those persons who come within the spirit of the exception if the words used can be reasonably said to include them.²⁸

C. THE PREVIOUS COURSE OF LEGISLATION on this subject will be considered by the court in determining the scope and effect of the latest statute.²⁹

D. EXCEPTIONS ARE CONTINUANCE OF COMMON LAW. — a. *Generally.*—The exceptions to the enabling acts, in favor of the representatives of deceased or incompetent persons, are held to be a mere continuance of the common law disability.³⁰ This is not entirely

26. *Drewry v. Hopper*, 77 Miss. 744, 27 So. 597; *Weiermuller v. Scullin*, 203 Mo. 466, 101 S. W. 1088.

27. In *Scott v. Burfiend*, 116 Mo. App. 71, 92 S. W. 175, the court speaking of § 4652, Rev. Stat. 1899, says: "The statute should be liberally construed and, in its application, the main purpose to be served is to prevent the living party to a contract from obtaining an unfair advantage over the estate of the deceased opposite party, but, when it appears that the death of a party does not necessarily place his estate at a disadvantage with the other party, there is no reason for disqualifying the living party and the statute should not be applied." See also *Weiermueller v. Scullin*, 203 Mo. 466, 101 S. W. 1088.

28. **Enabling Acts Liberally Construed.**—An exception to the disqualifying exception providing that in all civil proceedings by or against surviving partners no interest or policy of law shall exclude any party to the record from testifying to matters having occurred between the surviving party and the adverse party on the record applies not only to those who are technically partners, but to those who are partners in the popular sense of the term, and hence to members of a fraternal organization who are jointly interested in erecting a lodge building. "This statute is remedial, enacted to enable parties to testify who stand on an equality, though a party in interest be dead. Its spirit embraces the survivor of two or more who jointly

contracted. If two persons jointly execute a note, and one die, in an action between the holder and the survivor, this statute should apply as if the makers had been partners. Otherwise, the mischief is only partially remedied. Those jointly concerned in a transaction are partners in the popular sense of the word, and, considering the obvious intentment of the statute, it should apply in case of a surviving partner in the popular as well as the technical sense." *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818. But see *Montelius v. Montelius*, 209 Pa. St. 541, 58 Atl. 910.

Contra.—Where a statute disqualifies parties and interested persons as witnesses against the representatives of a deceased or incompetent person, but excepts certain classes of actions, a party otherwise incompetent will not be permitted to testify merely because the action is within the spirit but not the letter of the exception. *Hecht v. Shaffer* (Wyo.), 85 Pac. 1056.

29. See *Cockley Mill Co. v. Bunn*, 75 Ohio St. 270, 79 N. E. 478.

Griswold v. Edson, 32 Minn. 436, 21 N. W. 475, holding that in construing the term "person" as used in the statute disqualifying certain witnesses as to conversations with or admissions of "a deceased or insane party or person" the court would take into consideration the manifest purpose of the various previous changes which had been made in the law.

30. *Alabama.*—*Parker v. Edwards*, 85 Ala. 246, 4 So. 612.

true, however, at least in those jurisdictions where the basis of the disqualification is not the interest of the witness, but merely the fact that the other party to the transaction is dead or incapable of testifying;³¹ nor is it true in the case of a predecessor in interest or title who is disqualified on behalf of his successor,³² nor, it has been held, in case of the disqualification of the surviving party to the contract or cause of action in issue.³³

b. *Previous Competency Not Destroyed.* — (1.) **Generally.** — With the exceptions heretofore noted³⁴ these statutes create no new disabilities, and hence do not disqualify the witness in any case in which he was competent at common law.³⁵

Florida. — *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266.

Georgia. — *Nesbit v. Parrott*, 84 Ga. 142, 10 S. E. 589.

Indiana. — *Milam v. Milam*, 60 Ind. 58.

Maryland. — See *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084.

Missouri. — *Jenkins v. Emmons*, 117 Mo. App. 1, 94 S. W. 812; *Ring v. Jamison*, 66 Mo. 424; *Angell v. Hester*, 64 Mo. 142; *Meier v. Thiemann*, 90 Mo. 433, 2 S. W. 435; *Leach v. McFadden*, 110 Mo. 584, 19 S. W. 947.

West Virginia. — *Crothers v. Crothers*, 40 W. Va. 169, 20 S. E. 927.

In *Le Clare v. Stewart*, 8 Hun (N. Y.) 127, it is held that under the statute of that state which disqualifies interested persons as witnesses against the representative of a decedent, the fact that the testimony of the witness is against his interest does not make him competent against such a representative, although he would have been competent at common law.

31. See *supra*, I, 2, C.

32. See *infra*, IV, 13, and *Mason v. McCormick*, 80 N. C. 244.

33. *Weiermueller v. Scullin*, 203 Mo. 466, 101 S. W. 1088, (*affirming* (Mo. App.), 88 S. W. 1008) in which the court recognizes that the previous cases on this subject are somewhat conflicting, and expressly overrules the case of *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990, which holds that the exception to the enabling statutes leaves the party just where the common law placed him, to wit, incompetent on ground of interest to testify for any purpose. The court

quotes with approval *Kirton v. Bull*, 168 Mo. 622, 68 S. W. 927.

The act disqualifying the surviving party to the contract in issue creates a new incompetency which is not dependent upon interest or being a party. Although a party has no legal interest in the result and would therefore be competent at common law, he is nevertheless incompetent in his own behalf under the statute. *Crenshaw v. Robinson*, 37 Ga. 118. But see *infra*, IX, 2.

34. See preceding section.

35. *Florida.* — *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266.

Georgia. — *Lowrys v. Candler*, 64 Ga. 236; *Flournoy v. Wooten*, 71 Ga. 168; *Wood v. Crawford*, 75 Ga. 733.

Illinois. — *White v. Ross*, 147 Ill. 427, 33 N. E. 541; *McKay v. Riley*, 135 Ill. 586, 26 N. E. 525; *Bradshaw v. Combs*, 102 Ill. 428.

Iowa. — *Nash v. Gibson, Exrx.*, 16 Iowa 305; *Keech v. Cowles, Admr.*, 34 Iowa 259; *Rinehart v. Buckingham*, 34 Iowa 409; *Sykes v. Bates*, 26 Iowa 521.

Maryland. — *Johnson v. Johnson*, 65 Atl. 918; *Swartz v. Chickering*, 58 Md. 290.

Mississippi. — *Rothschild v. Hatch*, 54 Miss. 554.

Missouri. — *Angell v. Hester*, 64 Mo. 142; *Jenkins v. Emmons*, 117 Mo. App. 1, 94 S. W. 812.

Pennsylvania. — *Packer v. Noble*, 103 Pa. St. 188; *Hogebloom v. Gibbs, Sterrett & Co.*, 88 Pa. St. 235; *McFerrer v. Mont Alto Iron Co.*, 76 Pa. St. 180.

West Virginia. — *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

(2.) **Previous Statutory Competency.**—The previous competency of a witness as to a particular matter, though created by statute changing the common law, is not destroyed by the subsequent passage of a general enabling statute containing the usual exceptions in actions by or against the representatives of deceased or incompetent persons.³⁰

(3.) **In Equity.**—(A.) **GENERALLY.**—The disqualifying statutes apply to equitable as well as legal actions.³⁷ But witnesses competent in equity cases prior to the enactment of the statute are not made incompetent thereby even against the representatives of decedent.³⁸

Wisconsin.—*Hanf v. Masonic Aid Assn.*, 76 Wis. 450; 45 N. W. 315.

"We think it was not the intention of our statute to narrow the common law rule as to the admissibility of witnesses to testify." At common law parties were incompetent as witnesses, but there were exceptions to the general rule, mostly on account of necessity to prevent a failure of justice. "We think, therefore, that in adopting the general rule of the law as to the admissibility of the particular class of parties named in statutes, it adopted it with its exceptions." *Milam v. Milam*, 60 Ind. 58.

"The statute enlarges to some extent the former rule of competency, or what is the same thing narrows the old rule of exclusiveness; but it preserves the common law rule as the class of excepted cases, at least where the proposed evidence does not violate the manifest policy of the statute." *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736, 6 So. 703.

Preliminary Matters.—At common law a party was generally competent as to preliminary matters not involving the main issues where the testimony was addressed to the court. See the following cases:

England.—*Forbes v. Wale*, 1 W. Bl. 532; *Morrow v. Saunders*, 3 Moore 671; *Fortescue's Case*, Godb. 193; *Anonymous*, Godb. 326; *Soresby v. Sparrow*, 2 Stra. 1186; *Jevens v. Harridge*, 1 Saund. 9; *Cook v. Remington*, 6 Mod. 237; *Ward v. Apreece*, 6 Mod. 264.

United States.—*Taylor v. Riggs*, 1 Pet. 591.

Illinois.—See *Pyle v. Oustatt*, 92 Ill. 209.

New York.—*Jackson v. Frier*, 16 Johns. 193.

36. *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875, holding a party competent to prove his account books as against the representative of a decedent in spite of the disqualifying statute, although his previous competency in this case was created by a statute modifying the common law. (See *infra*, X, 2, B).

A statute making the defendant in an action wherein the defense of usury is pleaded, a competent witness to prove the usurious character of the contract enacted prior to the passage of the general enabling act with its exception in case of actions to which an executor or administrator was a party, is not repealed or affected by the subsequent passage of the latter act, and therefore the defendant in such an action is competent for the purpose therein stated, although the adverse party is an executor or administrator. *Rinehart v. Buckingham*, 34 Iowa 409.

37. *Bush v. Prescott & N. W. R. Co.* (Ark.), 103 S. W. 176.

38. *White v. Ross*, 147 Ill. 427, 33 N. E. 541; *Weston v. Elliott*, 72 N. H. 433, 57 Atl. 336.

The principal on a promissory note is competent in equity but not at law in favor of a surety in a suit against the latter by the administrator or executor of a deceased holder. *Dodgson v. Henderson*, 113 Ill. 360; *English v. Landon*, 181 Ill. 614, 54 N. E. 911.

In a bill in equity by an administrator against a surviving executor for an accounting of income property bequeathed by the defendant's testator, exception was taken to the admission of the testimony of the defendant, that certain payments were made by him from the income

(B.) DEFENDANT COMPETENT FOR CO-DEFENDANT. — Since, prior to the enactment of the enabling statutes a defendant in an equity suit was competent for his co-defendant where his testimony did not involve his own interest, the statute does not render him incompetent even as against the representative of a deceased or incompetent person.³⁹

of the estate. *Held*, that the statutes permitting the parties to testify were not intended to repeal the common law rule, that the surviving party can testify in equity in matters of accounting before a master, in his discretion, subject to the revision of the master, and it appearing that such a discretion was properly exercised in this case, the witness was properly allowed to testify. *Pierce v. Burroughs*, 59 N. H. 512.

Answer in Equity. — As to the force and effect of an answer in equity as evidence, see article "ANSWERS," Vol. I.

39. *White v. Ross*, 147 Ill. 427, 33 N. E. 541; *McKay v. Riley*, 135 Ill. 586, 26 N. E. 525; *Bradshaw v. Combs*, 102 Ill. 428.

Weston v. Elliott, 72 N. H. 433, 57 Atl. 336. This was an action in equity by the executor of a deceased surety on a bond against two of the remaining sureties for contribution, alleging that the other sureties besides the defendants were insolvent. One of the defendants moved that plaintiff be compelled to file a suit against him separately so that he might secure the testimony of his co-defendant and filed an affidavit setting out an agreement by the decedent with defendant personally that decedent would hold the assets of the estate so that they could not be dissipated by the principal in the bond; that the other defendant was not a party to this agreement and that the agreement had not been kept by the decedent. The other defendant by plea alleged the same sort of an agreement between himself and the decedent. The court made an order that if the plaintiff executor did not elect to testify in the hearing of the case, the last named defendant could be called as a witness for his co-defendant as to the alleged agreement between the latter and the decedent, provided it should appear that the witness was not a party to such

agreement. This was held proper under the circumstances although objected to as violating § 16, c. 224, Pub. St. 1891, providing that where one party to a suit is an executor neither shall testify unless the executor elects to testify. The court holds that this statute is merely an exception to the general enabling act and does not impose any new restrictions upon the competency of witnesses. The court says: "In chancery, parties to the record were subject to examination as witnesses much more freely than at law. 1 Gr. Ev. § 361. Under certain circumstances, one defendant could use a co-defendant as a witness. A party to the suit, however, could not be examined, except upon leave granted by the court for that purpose. . . . The power of the court to make the order was, as has been seen, not taken away by the statutory change rendering witnesses competent who had previously been incompetent because of interest." For the same result, under a similar statute, see *White v. Ross*, 147 Ill. 427, 35 N. E. 541.

For the Common Law Rule as to the right of one defendant to examine his co-defendant, see the following cases:

England. — *Dixon v. Parker*, 2 Ves. 219; *Murray v. Shadwell*, 2 Ves. & B. 401; *Hurd v. Partington*, *Younge* 307; *Fletcher v. Glegg*, *Younge* 345; *Smith v. Pincombe*, 1 H. & Tw. 250, 18 L. J. Ch. 211, 13 Jur. 158; *Paris v. Hughes*, 1 Keen 1; *Steed v. Oliver*, 5 Hare 492, 67 Eng. Reprint 1006; *Daniell v. Daniell*, 3 De G. & S. 357, 13 Jur. 164; *Dungannon v. Skinner*, 1 Hog. 281; *Franklyn v. Colquhoun*, 16 Ves. Jr. 218, 33 Eng. Reprint 967; *Hubbard v. Hewlett*, 2 Madd. 468; *Piddock v. Brown*, 3 P. Wms. 288; *Ashton v. Parker*, 14 Sim. 632, 9 Jur. 574; *Monday v. Guyer*, 1 De G. & S. 182, 11 Jur. 861; *Carrington v. Pell*, 3 De G. & S. 512; *Eade v. Lingood*, 1 Atk. 204, 26 Eng. Reprint 132; *Bar-*

(4.) Proving Facts Preliminary to Introduction of Secondary Evidence.

At common law a party or interested person was competent in his own behalf to prove the fact and circumstances of the loss of a written instrument as a preliminary step to the introduction of secondary evidence of its contents.⁴⁰ This rule continues under the statute even though it is not included within the exception to the disqualifying portion thereof,⁴¹ unless such facts are the material issues of the case and involve prohibited matters.⁴² But the witness is not competent to prove the terms and conditions or contents of such lost instrument,⁴³ unless such testimony does not fall within the

ret v. Gore, 3 Atk. 402; *Clarke v. Wyburn*, 12 Jur. 613; *Ellis v. Deane*, 3 Moll. 58.

Illinois. — *Mixell v. Lutz*, 34 Ill. 382.

New Jersey. — *Neville v. Demeritt*, 2 N. J. Eq. 321; *Harrison v. Johnson*, 18 N. J. Eq. 420.

⁴⁰ As to the rule at common law, see the following cases:

England. — *Read v. Brookman*, 3 T. R. 151.

United States. — *Riggs v. Tayloe*, 9 Wheat. 483; *Tayloe v. Riggs*, 1 Pet. 591; *Doe v. Winn*, 5 Pet. 233; *Boyle v. Arledge*, Hempst. 620; *De Lane v. Moore*, 14 How. 253.

Arkansas. — *Moore v. Maxwell*, 18 Ark. 469; *Kellogg v. Norris*, 10 Ark. 18.

Connecticut. — *Fitch v. Bogue*, 19 Conn. 285; *Witter v. Latham*, 12 Conn. 392 (*overruling Coleman v. Wolcott*, 4 Day 388).

Kentucky. — *M'Dowell v. Hall*, 2 Bibb 610; *Hamit v. Lawrence*, 2 A. K. Marsh. 366; *Drake v. Vaughan*, 6 J. J. Marsh. 144; *Hart v. Strode*, 2 A. K. Marsh. 115.

Massachusetts. — *Davis v. Spooner*, 3 Pick. 284; *Taunton Bank v. Richardson*, 5 Pick. 436; *Donelson v. Taylor*, 8 Pick. 390; *Poignand v. Smith*, 8 Pick. 272; *Page v. Page*, 15 Pick. 368.

New Hampshire. — *McNiel v. McClintock*, 5 N. H. 355.

New York. — *Chamberlain v. Gorham*, 20 Johns. 144; *Jackson v. Davis*, 5 Cow. 123, 15 Am. Dec. 451; *Jackson v. Frier*, 16 Johns. 193.

North Carolina. — *Blanton v. Miller*, 1 Hayw. 4; *Seekright v. Bogan*, 1 Hayw. 176; *Cotton v. Beasley*, 2 Murph. 259.

Ohio. — *Smiley v. Dewey*, 17 Ohio 156.

Pennsylvania. — *Meeker v. Jackson*, 3 Yeates 442; *Snyder v. Wolfley*, 8 Serg. & R. 328; *Douglass v. Sanderson*, 1 Yeates 15, 2 Dall. 116; *Jordan v. Cooper*, 3 Serg. & R. 564; *Siltzell v. Michael*, 3 Watts & S. 329.

South Carolina. — *Davis v. Benbow*, 2 Bailey 427.

Vermont. — *Penfield v. Cook*, 1 Aik. 96.

Virginia. — *Ben v. Peete*, 2 Rand. 539.

⁴¹ *Jenkins v. Emmons*, 117 Mo. App. 1, 94 S. W. 812; *Parker v. Edwards*, 85 Ala. 246, 4 So. 612; *Milam v. Milam*, 60 Ind. 58; *Choate v. Huff* (Tex. App.), 18 S. W. 87; *Keech v. Cowles, Admr.*, 34 Iowa 259; *Stevens v. Witter*, 88 Iowa 636, 55 N. W. 535.

Although the statute disqualifies a person from testifying in support of his own claim against the estate of a deceased person, he is nevertheless competent to lay the foundation for the introduction of secondary evidence of the contents of the lost writing. *Cole v. Gardner*, 67 Miss. 670, 7 So. 500; *Harper v. Lacey*, 62 Miss. 5.

Although the statute disqualifies the witness as to matters transpiring before the death of the decedent, he is nevertheless competent to prove the loss of an instrument which is the basis of the action, even where such loss occurred before the decedent's death. *Nash v. Gibson, Exrx.*, 16 Iowa 305.

⁴² *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17; *Calwell v. Prindle*, 11 W. Va. 307.

⁴³ *Alabama*. — *Parker v. Edwards*, 85 Ala. 246, 4 So. 612.

Iowa. — *Stevens v. Witter*, 88 Iowa 636, 55 N. W. 535 (*holding* the witness incompetent to prove the terms

class of prohibited matters,⁴⁴ though he may identify it as the one in question.⁴⁵

E. STATUTORY PROVISIONS AS TO CONSTRUCTION.—The enabling statutes sometimes provide that their principles shall be applied to cases within their reason and spirit, though not within their strict letter. There is, however, no occasion to invoke this provision where the case falls within the express terms of the statute.⁴⁶ Some statutes, after setting out the exceptions to the general enabling act, provide that no additional exceptions shall be allowed.⁴⁷

F. VALUE OF CASES AS PRECEDENTS.—Legislation has been so varied that the value of the decisions in one state as precedents in another is comparatively small, except where the statutes are identical.⁴⁸

3. Effect on Pending Actions.—These statutes apply to actions pending at the time of their passage,⁴⁹ unless otherwise provided in the statute.⁵⁰

4. Retrospective Operation.—The fact that the matter testified

of the lost contract on which his claim was based).

Michigan.—Schratz *v.* Schratz, 35 Mich. 485.

Missouri.—Messimer *v.* McCray, 113 Mo. 382, 21 S. W. 17.

New Hampshire.—Sabre *v.* Smith, 62 N. H. 663.

New York.—Hadsall *v.* Scott, 26 Hun 617.

North Carolina.—Hussey *v.* Kirkman, 95 N. C. 63.

South Carolina.—Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551.

Texas.—Britton *v.* Tischmacher (Tex. Civ. App.), 31 S. W. 241.

^{44.} See *infra*, VI, and Simmons *v.* Havens, 101 N. Y. 427, 5 N. E. 73.

^{45.} Choate *v.* Huff, 4 Will. Civ. Cas. § 280.

^{46.} In Ohio, it is provided by statute immediately following the general enabling act and its exceptions (§ 5242 Rev. Stat. 1906) that, when a case is plainly within the law and spirit of those sections immediately preceding the exceptions, "though not within the strict letter, their principles shall be applied." Cockley Mill Co. *v.* Bunn, 75 Ohio St. 270, 79 N. E. 478, where the court says: "It will be observed that the law is not that the exceptions are to be multiplied by judicial construction, but that the principles of the three sections shall be applied when a case, not within the letter, is

plainly within their reason and spirit." But on the other hand where a case is provided for by the express terms of the statute, no occasion can arise for invoking the spirit or reason of the statute to supply the omission of its letter or terms.

The same provision is found in the Wyoming statute. See *supra*, I, 2, B, note, and also Hecht *v.* Shaffer (Wyo.), 85 Pac. 1056.

^{47.} Jackson *v.* Gallagher, 128 Ga. 321, 57 S. E. 750 (§ 5270 Civ. Code 1895); New Ebenezer Assn. *v.* Gress Lumb. Co., 89 Ga. 125, 14 S. E. 892.

^{48.} Guillaume *v.* Flannery (S. D.), 108 N. W. 255. See also O'Connor *v.* Slattery (Wash.), 89 Pac. 885.

^{49.} Besson *v.* Cox, 35 N. J. Eq. 87.

Testimony Taken Prior to Passage of Statute.—The act of 1887 by the express terms of § 12 applies to testimony taken before its passage as well as to that taken after it went into effect. Duffield *v.* Hue, 136 Pa. St. 602, 20 Atl. 526.

Effect on Deposition Previously Taken.—The deposition of a claimant taken when competent is not admissible after a change in the law making the witness incompetent. Mitchell *v.* Haggenmeyer, 51 Cal. 108.

^{50.} Kimball *v.* Baxter's Estate, 27 Vt. 628; Pub. Gen. Laws Md., art. 35, § 3.

to occurred prior to the passage of the statute does not make the witness competent.⁵¹

Competency of Subscribing Witnesses.—A general enabling act making parties and interested persons competent witnesses in all civil proceedings does not make an interested person in whose presence a will was executed prior to such act a competent witness to prove the execution.⁵²

5. Constitutionality.—Such a statute which applies to matters occurring prior to its passage is not for that reason unconstitutional because impairing contractual or vested rights.⁵³ An act disqualifying an agent who contracted with decedent is not unconstitutional.⁵⁴ It has been held that the clause found in some statutes to the effect that the witness may be required to testify by the court is unconstitutional.⁵⁵ A statute disqualifying interested witnesses from testifying as to transactions with a decedent does not violate a constitutional provision giving parties the right to use witnesses not disqualified by interest.⁵⁶

6. Application to Courts.—A. GENERALLY.—The disqualifying statutes apply to all the courts having jurisdiction of civil proceeding.⁵⁷

51. Kenney Presby. *Home v. Kenney* (Wash.), 88 Pac. 108.

52. *Camp v. Stark*, 81* Pa. St. 235, holding that a devisee in the will, in whose presence it was executed, being at that time an incompetent witness to such fact was not rendered competent by the subsequent act of 1869 removing the disqualification of parties and interested persons as witnesses in civil proceedings, since the validity of the will depended upon the competency of the witness at the time the will was executed, and the subsequent enabling act did not and was not intended to operate retrospectively to make valid an invalid will. But see *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387, and articles "WILLS"; "WRITTEN INSTRUMENTS."

53. **Constitutionality of Retrospective Statute.**—A statute passed subsequently to the conversations or transactions as to which testimony of the witness is offered making the witness incompetent thereto, nevertheless applies to such transactions and is constitutional, since it does not relate to or impair contractual or vested rights, but relates merely to the remedy and declares a rule of evidence. *Kenney Presby. Home v. Kenney* (Wash.), 88 Pac. 108.

54. *Wood v. Kaufman*, 135 Mich. 5, 97 N. W. 47.

55. The clause, "or required to testify thereto by the court," originally attached to § 5598, Shannon's Code Tennessee, disqualifying parties to actions against personal representatives unless called by the opposite party, was held unconstitutional because conferring on the courts legislative power, making the rights of parties depend upon the arbitrary judgment, whim, caprice, or even prejudice of the judge in each particular case. *Tillman v. Cocke*, 9 Baxt. (Tenn.) 429; *Berry v. Jones*, 11 Heisk. (Tenn.) 206.

56. *Donnell v. Braden*, 70 Iowa 551, 30 N. W. 777, following *Karney v. Paisley*, 13 Iowa 89.

57. The disqualifying statute applies in all civil proceedings as well to the orphans' court as to the court of common pleas. "The tribunal may be a register of wills, master, auditor, arbitrator, referee, court of common pleas at law or in equity, the orphans' court, quarter sessions, the superior or supreme court, or any other tribunal created by law to try causes of action between contesting parties." *In re Crosetti's Estate*, 211 Pa. St. 490, 60 Atl. 1081.

B. FEDERAL COURTS. — a. *Generally.* — In the federal courts the competency of witnesses with respect to transactions or communications with persons since deceased is governed entirely by the federal and not the state law upon that subject.⁵⁸ Territorial courts are not federal courts within the meaning of this rule,⁵⁹ although the courts of the District of Columbia formerly were.⁶⁰

b. *In Admiralty.* — Proceedings *in rem* in the admiralty courts form no exception to the operation of these disqualifying statutes.⁶¹

III. PROCEEDINGS TO WHICH STATUTE APPLIES.

1. *Generally.* — The term action as used in these statutes includes all civil proceedings.⁶²

2. *Tort Actions.* — The disqualification applies to tort actions⁶³ unless the form of the statute is such as to confine it to actions on contract.⁶⁴

3. *Equity Suits.* — The statutes apply to actions in equity as well as at law,⁶⁵ but are subject to the same exceptions which prevailed in equity cases prior to their passage.⁶⁶

4. *Proceedings in Rem.* — It has been held that inasmuch as there are strictly no parties to a proceeding *in rem* that a statute in so far as it disqualifies merely parties has no application to such an action,⁶⁷ though the general rule seems to be to the contrary.⁶⁸

5. *Death of Party Pending Suit.* — A. *GENERALLY.* — Where pending an action a party thereto dies and his legal representative is substituted, the statute immediately applies to the subsequent pro-

Proceedings in Equity. — See *infra*, III, 3.

58. *Smith v. Au Gres*, 150 Fed. 257, 80 C. C. A. 145; *Miller v. Steele*, 153 Fed. 714; *Crawford v. Moore*, 28 Fed. 824; *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553; *Stephens v. Bernays*, 42 Fed. 488.

59. *Corbus v. Leonhardt*, 114 Fed. 10, 51 C. C. A. 636.

60. *Page v. Burnstine*, 102 U. S. 664.

61. Thus where a vessel is libeled and the claimant, after filing his stipulation to answer the judgment, dies, the plaintiff is not a competent witness against the claimant's administrator, who has answered, as to transactions or communications with the decedent. *Charlotte v. Soutter*, 28 Fed. 733.

62. *Appeal of McBride*, 72 Pa. St. 480.

63. *Erwin v. Nolde*, 164 Pa. St. 205, 30 Atl. 246.

64. *Cincinnati, H. & I. R. Co. v.*

Cregor, 150 Ind. 625, 50 N.E. 760, applying § 507, *Burns' Ann. Stat.* 1894.

65. *Bush v. Prescott & N. W. R. Co.* (Ark.), 103 S. W. 176; *Clark v. Clough*, 65 N. H. 43, 23 Atl. 526.

The statute as to incompetency of parties as to transactions with deceased persons applies to proceedings in chancery, whether on a hearing before the chancellor or in reference to the register. *Key v. Jones*, 52 Ala. 238; *Kirksey v. Kirksey*, 41 Ala. 626.

66. See *supra*, III, 3, D, b, (3).

67. *In re Young's Will*, 123 N. C. 358, 31 S. E. 626; it is said that there are strictly no parties to a proceeding *in rem*, and for this reason the proponent of a will is not regarded as a party within the meaning of the statute.

68. *Charlotte v. Soutter*, 28 Fed. 733 (see *supra*, II, 7, B, b). And see *infra*, III, 6, E, c, (1).

ceedings therein⁶⁹ notwithstanding the fact that witnesses who would be incompetent under the new state of facts have already testified.⁷⁰ The fact that a witness rendered incompetent by the death has testified in the case prior thereto does not make him subsequently competent.⁷¹

Death During Examination of Witness.—Where the death of the adverse party occurs during examination of the witness, the disqualification immediately attaches; but the testimony already given cannot be stricken out since its competency depends upon the conditions existing at the time it was given.⁷²

B. FAILURE TO SUBSTITUTE REPRESENTATIVE.—Where no representative has been substituted for the decedent and his estate is therefore not bound by the proceedings, the statute does not apply,⁷³ though the rule is otherwise where, notwithstanding this fact, the judgment would be evidence against the decedent's representative.⁷⁴

69. *Alabama*.—*Marcy v. Howard*, 91 Ala. 133, 8 So. 566; *Beadle v. Graham*, 66 Ala. 99.

Arkansas.—*Bush v. Prescott & N. W. R. Co.*, 103 S. W. 176.

California.—*Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532.

Georgia.—*Ford v. Kennedy*, 64 Ga. 537.

Iowa.—*In re Wiltsey's Will*, 122 Iowa 423, 98 N. W. 294.

Kansas.—*Park v. Ensign*, 10 Kan. App. 173, 63 Pac. 280; *Jaquith v. Davidson*, 21 Kan. 341.

Mississippi.—*Duncan v. Gerdine*, 59 Miss. 550.

Missouri.—*Lewis v. Weisenham*, 1 Mo. App. 222.

Nebraska.—*Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848.

New Jersey.—*Beckhaus v. Ladner*, 48 N. J. Eq. 152, 161, 21 Atl. 724; *Holstead v. Tyng*, 29 N. J. Eq. 86.

Pennsylvania.—*Irwin v. Nolde*, 164 Pa. St. 205, 30 Atl. 246; *Dick v. Williams*, 130 Pa. St. 41, 18 Atl. 615; *Hart v. McGrew*, 11 Atl. 617; *Hommel v. Lewis*, 104 Pa. St. 465; *Eilbert v. Finkbeiner*, 68 Pa. St. 243; *Craig v. Brendel*, 69 Pa. St. 153; *Karns v. Tanner*, 66 Pa. St. 297.

Texas.—*O'Neill v. Brown*, 61 Tex. 34.

Virginia.—*Keran v. Trice*, 75 Va. 690.

This is the rule under code 1904, § 3346, disqualifying a party to a transaction where the other party thereto is incapable of testifying by reason of death. The rule was the

same under the former statute disqualifying one party where the other party to the transaction "is dead." The change which was made in the statute does not indicate any intention on the part of the legislature to change the rule. *Puckett v. Mullins*, 106 Va. 248, 55 S. E. 676; citing *Keran v. Trice*, 75 Va. 690, construing the former statute.

70. *Crawford v. Shriver*, 139 Pa. St. 239, 21 Atl. 518, holding that under the statute of 1869, one who is substituted a party defendant to a suit as the executor of a deceased party may not be examined as to matters occurring before the death of his decedent, notwithstanding a plaintiff had been examined and had testified at length before the decedent's death.

71. Where pending a suit in equity one party dies, the adverse party cannot thereafter testify merely because prior thereto he has given testimony before a master in chancery; the evidence taken before the master not being heard or considered until it was all taken, some two years after the decedent's death. *Clark v. Harper*, 215 Ill. 24, 74 N. E. 61.

72. *Comins v. Hetfield*, 80 N. Y. 261.

73. Where one of the defendant partners has died pending an action against the firm and his representatives have not been substituted, the statute does not apply. *Roberts v. Yarboro*, 41 Tex. 449.

74. In an action against a principal and surety, the fact that the

C. ON RETRIAL. — Where after the first trial and before a retrial of an action a party thereto dies and his representative is substituted, the disqualifying statute applies.⁷⁵ This has been held to be the rule although the testimony of the decedent given on the first trial has been introduced in evidence,⁷⁶ though such a ruling is obviously inapplicable to those jurisdictions in which the statute by its terms or by construction is made inapplicable when the party protected has introduced the testimony of the decedent.⁷⁷

D. TESTIMONY TAKEN PREVIOUS TO INCOMPETENCY. — a. *Generally.* — Testimony already admitted in the pending action is not rendered incompetent by the subsequently occurring incompetency of the witness,⁷⁸ even though the decedent's testimony was not taken.⁷⁹ But the fact that a party is disqualified on a second trial by the death of the adverse party does not render competent his testimony given on the preceding trial,⁸⁰ but on the contrary such testimony is subject to the same incompetency as the witness.⁸¹

b. *Deposition.* — (1.) *Generally.* — The deposition of a witness who subsequently becomes incompetent by reason of the death of one of the parties is also incompetent in most jurisdictions,⁸² though

principal dies pending the action, and that his name is on motion of the plaintiff stricken from the record does not make the latter a competent witness. The principal having been a party to, and having had notice of, the suit, a judgment therein against the surety would be conclusive evidence in a suit by the latter against the administrator of the principal on an implied contract of indemnity. *Lacock v. Com.*, 99 Pa. St. 207.

75. *Keyser v. Warfield*, 103 Md. 161, 63 Atl. 217 (if the testimony given by the decedent on the former trial is not offered in evidence).

76. Where a party to the action who has testified therein dies after the trial and judgment and a new trial is granted in which the decedent's representative is substituted, the adverse party is an incompetent witness in his own behalf on the new trial, notwithstanding the testimony of the decedent taken on the first trial has been admitted in evidence. "It by no means follows that because the testimony of the deceased party, duly taken in his lifetime, was given in evidence on the trial, therefore the surviving party is made competent to go on the stand to testify in his own behalf. When the testimony of the party since deceased, was

taken, he was a competent witness. He was subject to cross-examination by the opposite party. The lips of the survivor were not then closed. He could then have offered himself as a witness to explain or contradict the testimony of the opposite party. If he did so he thereby perpetuated his own testimony, and it is now available. If he then failed to perpetuate it, there is no equality in now permitting him, after the death of his adversary, to go on the stand to testify to anything which transpired during the life of the opposite party. The lips now closed in death cannot prompt any cross-examination, nor explain or contradict the testimony thus given." *Evans' Admx. v. Reed*, 84 Pa. St. 254.

77. See *infra*, X, 9.

78. *Armitage v. Snowden*, 41 Md. 119; *Comins v. Hetfield*, 80 N. Y. 261; *Collins v. McGuire*, 76 App. Div. 443, 78 N. Y. Supp. 527, *holding* that such testimony could not be stricken out.

79. *Marlatt v. Warwick*, 18 N. J. Eq. 108, 19 N. J. Eq. 439.

80. *Barker v. Hebbard*, 81 Mich. 267, 45 N. W. 964, *citing* *Taylor v. Bunker*, 68 Mich. 258, 36 N. W. 66.

81. *Trunkay v. Hedstrom*, 131 Ill. 204, 23 N. E. 587.

82. *Arkansas*. — *Park v. Lock*, 48 Ark. 133, 2 S. W. 696.

in others its competency is held to be unaffected by the subsequently occurring disability of the deponent.⁸³ The cause of the conflict in the decisions is their inability to agree on when the deponent is deemed to have testified, whether at the time the deposition is taken or when it is offered in evidence. Where, however, the deposition was taken pursuant to a stipulation that it might be read, it is competent even after the adverse party's death.⁸⁴ So where the decedent had an opportunity for cross-examination it has been held admissible.⁸⁵

(2.) **Where Deposition Has Been Read Prior to Death.** — It has been held that even where a deposition has been read in evidence prior to the death which renders the deponent incompetent, the court is not at liberty to consider the evidence as against the decedent's representatives who have been substituted in the action.⁸⁶

Illinois. — *Smith v. Billings*, 177 Ill. 446, 53 N. E. 81 (*affirming* 76 Ill. App. 454, where the reason is fully explained as being that the object of the statute is not to exclude interested testimony, but to place parties on an equality).

Iowa. — *Quick v. Brooks*, Admr., 29 Iowa 834.

Kentucky. — *Hardin's Admr. v. Taylor*, 78 Ky. 593; *Newman's Admr. v. Blades*, 21 Ky. L. Rep. 1353, 54 S. W. 849.

Mississippi. — *Hewlett v. George*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Missouri. — *Messimer v. McCrary*, 113 Mo. 382, 21 S. W. 17.

Ohio. — *St. Clair v. Orr*, 16 Ohio St. 220.

Tennessee. — *Beaty v. McCorkle*, 11 Heisk. 593.

Texas. — *Rogers v. Tompkins* (Tex. Civ. App.), 87 S. W. 379 (citing *Park v. Lock*, 48 Ark. 133, 2 S. W. 696; *Webster v. Mann*, 56 Tex. 119, 42 Am. Rep. 688).

West Virginia. — *Zane v. Fink*, 18 W. Va. 693.

^{83.} *McMullen v. Ritchie*, 64 Fed. 253; *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697. See *Keran v. Trice*, 75 Va. 690.

^{84.} **Effect of Stipulation.** — After issue had been joined the depositions of the plaintiff and defendant were taken under a stipulation between their attorneys, which provided, among other things, that the depositions might be read upon the trial;

the plaintiff was cross-examined by defendant's counsel in the latter's presence; the defendant died before the trial and his executrix was substituted in his place; upon the trial of the action plaintiff offered his deposition in evidence, which was excluded, and he then offered the deposition of the defendant which was admitted and read (although it was against his interest) to the jury, after which the plaintiff's deposition was again offered and excluded. *Held*, that the deposition of the plaintiff, although it related to personal transactions had between plaintiff and the deceased, should have been admitted in evidence when offered upon the trial. That in addition to the provisions of the code, under the express stipulation of the attorneys the depositions of either or both might be read upon the trial. *MacDonald v. Woodbury*, 30 Hun (N. Y.) 35.

^{85.} *Hay's Appeal*, 91 Pa. St. 265.

^{86.} *Smith v. Billings*, 76 Ill. App. 454 (*affirmed* in 177 Ill. 446, 53 N. E. 81), *holding* that such use of the testimony would be "clearly in contravention of the spirit of the statute." The court says: "Nor do we view the fact that the deposition had been read before the death of Billings as changing the rule. It is the use of the testimony in determining the issues upon the trial which the statute precludes, and although the reading of the testimony to the court had been concluded before the death of Billings,

(3.) **Testimony Taken at Instance of Decedent.**—Testimony of the witness subsequently rendered incompetent by the death of one of the parties is nevertheless admissible if taken at the instance of the latter.⁸⁷

(4.) **Where Decedent Has Testified.**—Some courts make an exception in case the decedent has testified in the case before his death, holding the deposition of the adverse witness competent as to the matters testified to by decedent.⁸⁸ If the latter's deposition contains no reference to prohibited matters, the fact that it has been introduced in evidence does not render competent the deposition of the adverse party.⁸⁹

(5.) **Statutes** sometimes provide for the taking of the deposition of a witness either before or after action brought in anticipation of the death or disability of the adverse party and the resulting incompetency of the witness.⁹⁰

(6.) **In Equity.**—In some jurisdictions a distinction is made between suits in equity and actions at law, holding that in the former a deposition competent when taken is not rendered incompetent by the subsequent death of a party and the resulting incompetency of the deponent.⁹¹

c. *On Retrial.*—Where on a retrial of an action a witness is in-

yet appellant asked that the court consider, weigh and act upon this testimony after the death of Billings, and as against appellees, defending as his executors.⁹²

87. In an action brought to recover damages for alleged fraudulent representations, the testimony of the plaintiff and defendant was taken at the instance of each other before the trial and thereafter, and before the trial the defendant died and the action was continued against his executors. *Held*, that the plaintiff was entitled to introduce in evidence the testimony taken upon the examination held at the instance of the defendant, and that such testimony was not incompetent under § 829 of the Code of Civil Procedure. *Rice v. Motley*, 24 Hun (N. Y.) 143. See *MacDonald v. Woodbury*, 30 Hun (N. Y.) 35.

88. *Hardin's Admr. v. Taylor*, 78 Ky. 593.

89. *Newman's Admr. v. Blades*, 21 Ky. L. Rep. 1353, 54 S. W. 849.

90. Under the Iowa Code, § 4605, any person anticipating the death or insanity of the adverse party may have his own deposition, or that of any other person whose testimony would become incompetent on the

death of the adverse party, taken either before or after the action is brought, and the same may be used after the adverse party's death or insanity, provided it was taken and filed ten days before the latter event. This provision, however, does not permit a party to use a transcript of his testimony given at a former trial during the life of the adverse party on a subsequent trial after the latter's death; such a transcript not being a deposition within the meaning of the statute. *Greenlee v. Mosnat* (Iowa), 111 N. W. 996.

91. *United States.*—*Sheidley v. Aultman*, 18 Fed. 666; *Vattier v. Hinde*, 7 Pet. 252.

Arkansas.—*Bush v. Prescott & N. W. R. Co.*, 103 S. W. 176.

Michigan.—*Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200.

Missouri.—*LaFayette Bldg. Assn. v. Kleinhoffer*, 40 Mo. App. 388.

New Jersey.—*Marlatt v. Warwick*, 18 N. J. Eq. 108, s. c. 19 N. J. Eq. 439; *Walker v. Hill*, 22 N. J. Eq. 513.

Pennsylvania.—*Galbraith v. Zimmerman*, 100 Pa. St. 374.

Rhode Island.—*King v. Patt*, 13 R. I. 132.

competent because of the death of a party intermediate the two trials, his testimony given on a former trial is also incompetent notwithstanding a statute making a certified copy of the reporter's notes of the testimony in a cause admissible in a retrial thereof.⁹² The reason for this rule is that the basis of the exclusion of the testimony of the witness, whether given orally or by deposition, is not that he is a party or interested, but that it gives him or the party on whose behalf he testifies an unfair advantage over the representatives of the decedent, of whose testimony they have been deprived.⁹³

6. As Affected by Parties and Issues. — A. GENERALLY. — The general rule is that the disqualification applies only to actions in which the decedent's estate or successor is a party or is interested.⁹⁴

92. The Supreme Court of Iowa, referring to §4604 of the code of that state, says: "The statutory prohibition seems to be as to the admissibility of the witness' testimony at the time of the trial when it is offered, if at the commencement of such trial the other party to the transaction or communication against whose executor or administrator the testimony is to be used is dead; and we think it is immaterial, under the statute, whether the evidence of such witness is offered by way of oral testimony at the trial, or by way of proof of the evidence given by him on a former trial. With reference to such transaction or communication, he has become incompetent to speak, and he can neither speak at that time nor can he then speak through his testimony given at another time. . . . Much is said by counsel for appellee in favor of the general proposition that, as plaintiff was competent to testify when his former testimony was given and has only been rendered incompetent by subsequent events, his former testimony ought to be accepted. But the policy of the statute seems not to be in harmony with this view. It was not on account of anything which has happened to the witness that he is unable to testify on this trial. It is because an obstacle has arisen to the enforcement of his claim as based on his own testimony by reason of the death of the other party, and that obstacle, as the statute provides, renders his testimony incompetent, unless in some way such obstacle is removed. . . . The transcript is admissible only when the testimony

is 'material, and competent.' . . . True it is that the testimony of plaintiff was competent testimony, so far as its relation to the issues was concerned, but it was incompetent as the testimony of plaintiff with reference to a subject-matter as to which he was forbidden to testify after the death of the adverse party, and for that reason it was incompetent testimony; that is, testimony of an incompetent witness." *Greenlee v. Mosnat* (Iowa), 111 N. W. 996.

93. *Greenlee v. Mosnat* (Iowa), 111 N. W. 996. And see *supra*, I, 1, c.

94. *Alabama*. — *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13; *Nelson v. Howison*, 122 Ala. 573, 25 So. 211; *Pugh v. Barnes*, 108 Ala. 167, 19 So. 370.

Georgia. — *Florida Cent. & P. R. Co. v. Usina*, 111 Ga. 697, 36 S. E. 928.

Indiana. — *Hines v. Consolidated Coal & Lime Co.*, 29 Ind. App. 563, 64 N. E. 886; *Hart v. Miller*, 29 Ind. App. 222, 64 N. E. 239.

Michigan. — *Latourette v. McKoen*, 104 Mich. 156, 62 N. W. 153.

New Jersey. — *Clawson v. Brewer*, 67 N. J. Eq. 201, 58 Atl. 598.

North Carolina. — *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782.

Virginia. — *Morgan v. Booker*, 106 Va. 369, 56 S. E. 137.

See *infra*, V. 2, "With Decedent Not Represented."

The statute has no application to transactions or communications with a decedent who is in no way represented in the action. *Hutton v. Doxsee*, 116 Iowa 13, 89 N. W. 79.

Where, however, the statute disqualifies the witness as to matters occurring between himself and a deceased "party or person", it is not necessary that the latter's representative be a party;⁹⁵ and the same rule has been laid down in some of those states where the statute disqualifies a surviving party to the contract or cause of action in issue.⁹⁶

The statutes usually provide that the witness shall be incompetent in actions or proceedings by or against certain classes of representatives or successors of the deceased or incompetent person, or in which the opposite or adverse party is one of such specified persons. Under such statutes although the witness is within the class of persons disqualified by the statute, he is not incompetent to testify unless the adverse party is also within the class of protected persons.⁹⁷ Where the action has abated⁹⁸ or where it has been dis-

The plaintiff, in an action of replevin brought against the purchaser at an administrator's sale to recover possession of a horse sold as property of the decedent, is not debarred from testifying that the decedent had made him a gift of the animal. The parties to the cause of action are both living. Neither of them in any sense represents the estate of the decedent, nor will judgment bind or conclude the estate. *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190.

In replevin to recover goods sold by plaintiff's bailees to defendant, plaintiff may testify as to transactions with the bailees, since deceased, as their estates were not represented in any way in the suit. *Seffler v. Watson*, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467, following *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190.

^{95.} *Mutual Life Ins. Co. v. O'Neil*, 116 Ky. 742, 76 S. W. 839; *Turner v. Mitchell*, 22 Ky. L. Rep. 1784, 61 S. W. 468; *Hurry v. Kline*, 93 Ky. 358, 20 S. W. 277. But see *Cooper v. Jackson*, 22 Ky. L. Rep. 295, 57 S. W. 254.

In *Griswold v. Edson*, 32 Minn. 436, 21 N. W. 475, the testimony of a party as to a conversation with the adverse party's agent, since deceased, was held excluded under the statute making parties and interested persons incompetent as to "any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties." The court after reviewing the course of previous leg-

islation on the subject showing that the term "person" must have been inserted in the statute for a purpose, says: "The danger of allowing a party to testify where he may feel safe to testify falsely, from the fact that the other party to the conversation cannot be produced to contradict him, because dead or insane, is just as great where he offers to testify to conversations or admissions of one not a party to the action or cause of action as of a party. There was just as much reason for excluding a party's evidence as to a conversation with or admission of any other person who has died or become insane, as for excluding it as to a conversation with or admission of one a party. The only reason for excluding it in either case is the danger of perjury. That exists in one case as fully as in the other. We cannot reject the words 'or person,' or construe them as having any but their ordinary meaning." *Followed* in *Lowe v. Lowe*, 83 Minn. 206, 86 N. W. 11.

^{96.} See *infra*, IX, 2.

^{97.} *Begole v. Hazzard*, 81 Wis. 274, 51 N. W. 325; *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522; *Thompson v. Humphrey*, 83 N. C. 416; *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. 502; *Shaw v. Cunningham*, 16 S. C. 631.

^{98.} Where suit was brought on an official bond against the principal and a surety and the administrator of a deceased surety, and the process was returned, as to the administrator, "not found," and no steps were taken

missed⁹⁹ as to the decedent's representative or successor, the statute no longer applies.

B. NATURE OF ISSUE. — In some states the statute has been held to apply only to actions involving some issue or issues to which the decedent, if alive, would have been a party,¹ or to those actions in which there is an attempt to impair or reduce the estate of the deceased or incompetent person, and which do not involve merely a determination of the conflicting claims of persons who may be entitled to the estate of the decedent.² The statute itself sometimes excepts from its operation the latter class of actions.³ No such limitations, however, are generally recognized,⁴ especially in those states where it is not necessary that the estate or its representative be a party or interested.⁵

C. ACTIONS IN WHICH ESTATE IS INTERESTED. — In Alabama the statute applies only to actions in which the estate is interested.⁶ It has reference to the object of the suit rather than the parties to

to have the cause continued as to such administrator for further process, and the plaintiff proceeded to trial as to the other defendants, the suit abated as to the administrator and he was not afterwards a party, if he was so before, and the plaintiff could testify as a witness in his own behalf. *Hall v. State*, 39 Ind. 301.

99. *Campbell v. Mayes*, 38 Iowa 9.

1. See *infra*, III, 6, E, c; *Brown v. Bell*, 58 Mich. 58, 24 N. W. 824.

2. *In re Miller's Estate*, 31 Utah 415, 88 Pac. 338. See *infra*, III, 6, E, c; III, 6, E, d, (2); IX, 1.

In an action by a widow against the administrator of her deceased husband to recover her share of the fund which remained in her hands for distribution, she is a competent witness, as it is not a claim against the estate in the ordinary acceptance. The claimant's right to a specified sum depends upon her relation to the decedent. When her relation is established, her right to participate in the fund to an amount fixed by law is absolute, unless that right has been forfeited by her misconduct, or unless some equitable set-off sufficient to discharge the amount can be established. *Sherwood v. Thomasson*, 124 Ind. 541, 24 N. E. 334 (*citing Shaffer v. Richardson*, 27 Ind. 122; *Hamlyn v. Nesbit*, 37 Ind. 284).

A proceeding which does not involve any right or liability of the decedent but is concerned merely with the determination of how the

estate is to be divided, as such, among the proper beneficiaries, is not within the statute. *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455. See also *Hoijt v. Davis*, 30 Mo. App. 309.

3. 2 *Purdon's Dig.* 1905, p. 1495, § 34(e); *Greenawalt v. McEnelley*, 85 Pa. St. 352.

4. See *infra*, III, 6, E, c.

5. See *infra*, III, 6, D, e (1), and IX, 2.

6. *First Nat. Bank v. Chaffin*, 118 Ala. 246, 24 So. 80; *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13; *Pugh v. Barnes*, 108 Ala. 167, 19 So. 370; *Alabama Life Ins. Co. v. Sledge*, 62 Ala. 566; *Hoyle v. Edwards*, 97 Ala. 649, 11 So. 748.

The purpose of the statute, which declares, "that neither party shall testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the results of the suit," is to exclude the living from testifying against the dead who cannot be heard in explanation or contradiction, and it applies to all cases involving a direct immediate conflict of interest between the witness, and the estate of a decedent where the effect of the evidence is to diminish the rights of the deceased, or those claiming under him. *Dismukes v. Tolsen*, 67 Ala. 386.

The estate of a deceased tenant,

it.⁷ The effect of the statute cannot be avoided by bringing the action against one who is in possession of but has no personal interest in property belonging to decedent's successors.⁸

D. ACTIONS BY OR AGAINST SPECIFIED PERSONS. — a. *Generally.* The statutes frequently confine the incompetency to actions by or against certain specified classes of persons, or to actions in which such a person is the adverse or opposite party. Under such a statute the witness is not disqualified in an action by or against one not included in terms or by construction within the classes specified.⁹

b. *Actions by or Against Representative.* — (1.) *Generally.* — This class of statutes universally include actions by or against executors or administrators, or actions in which they are parties adverse to the witness.¹⁰

who died in the possession of personal property which had been lent to him, is not interested in the result of a suit brought by the lender against the landlord to recover damages for the conversion of such property, and therefore the plaintiff may testify as to any relevant fact showing the bailment. *Butler v. Jones*, 80 Ala. 436, 2 So. 300.

A party cannot be allowed to testify to a conversation with a deceased person, whose estate would be liable to refund to the adverse party in the event of recovery. *Jackson v. Clifton*, 66 Ala. 29.

Where the administrator of the deceased wife is a party defendant to a suit between the children of the deceased husband, relating to property which is claimed as belonging to the estate of each, one of the plaintiffs is not competent to testify as a witness to any transaction with, or statement by, the deceased wife, unless called by the opposite party. *Skinner v. Chapman*, 78 Ala. 376.

7. *Morris v. Birmingham Nat. Bank*, 93 Ala. 511, 9 So. 606.

8. *Moore v. Walker*, 124 Ala. 199, 26 So. 984.

A son, claiming an equal distribution of his father's estate, as against a daughter who sets up certain gifts to the son as advancements, is a competent witness, on the ground that the controversy is between parties claiming by devolution. *In re Allen's Estate*, 207 Pa. St. 325, 56 Atl. 928.

Where a deceased person, in her lifetime, deposited money in a sav-

ings fund in the joint name of herself and another person, such other person, in an action against him by the administrator of the deceased to recover the deposit, is not a competent witness as to what took place between him and the deceased in regard to the fund in controversy. "The contest is in no sense a controversy between parties 'respectively claiming such property by devolution on the death of such owner.' It is not a contest between two adversary claimants to the property of the former owner, but a contest between the legal representative of that owner, and one claiming adversely to the title of the owner. Of course, such a claimant is not competent to testify in his own behalf in such a case. The express words of the act of May 23, 1887, P. L. 158, § 5, clause *e*, exclude him." *Flanagan v. Nash*, 185 Pa. St. 41, 39 Atl. 818.

9. *Party Claiming Under Deceased Trustee.* — Where it appeared that a trustee since deceased had made a declaration of trust in favor of plaintiff's wife, also deceased, the adverse party's testimony as to transactions between himself and the deceased trustee was held admissible because the plaintiff did not hold any of the relations to the deceased specified in the statute. *Minton v. Pickens*, 24 S. C. 592.

10. *Colorado.* — *Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884; *Palmer v. Hanna*, 6 Colo. 55.

Georgia. — *Dixon v. Edwards*, 48 Ga. 142.

(2.) **Meaning of Adverse Party.** — The “adverse party”, within the meaning of a statute disqualifying a person where the adverse party is the representative of a decedent, is the real party in interest, and the court will go back of the face of the record to determine this matter.¹¹ It has been held that the personal representative of the estate is not an adverse party to any claimant in a proceeding to distribute the estate, because in the controversy between such claimants he is officially disinterested.¹²

Indiana. — Taylor v. Duesterberg, 109 Ind. 165, 9 N. E. 907; Zimmerman v. Beatson, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165; Nelson v. Mastersen, 2 Ind. App. 524, 28 N. E. 731.

Maine. — Nash v. Reed, 46 Me. 168.

Maryland. — Webster v. LeCompte, 74 Md. 249, 22 Atl. 232; Neidig v. Whiteford, 29 Md. 178.

Missouri. — Kaho v. King, 19 Mo. App. 44; Reed v. Morgan, 100 Mo. App. 713, 73 S. W. 381; St. Joseph v. Baker, 86 Mo. App. 310.

Vermont. — Randall's Admr. v. Randall, 64 Vt. 419, 24 Atl. 1011.

A party to an action against the executor cannot testify to admissions made to him by the decedent. Tucker v. Gentry, 93 Mo. App. 655, 67 S. W. 723.

Where the representative is a necessary party, the adverse party is incompetent though the representative is not actually a party. See Muller v. Rhuman, 62 Ga. 332.

In an action by an administrator of a deceased person for the annulment of a contract, the defendant is incompetent to testify in his own behalf in reference to transactions and conversations had with the deceased personally. Rhode Island Hospital Tr. Co. v. Hazard, 6 Fed. 119.

Of Deceased Party to Contract or Cause of Action. — It has been held that a statute providing that when an original party to a contract or cause of action is dead, or when an executor or administrator is a party to the suit or action, neither party shall be competent, refers only to an executor or administrator of a deceased party to the contract or cause of action in issue and on trial. Robertson v. Mowell, 66 Md. 530, 8 Atl. 273.

11. Watson v. Russell, 18 Iowa 79, holding that such a statute had no application to an action by the administrator of a deceased trustee concerning the matter of the trust where the real party in interest, the beneficiary of the trust, was living; and that the defendant was therefore fully competent. Within the meaning of the statute the party beneficially interested “is the adverse party. The trustee, it is true, or his administrator, is the party plaintiff upon the record. But the law, in its reason and spirit, reaches beyond the mere nominal party, and treats the beneficiary as the one adversely interested. Thus, in part at least, the reason of the law is that as one party cannot give his version of the transaction, or speak of matters transpiring before his death, and as he is removed from the stage of action, and cannot assist in the preparation or prosecution of his case, neither shall the other. But a party clothed with a mere naked trust, having no interest in the controversy, ordinarily knows nothing of the circumstances surrounding the transaction in its inception, or in the sense in which the word ‘party’ is used in the law, and hence is not, within the statute, an adverse litigant. It is true that the law ordinarily refers to the party to the record, but to it there are exceptions, and the case before us is one.” See Boynton v. Phelps, 52 Ill. 210.

12. Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455 (opinion on rehearings), holding that in such a proceeding the administrator is a mere stakeholder. But see more fully III, 6, E, d.

In Hoyt v. Davis, 30 Mo. App. 309, a petition by the widow for distribu-

(3.) **Nominal Party.**— In actions where the representative is merely a nominal party the statute does not apply.¹³ In an action by an executor or administrator for the benefit of the estate he is not a nominal party,¹⁴ though it has been held that in an action against the decedent's grantee to set aside the conveyance for the benefit of creditors the representative is only a nominal party, the creditors being the parties in interest.¹⁵ There must be something to show that a representative who is a party to the record is only a nominal

tion, in discussing that part of the statute disqualifying the adverse party "where an executor or administrator is a party," Thompson, J., says: "In order to bring the case within the intendment of this provision, there must be a proceeding *inter partes* in which the executor or administrator is an adversary party on one side and the party tendered as a witness is an adversary witness on the other side. Something more is required than the mere presence of the executor or administrator as a party to the record. Certainly he is a necessary party, and may even appeal from an order of distribution which he deems to be erroneous or injurious to the estate. Estate of McCune, 76 Mo. 200. But it does not follow in such a proceeding as this that he is one party, and the widow of the deceased claiming a distributive share is 'the other party,' within the meaning of the statute. This is rather a proceeding *in rem*, such as a proceeding to contest the validity of a will, in which, notwithstanding the statute, all the distributees are competent to testify, though the executor is, as here, a necessary party. Garvin's Admr. v. Williams, 50 Mo. 206, 212. At most, this is a matter in controversy between the distributees, in which the executors are mere stakeholders, so to speak—custodians of the fund which in any event must pass entirely out of their hands; so that they have no personal interest in the question into whose hands it shall be adjudged to pass, which is not the case here. Not they, but the opposing distributees, are the adversary parties. In such a case, it has been held by our supreme court, in a judgment which, so far as we can see, has never been overruled or even

questioned, that the widow of the deceased is a competent witness. Spradling v. Conway, 51 Mo. 51."

13. Buck v. Rich, 78 Me. 431, 6 Atl. 871; Harnish v. Herr, 98 Pa. St. 6.

Hale v. Kearly, 8 Baxt. (Tenn.) 49, holding that in an action instituted by a widow for the wrongful death of her husband where the action was brought in the name of decedent's administrator because of his refusal to act himself, the statute did not apply, the administrator being merely a nominal party and the estate of his intestate having no interest in the result.

The plaintiff in an action to foreclose a mechanic's lien is not incompetent to testify as to transactions with the deceased owner merely because the latter's widow and survivor in community is made a party to the suit as such, where she is not a proper party because no judgment is sought against her and she has disclaimed all interest in the property, which had been sold under a deed of trust before the owner's death. Kahler v. Carruthers, 18 Tex. Civ. App., 216; 45 S. W. 160.

14. Drew v. Roberts, 48 Me. 35; Farnum v. Virgin, 52 Me. 576; Wing v. Andrews, 59 Me. 505.

In an action brought for the benefit of an estate in the name of the executor, the plaintiff is not a nominal party, so as to allow the defendant to testify, whether the amount recovered would go to the estate for the payment of the debts or to the legatee under the will, and the deposition of the defendant would not be admissible. Buck v. Rich, 78 Me. 431, 6 Atl. 871.

15. Miller v. Davis, 60 Hun 198, 14 N. Y. Supp. 725.

party before the statute can be disregarded,¹⁶ and a witness who is disqualified is not competent for this purpose.¹⁷

(4.) **Unnecessary and Improper Party.** — Where the representative of a decedent is an unnecessary and improper party to the record, another party to the cause, otherwise competent to testify, is not thereby disqualified.¹⁸ Where, however, the facts governing the necessity of making such representative a party are in dispute and no steps have been taken to strike his name from the record, he must be treated as a proper party for the purpose of determining the competency of other parties to testify.¹⁹

(5.) **Actions by or Against.** — The statutes generally provide that the disqualification shall apply in actions both by and against the representative.²⁰ In some jurisdictions, however, the statute in terms applies only to actions *against* the representative. Under such a statute it has been held that in an action *by* the representative the adverse party is competent,²¹ though it has also been held to the contrary.²² A statute providing that a person shall not be compe-

16. *Drew v. Roberts*, 48 Me. 35; *Harnish v. Herr*, 98 Pa. St. 6.

17. Thus on the foreclosure of a mechanic's lien where one of the defendants has died pending the action and his administrator had been substituted, plaintiff was held incompetent to prove the terms of the original contract, although he claimed that the administrator was only a nominal party because his intestate was merely the agent of the other defendant; nor was the plaintiff a competent witness to prove the truth of the latter claim. *Harnish v. Herr*, 98 Pa. St. 6.

18. *Oram v. Rothermel*, 98 Pa. St. 300, in which one of the defendant partners died and his executors were substituted but never appeared, and no judgment by default was ever entered against him, it was held that since the interest of the deceased passed upon his death to the surviving partners defendant, the executors were unnecessary and improper parties, and plaintiffs could not by having such executors made parties of record deprive the defendants of the right to be examined as witnesses if otherwise entitled thereto. See also *Kohler v. Carruthers*, 18 Tex. Civ. App. 216, 45 S. W. 160.

19. *Harnish v. Herr*, 98 Pa. St. 6. This was an action on a mechanic's lien against two persons as owners. Subsequently one of them died and

his administrator was substituted. On the trial the jury was sworn as to both defendants. The plaintiff offered himself as a witness with reference to the terms of the original contract, contending that he was not disabled from testifying by reason of the fact that the action was against an administrator, because said administrator was not a necessary party to the suit, his decedent having been merely the agent of the co-defendants in contracting for the building. This fact he also proposed to testify to. *Held*, that the name of the administrator not having been stricken off the record, and the jury having been sworn to try the case as against him, the plaintiff was incompetent to testify as to either of the points above stated.

20. See *supra*, I, 2.

21. *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733; *McGregor v. Donnelly*, 67 Cal. 149, 7 Pac. 422 (action by administrator).

§ 1880, subd. 3, providing that parties to an action or proceeding, etc., against executors on a demand against the estate cannot be witnesses, does not prevent a person against whom an action is brought by an executor for the benefit of the estate, from being a witness in his own favor. *Sedgwick v. Sedgwick*, 52 Cal. 336.

22. *Ewing v. White*, 8 Utah 250,

tent to establish his claim or defense against the estate, applies to actions by and against the estate.²³ And one providing that no party to any action or proceeding or any person interested therein shall testify as to certain specified matters against the decedent's representatives, applies to actions both by and against such representative.²⁴

(6.) *Proceedings in Intervention.*—Statutes applying in terms to actions by or against the representative of a deceased or incompetent person include proceedings in intervention, and the intervenor is governed by the same rules as apply to the primary parties to the action.²⁵ But a defendant who disclaims any interest in the subject-matter is no longer a party within the meaning of the statute.²⁶ A party to an action though incompetent in his own behalf as against the representative of the decedent is competent on behalf of intervenors in the action in whose claims he has no interest, and with whom he has raised no issue.²⁷

30 Pac. 984. And see *Coats v. Harris*, 9 Idaho 458, 75 Pac. 243.

23. See *McCaughan v. Hardy*, 78 Miss. 598, 29 So. 397.

24. *Harrow v. Brown*, 76 Iowa 179, 40 N. W. 708; *Leasman v. Nicholson*, 59 Iowa 259, 12 N. W. 270, 13 N. W. 289.

25. *Bachelor v. Brown*, 47 Mich. 366, 11 N. W. 200; *Lewis v. Oliver*, 22 Mo. App. 203; *Mutual Life Ins. Co. v. Watson*, 30 Fed. 653.

26. *Markham v. Carothers*, 47 Tex. 21.

27. In an action by an administrator to recover money claimed as part of the decedent's estate, defendant claimed a portion of the money in his own right. Intervening parties claimed the remainder of the fund. Between defendant and the intervenors there was no issue. Plaintiff took issue with the intervenors. The defendant's testimony as to personal communications between himself and the decedent was held incompetent in his own behalf, but competent on behalf of the intervenors. The court says: "Inasmuch as judgment was rendered against defendant for the balance of the fund to which intervenors were found not to be entitled, and as defendant made no claims adverse to intervenors, it may be conceded that defendant, as far as his testimony in behalf of intervenors was concerned, was not an interested witness under

the provisions of Code, section 4604. But the statute excludes in such cases the testimony of a *party* to the suit as against the administrator as well as that of a *person interested*, and counsel for appellant insists that defendant was therefore disqualified to testify to personal transactions and communications with deceased, even in intervenor's behalf. We cannot agree with this view. The relief asked by the intervenors was against the plaintiff as administrator, and no relief was sought against defendant. The interventions were wholly distinct from the action in which plaintiff sought in behalf of the estate to recover money from defendant. The statutory provision is to be applied with a view to the object for which it was passed. *Watson v. Russell*, 18 Iowa 79. The situation is different from that involved in *Burton v. Baldwin*, 61 Iowa 283, and *Williams v. Barrett*, 52 Iowa 637. In those cases it was held that one defendant to a suit was incompetent to testify in behalf of other defendants, although not interested generally with such other defendants; but the cases each involved only one action, while in this case we find that the action against defendant was wholly distinct from the actions by the intervenors against plaintiff." *Hogan v. Sullivan*, 114 Iowa 456, 87 N. W. 447. See also *Jacobs v. Jacobs* (Iowa), 104 N. W. 489.

(7.) **Third Party Claim Cases.** — (A.) **GENERALLY.** — The proceedings taken by a third party to enforce his claim to property levied upon by the representative of the decedent are governed by the statute, and the claimant is therefore incompetent.²⁸ But in a third party claim case where the defendant in execution has since died, both the plaintiff²⁹ and the claimant³⁰ are competent witnesses, since the decedent's representative is not a party to the proceeding between them.

(B.) **ACTION AGAINST SHERIFF.** — The plaintiff in an action against the sheriff to recover possession of property claimed to have been wrongfully attached is not rendered incompetent under the Iowa statute by the death of the plaintiff in the attachment.³¹

(8.) **Nature and Purpose of Action.** — (A.) **GENERALLY.** — Generally speaking, the statute applies to any action in which the representative is suing or defending in his representative capacity. Thus it applies to an action by the representative to recover property as part of the estate,³² to recover on a note,³³ to an action against him for the specific performance of decedent's contract,³⁴ and to proceedings to sell land belonging to the estate.³⁵ Whether it applies to proceedings to probate or set aside a will or to distribute the estate is elsewhere discussed.³⁶

(B.) **POSSIBILITY OF JUDGMENT FOR OR AGAINST REPRESENTATIVE.** — Under some of the statutes the disqualification only applies in actions in which a judgment may be rendered for or against the representative as such.³⁷ The fact that the only judgment which can

28. *Bachelor v. Brown*, 47 Mich. 366, 11 N. W. 200; *Harbison v. Gililand*, 2 Pac. Co. Ct. 369, holding that proceedings taken under the sheriff's interpleader act by one claiming title to property levied upon by an administrator come within the meaning of the term "actions" by or against executors or administrators.

29. *Anderson v. Wilson*, 45 Ga. 25; *Powell v. Watts*, 72 Ga. 770.

30. *Thompson v. Cody*, 100 Ga. 771, 28 S. E. 669; *Powell v. Watts*, 72 Ga. 770; *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068; *City Nat. Bank v. Crahan* (Iowa), 112 N. W. 793. See also *Woodruff v. Wilkinson*, 73 Ga. 115. But see *Bothwell v. Dobbs*, 59 Ga. 787.

31. *Bevan v. Hayden*, 13 Iowa 122.

32. *Manchester v. Bursey* (Tex. Civ. App.), 91 S. W. 817.

33. *Benton v. Hopkins*, 68 N. H. 606, 44 Atl. 391.

34. In an action against a decedent's estate to specifically enforce an alleged contract to devise certain property to the complainant, the executors being necessary parties, the complainant is not a competent witness as to his transactions with the decedent. (P. L. 1900, p. 363, § 4.)

Clawson v. Brewer, 67 N. J. Eq. 201, 58 Atl. 598; citing *Kempton v. Bentine*, 59 N. J. Eq. 149, 44 Atl. 461.

35. In a proceeding by the executor to sell land of the estate, an intervening son of a testator is incompetent to testify as to an alleged conveyance of the land in question made by the testator to his granddaughter to be held in trust for his son, for services alleged to have been performed for the testator. *In re Wickham's Estate* (Iowa), 90 N. W. 600.

36. See *infra*, III, 6, E, c.

37. See statutes, *supra*, I, 2, and *Caffey's Exr. v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738; *Hoxie v. National Bank*, 20 Tex. Civ. App. 462, 49 S. W. 637; *Hale v. Kearly*,

be rendered against the representative is one for costs does not relieve the adverse party of his incompetency.³⁸ But where the liability of the decedent's estate is fixed and cannot be increased or diminished by the action, the statute does not apply.³⁹ A proceeding to probate a will does not come within the scope of such a statute which is confined to actions by or against executors or administrators;⁴⁰ nor does a proceeding by the widow against the administrator to recover her share of the funds remaining in his hands for distribution.⁴¹

(C.) PURPOSE OF ACTION. — Although the purpose of an action against an administrator is to increase the assets of the estate, if he is defending in his representative capacity he is entitled to the protection of the statute.⁴²

(9.) Who Is Executor, Administrator or Representative. — Who is an

8 Baxt. (Tenn.) 49; *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923; *Sherlock v. Alling*, 44 Ind. 184; *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243.

In *Charlotte v. Soutter*, 28 Fed. 733, it was held that the statute does not exclude the testimony of an executor in reference to a transaction between the testator and the witness in an inquiry incident to taking an account, and not upon an issue which is the subject of a decree.

38. Under a statute providing that in actions by or against an administrator in which judgment may be rendered for or against him neither party is competent as to transactions with the decedent, the adverse party is not competent against the administrator as to such transactions, although the only judgment which can be rendered against such administrator is one for costs. *Bush v. Prescott & N. W. R. Co. (Ark.)*, 103 S. W. 176.

39. The plaintiff obtained judgment against one Patterson and caused an execution to be issued against the defendant and the Fayette county railroad company, attaching as the property of Patterson certain shares of stock of said company which stood in the name of the defendant Jacobus. Thereafter the said Patterson died and his administrator was substituted of record as party defendant. On the trial the defendant Jacobus was allowed to testify as a witness in his own behalf as to what took place between

him and the deceased at the time the stock in question was assigned by the latter to the former, and the administrator was also permitted to testify (he being present at the time of the assignment of the stock) that the consideration for such transfer was the assumption by Jacobus of certain of decedent's debts, to all of which testimony the plaintiff objected. *Held*, that the liability of the deceased to the plaintiff having become fixed by the judgment against him, there can be no judgment against his estate in this action by which the bank's claim can be increased or whereby his liability can be lessened in whole or in part. The real issue was between the bank and the witness Jacobus, and consequently the case is within the first clause of § 858, which provides that "no witness shall be excluded . . . in any civil action because he is a party to or interested in the issue tried." Within the meaning and object of this proviso this was not an action by or against an administrator, on which judgment may be rendered for or against him, and there was no error in admitting the testimony of the witnesses on their own motion. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275.

40. *In re Spiegelhalter's Will*, 1 Penne. (Del.) 5, 39 Atl. 465.

41. *Sherwood v. Thomasson*, 124 Ind. 541, 24 N. E. 334.

42. *Roe v. Harrison*, 9 S. C. 279, so holding in the case of an action by a junior judgment creditor of the

executor, administrator,⁴³ or representative⁴⁴ within the meaning of these statutes is elsewhere treated.

c. *Actions by or Against Heirs or Other Beneficiaries.* — Under many statutes the incompetency of the witness is extended to all actions by or against heirs,⁴⁵ distributees,⁴⁶ devisees and legatees⁴⁷ of deceased persons. In some instances the statute is limited to particular classes of actions.⁴⁸ The extent of the protection extended by such statutes is elsewhere discussed.⁴⁹

d. *Actions by or Against Other Persons.* — The statutes frequently cover not only actions by or against the representatives, heirs, distributees and beneficiaries of the decedent, but also actions by or against guardians,⁵⁰ either generally or of particular classes of persons, against insane or incompetent persons,⁵¹ or against as-

intestate against the administrator and a senior judgment creditor to set aside as fraudulent the intestate's confession of such senior creditor's judgment.

43. See *infra*, V, 4.

44. See *infra*, V, 3.

45. See *infra*, V, 13. Neas v. Neas, 61 Iowa 641, 17 N. W. 30.

In an Action by Heirs to Set Aside a Tax Deed given under a tax sale against their ancestors, the grantee, defendant, is not a competent witness as to an alleged agreement between himself and the ancestor whereby the witness was to secure title by means of the tax sale upon certain considerations. Grimes v. Ellyson, 130 Iowa 286, 105 N. W. 418.

In an action by heirs to set aside an assignment made by plaintiffs' ancestor to the defendant, her husband, the latter is not competent in his own behalf as to verbal transactions with the decedent. Noel v. Fitzpatrick, 30 Ky. L. Rep. 1011, 100 S. W. 321.

In an action by a creditor of the ancestor against the heir at law to recover an alleged debt due from the ancestor under the statute making the heir at law liable for such debts to the extent of lands descended to him, the judgment is *in personam*, and the creditor is therefore an incompetent witness under the statute as to transactions with the decedent. Joss v. Mohn, 55 N. J. L. 407, 26 Atl. 987.

The statute applies to an action by an heir against the assignee of an

insurance policy to recover the surplus remaining after the satisfaction of a debt which the assignment was made to secure. Hedges v. Williams, 26 Tex. Civ. App. 551, 64 S. W. 76.

46. See *infra*, V, 13.

47. See *infra*, V, 14.

48. Hankey v. Downey, 10 Ind. App. 500, 38 N. E. 220; Gavin v. Buckley, 41 Ind. 528; Harding v. Elzey, 88 Ind. 321; Cincinnati, H. & I. R. Co. v. Creagor, 150 Ind. 625, 50 N. E. 760.

In an action by the creditor of a decedent to compel the widow to account for the value of the personal property of such decedent taken and converted by her after his death, and to compel the application of the proceeds to the payment of the plaintiff's debt, the widow is an heir under §499 R. S. 1881, providing that in all suits by or against heirs, etc., founded on a contract with or demand against the ancestor to obtain title or possession to real or personal property, etc., neither party shall testify to matters prior to the ancestor's death; and the plaintiff is not a competent witness to testify as to any matter which occurred prior to the death of the ancestor. Allegations in the complaint making the widow liable as an administrator *de son tort* did not change the action so as to make the plaintiff competent to testify as a witness. Larch v. Goodacre, 126 Ind. 224, 26 N. E. 49.

49. See *infra*, VI.

50. See *infra*, V, 20.

51. See *infra*, V, 20.

signees⁵² or successors in interest⁵³ or persons dead or incompetent.

e. *Representative Capacity or Interest.* — (1.) *Generally.* — Such statutes only apply to those actions in which some one of the parties to be affected thereby is claiming or defending in his representative capacity or interest.⁵⁴ The mere fact that he happens to be the personal representative or successor of the deceased does not invoke the statute where he is not claiming as such but in his individual right,⁵⁵ though the contrary has been held.⁵⁶ Where the statute applies to actions by or against heirs, the fact that an heir is a party does not invoke the statute where such person is not claiming as one of the heirs.⁵⁷ And the same is true in the case of a dev-

52. See *infra*, V, 20.

53. See *infra*, V, 20.

54. *Colorado.* — Prewitt v. Lambert, 19 Colo. 6, 34 Pac. 683.

Maryland. — Schull v. Murray, 32 Md. 9.

Massachusetts. — Shailer v. Bumstead, 99 Mass. 112.

Nebraska. — Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665.

New Jersey. — Crimmins v. Crimmins, 43 N. J. Eq. 86, 10 Atl. 800; Hodge v. Coriell, 44 N. J. L. 456; Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 Atl. 3.

New Hampshire. — Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190.

New York. — Mason v. Prendergast, 120 N. Y. 536, 24 N. E. 806.

Pennsylvania. — Brown v. Carey, 149 Pa. St. 134, 23 Atl. 1103; Crothers v. Crothers, 149 Pa. St. 201, 24 Atl. 190.

Rhode Island. — Hamilton v. Hamilton, 10 R. I. 538.

Virginia. — See Martz's Exrs. v. Martz's Heirs, 25 Gratt. 361.

It is competent, in an action by a widow to recover of her deceased husband's unmarried brother for board furnished such brother while he lived in her husband's family on a farm which the brothers worked together, for the defendant to testify on what terms he lived with his brother, since plaintiff is not suing in her representative capacity. *McClintic v. McClintic*, 111 Iowa 615, 82 N. W. 1017.

An administrator who assigns a note and receives it back as representative is protected against testimony by the maker as to lack of consideration. *McAyeal v. Guilett*, 202 Ill. 214, 66 N. E. 1048.

55. *Murphy v. Ganey*, 23 Utah 633, 66 Pac. 190.

The fact that the defendant is the executrix of a decedent does not render the plaintiff incompetent if the defendant is defending in her individual and not her representative capacity. *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4.

In an action by the executrix of an estate who claims simply as devisee, the adverse party is not incompetent as to transactions with plaintiff's testator since the statute does not apply to actions by or against devisees. *Goodwin v. Fox*, 129 U. S. 601.

56. *Campbell Bkg. Co. v. Cole*, 80 Iowa 211, 56 N. W. 441. This was an action by a partnership on notes executed by the defendant and his wife, since deceased. It was alleged that defendant's name had been signed by the wife by his direction and authority, which defendant denied. Over objection one of the partners was allowed to testify to facts and circumstances leading up to and attending the execution of the note and the statements of the wife in that regard. This ruling was held error as the testimony related to transactions and communications with a deceased person, of whom the defendant was the "next of kin." See also *Dixon v. Edwards*, 48 Ga. 142; *Field v. Field* (Tex. Civ. App.), 87 S. W. 726. But see *Cahalan v. Cahalan*, 82 Iowa 416, 48 N. W. 724.

57. *Wagner v. Isensee*, 11 Tex. Civ. App. 491, 33 S. W. 155; *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132. See *Pierce v. Rollins*, 83 Me. 172, 22 Atl. 110; *Wentworth v. Wentworth*, 71 Me. 72.

In an action by the heirs of a husband and wife against the wife's

isee.⁵⁸ It has been held that heirs or devisees sued merely because in possession and claiming land received on the testator's death, are not deemed to be the representatives of the decedent.⁵⁹ Thus in an action to enforce a contract with the decedent for the conveyance of land, the heirs are made parties merely because they are in possession of the land and do not defend as representatives of their ancestors.⁶⁰ So in an action for chattels in the possession of the

executors and the other heirs to recover their interests as heirs in the deceased husband's share of the community estate, one of the defendants, who was also the grantee in a deed to part of the community land executed by the wife after the husband's death, was held a competent witness against the plaintiffs as to the delivery of the deed to her by her mother. The plaintiffs claimed nothing as heirs of the deceased wife, their action being directed against the witness' claim to all of the land under the deed; the issue being whether the wife could convey more than her half of the community estate. Art. 2302, Rev. Stat. 1895, was held not to apply. *Jennings v. Borton* (Tex. Civ. App.) 98 S. W. 445.

In an action by a divorced wife of a decedent claiming a community right in property conveyed to the decedent during their marriage, she does not sue as his heir "but rather as a surviving partner," and the action is therefore not by an heir within the meaning of the statute. *Crenshaw v. Harris*, 16 Tex. Civ. App. 263, 41 S. W. 391.

Although the plaintiff in an action to set aside a deed is the heir of the defendant's grantor, the defendant is not an incompetent witness merely because of this fact if the plaintiff is not claiming as heir. *Camfield v. Plummer*, 212 Ill. 541, 72 N. E. 787.

In *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373, in a suit for partition of certain real property and to set aside a deed, it appeared that complainant's father had devised the property in question to his wife with power to sell for the support of herself or family. The plaintiffs testified that the deed made by the widow to defendant's ancestor was not made for the support of herself or family. Defendant objected to this testimony on the ground that he was

defending as the heir of the deceased grantee. The court held, however, that both parties were claiming the property under the will, that defendant was not defending as heir, and the testimony was therefore competent.

58. In an action against a devisee under a will to establish a deed alleged to have been executed by him to complainant grantee, the latter is not an incompetent witness, because such devisee does not defend in that capacity. *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. 782.

59. *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255; *Wentworth v. Wentworth*, 71 Me. 72 (holding the demandant in a writ of dower competent against her son holding the estate of inheritance from decedent. The son is made a party not as heir but as tenant). See *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434.

On a proceeding to partition decedent's real estate, the widow claiming a portion of the estate by reason of an alleged resulting trust is a competent witness in her own behalf to prove that the property was purchased with money furnished by her from her separate estate, though the title was taken in the name of the decedent. *Small v. Pryor*, 69 N. J. Eq. 606, 61 Atl. 564, following *McKinley v. McCoe*, 66 N. J. Eq. 70, 57 Atl. 1030. But see *Fairchild v. Fairchild* (N. J. L.), 44 Atl. 944, holding the widow incompetent in a suit by her against the heirs to set aside a deed from herself to a third person, and one from the latter, for the same property, to the decedent.

But where the administrator or executor is a necessary party to such an action the statute applies. *Wilson v. Terry*, 70 N. J. Eq. 231, 62 Atl. 310 (*distinguishing McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030).

60. In *Cowdrey v. Cowdrey* (N.

executor it is held that the executor being made a party merely because he is in possession of the chattels the statute does not apply.⁶¹

(2.) **Must Appear on Record.** — The fact that a party is suing or defending in a representative capacity must appear on the record.⁶² But the mere fact that he appears or describes himself on the record as administrator or executor does not invoke the statute where he is actually suing or defending as an individual.⁶³

(3.) **Representative Suing or Defending as Trustee.** — Where the representative claims title to the property in question as trustee in a trust not created by the decedent or the probate proceedings, the statute does not apply.⁶⁴ And the same rule has been applied where the executor is suing or defending merely as a trustee for the beneficiaries under the will,⁶⁵ though it has been held to the contrary

J. Eq.), 64 Atl. 98, which was an action by a widow against the heirs of her deceased husband to establish her alleged title to certain land in possession of the heirs where the plaintiff claimed under an alleged written contract from her husband, it was held that she was a competent witness in her own behalf as to transactions with the decedent under the statute excluding the testimony of a party as to a transaction with or admission by the deceased party whose representatives are parties to the suit. The action does not seek to establish a debt against the decedent or any pecuniary liability on the part of the defendants, they being made parties merely because they are in possession of the land. In determining whether the witness is competent, the true criterion is, "does the judgment or decree asked for by the plaintiff or complainant seek to charge the heir at law with personal liability by reason of his or her being an heir at law, or does it make him or her a party simply because he or she is in possession as terre tenant of land claimed by the complainant or plaintiff substantially as a grantee of the land from the original owner might be in possession, claiming title." The court follows McKinley v. Coe, 66 N. J. Eq. 70, 57 Atl. 1030, and owing to the contrary dicta in Kleb v. Kleb, 70 N. J. Eq. 305, 62 Atl. 396, examines and reviews previous cases on the point in question. The cases of Hodge v. Coriell, 44 N. J. L. 456, 46 N. J. L. 354; Palmtree v. Tilton, 40 N. J. Eq. 555, 5 Atl. 105; Crimmins v. Crimmins, 43 N. J.

Eq. 86, 10 Atl. 800, are approved and treated as overruling Colfax v. Colfax, 32 N. J. Eq. 206, and are said to be cited with approval and followed in Smith v. Smith, 52 N. J. L. 207, 19 Atl. 255; Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 Atl. 3. The case of Greenwood v. Henry, 52 N. J. Eq. 447, 28 Atl. 1053, is expressly overruled in so far as contra, and the case of Kempton v. Bartine, 59 N. J. Eq. 149, 44 Atl. 461, 60 N. J. Eq. 411, 45 Atl. 966, is held not to overrule cases previously cited. Compare Clawson v. Brewer, 67 N. J. Eq. 201, 58 Atl. 598; Ayres v. Short, 142 Mich. 501, 105 N. W. 1115; Fort v. Davis, 67 Ala. 481.

61. Hodge v. Coriell, 44 N. J. L. 456, 46 N. J. L. 354.

62. Hodge v. Coriell, 44 N. J. L. 456, 46 N. J. L. 354. But see *contra*, Penny v. Croul, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

63. Roberts v. Pierce, 79 Ill. 378; Chase v. Chase, 66 N. H. 588, 29 Atl. 553.

64. Chase v. Irwin, 87 Pa. St. 286. In this case the executors, to save a judgment in favor of the deceased, levied on land which on sheriff's sale was sold to their attorney who then conveyed to them as trustees for the estate. In a subsequent action of ejectment by the executors the defendant was held a competent witness, since the plaintiffs were suing as trustees rather than as executors.

65. Clark v. Clark, 21 Tex. Civ. App. 371, 51 S. W. 337, (citing Caffey's Exrs. v. Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738; s. c. on a

on the ground that such a case is equally within the spirit of the statute.⁶⁶

(4.) **Action Against Representative Personally.** — In an action against a representative in his individual and not in his representative capacity, the statute does not apply.⁶⁷ Although the personal representative, sued as an individual, disclaims any personal interest and defends in the right of the estate, nevertheless he is not entitled to the protection of the statute,⁶⁸ although the contrary has been

second appeal, 19 Tex. Civ. App. 145, 47 S. W. 565; *Wagner v. Isensee*, 11 Tex. Civ. App. 491, 33 S. W. 155), where it was held that the executors, defendants in the action, "occupied the position of trustees for the legatees in the will, and hence the suit was really against the legatee;" and as the statute does not embrace legatees it was not applicable.

Where an action is brought against executors for certain property held by them in trust for the decedent's devisees, the plaintiff's petition alleging that the legal title is in such devisees, and that the executors hold possession for the devisees, the statute does not apply, unless it be further developed that the suit is prosecuted against the executors as the legal representatives of the estate. *Caffey's Exrs. v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738.

66. In a suit in equity for an accounting and for the discharge of certain mortgages against certain persons as executors of a decedent, or as trustees under his will, it was held that the statute excluding a party as a witness when the adverse party is an executor or administrator applied, and plaintiff's deposition was incompetent. The decisions of this court demonstrate "that a literal construction is not to be placed upon the statute, but, on the contrary, that it is to be interpreted with reference to its general scope and object, which was to secure equality . . . between the living and the dead. Such being the undoubted purpose of its makers, it will, if possible, be construed and applied accordingly, and, therefore, we have no hesitation in affirming the ruling of the matter, excluding so much of the deposition as relates to matters concerning which Herman Foster, if alive,

could have testified. The statute, manifestly, was not intended for the present benefit of the executor, but for the protection of the estate, and it can, therefore, make no conceivable, practicable or equitable difference whether Clough and Foster hold the property in controversy as executors of Herman or as trustees under his will, inasmuch as it is obviously entitled to the same protection in the one case as in the other." *Clark v. Clough*, 65 N. H. 43, 76, 23 Atl. 526.

67. *Johnson v. Hall*, 9 Baxt. (Tenn.) 351; *Hildick v. Williams*, 3 N. Y. Supp. 817.

In an action against an executor individually for conversion, though the property was taken as decedent's, the statute does not apply. *Huff v. Latimer*, 33 S. C. 255, 11 S. E. 758. See *Hodge v. Coriell*, 44 N. J. L. 456.

Where the action is against an executor personally, based upon rents collected by him and belonging to the plaintiff, the defendant is competent in his own behalf. *Connor v. Hickey* (Tenn.), 48 S. W. 289.

Where one acting in a representative capacity caused a levy to be made under an execution in his favor, on property not subject thereto, in a litigation between himself and the owner of the property included in the levy, the latter is not debarred from testifying in his own behalf, by the fact that the former is sued in a representative capacity. In such case he is not sued in a representative capacity within the meaning of the statute. *Holmes v. Chester*, 27 N. J. Eq. 423.

68. *Hodge v. Coriell*, 44 N. J. L. 456, 46 N. J. L. 354, was an action of replevin to recover chattels where the defendant set up title as executor of one who he claimed owned the chattels in his lifetime. The plaintiff

held.⁶⁹ Where the executor is sued on a contract made by him individually, the fact that it relates to the estate property does not of itself invoke the statute.⁷⁰

E. PROBATE PROCEEDINGS. — a. *Generally.* — In a general way it may be said that the statutes apply to probate proceedings; the extent to which this is true, however, depends somewhat upon the form of the statute⁷¹ and the construction placed upon it, and the nature of the particular proceeding.⁷²

b. *Appointment or Removal of Administrator.* — Whether a petition for appointment as administrator⁷³ or proceedings for the re-

was held competent to prove declarations by the testator as to his title, since the defendant was made such merely because he was in possession of the chattels, claiming ownership. The court says: "If, therefore, the theory is to be resorted to that in this instance the defendant is sued in his representative capacity, it can be not with a view of strengthening the plaintiff's remedy, but merely to work the defendant's exclusion as a witness. It may be that the interest of the party in the cause of action, by reason of his being the representative of a decedent, rather than his *status* as a party suing or being sued, would, in some respects, be the better criterion for the exclusion of the adverse party. But such a rule would be open to the objection that the application of the criterion would depend not on a patent circumstance, such as the attitude of a party on the record, but on the latent fact of an interest subject to dispute and which might not appear until the later stages of the trial." See *Elliott v. Keith*, 102 Ga. 117, 29 S. E. 155.

69. *Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83, which was a case similar to *Hodge v. Coriell*, *supra*. But see dissenting opinion. See also *Stuckey v. Belah*, 41 Ala. 700.

70. *Hall v. Richardson*, 22 Hun (N. Y.) 444.

71. See *supra*, I, 2.

72. See *infra*, succeeding sections, and IV, 14.

73. In a probate contest between an alleged widow and a nephew (an alleged heir at law), of an intestate for the right to nominate his administrator, such widow was permitted to testify to a conversation between herself and the deceased,

constituting a present, verbal contract of marriage, or common-law marriage between them. *Held*, that such evidence in said proceeding having the effect of proving that she was the widow of deceased and lawfully married to him would render her entitled to dower out of his estate; that the judgment rendered would be competent evidence in a proceeding for dower out of his estate, where the defense of the nephews and nieces was that she was not his widow and, therefore, the nature and effect of the judgment thereof considered, such testimony is made incompetent by the express provisions of § 329 of the Code of Civ. Procedure. *Sorensen v. Sorensen*, 56 Neb. 729, 77 N. W. 68.

For purpose of obtaining letters of administration, petitioner may testify as to transactions between himself and the decedent. While it is true that the witness was testifying as to a transaction with a person deceased, he was not so testifying in an action against the administrator or other person named in the section as bearing certain relations to such deceased. It is clear, therefore, that there was no violation of § 400 of the code, in receiving the testimony in question. *In re Estate of Neubert*, 58 S. C. 469, 36 S. E. 908.

In a contest over the right to administer upon an estate between parties not claiming as heirs, and where a person claiming to be the surviving wife of the decedent has renounced her right to administer in favor of one of the parties to the contest, such wife is not incompetent to testify to transactions with and statements by the decedent tending to establish that she was in fact his wife; nor is her competency affected

removal of an administrator⁷⁴ come within the statute depends upon whether persons protected by the statute are parties.

c. *Proceedings Involving Validity of Will.* — (1.) **Probate of Will.** As to whether the statutes apply to proceedings to probate a will the cases are not in harmony, the conflict being partly due to the differences in the language of the statutes themselves,⁷⁵ and partly to the fact that some courts apply the statutes only to those proceedings whose object is to diminish the estate rather than to determine to whom it shall pass.⁷⁶ It has been held that, being a proceeding *in rem*, there are strictly speaking no parties to a proceeding to probate a will and therefore witnesses cannot be disqualified merely because they appear as parties to the record if not beneficially interested.⁷⁷ The rule by the weight of authority is that the statute fully applies to such proceedings,⁷⁸ although the contrary

by the fact that there is another suit pending to establish that she is such surviving wife. *Ingersoll v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 56.

74. In *Henderson v. Treadway*, 69 Ill. App. 357, it was held that the administrator is not a competent witness in his own behalf in proceedings by an heir for his removal, where his right to appointment depended upon the validity of his alleged claim against the estate.

One who claims to be the widow of a deceased person, basing such claim on agreement between her and the deceased to live together as man and wife, is not competent to testify in her own behalf in reference to such agreement between witness and deceased, in action to remove the administrator of deceased's estate in order that she may be appointed in his place, as such testimony relates to a personal transaction between the witness and deceased. *In re Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803.

75. See *supra*, I, 2.

76. See *supra*, III, 6, B.

77. *In re Young's Will*, 123 N. C. 358, 31 S. E. 626, holding that a creditor proposing the will for probate was not incompetent against the contestants. Interested parties, however, are incompetent. *In re Worth's Will*, 129 N. C. 223, 39 S. E. 956; *In re Peterson's Will*, 136 N. C. 13, 48 S. E. 561.

78. *Colorado.* — *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

Illinois. — *Godfrey v. Phillips*, 209

Ill. 584, 71 N. E. 19; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999.

Iowa. — *Smith v. James*, 72 Iowa 515, 34 N. W. 309; *In re Townsend's Estate*, 122 Iowa 246, 97 N. W. 1108; *In re Wiltsey's Will*, 122 Iowa 423, 98 N. W. 294.

New Hampshire. — *Welch v. Adams*, 63 N. H. 344, 1 Atl. 1.

New York. — *In re Eysaman's Will*, 113 N. Y. 62, 20 N. E. 613; *In re Dunham's Will*, 121 N. Y. 575, 24 N. E. 932.

Texas. — *Lewis v. Aylott*, 45 Tex. 190.

Wisconsin. — *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919 (see *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437).

Under a statute disqualifying parties to an action by or against heirs or devisees founded on a contract with or demand against the ancestor to obtain title to or possession of property of or in the right of the ancestor, or to affect the same in any manner, the parties to a will contest are incompetent. The term "demand" as used in the statute should be given a broad meaning, and applies to actions by or against devisees in relation to a will of the ancestor. Furthermore, the ultimate object of the suit to contest a will is to affect in some manner the property of the ancestor. Such suits are therefore within the spirit and meaning of the statute, if not within its express terms. *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

is held in several states, among others New Jersey, Kentucky, Maine and Utah.⁷⁹

A statute disqualifying a witness to testify against personal representatives, heirs, legatees and devisees applies to a will contest and serves to disqualify the proponent⁸⁰ of the will, unless he be a person having no interest,⁸¹ and also the beneficiaries thereunder where interest is a disqualification.⁸² The contestant is likewise disqualified under such a statute;⁸³ he is incompetent not only as

79. *Mackin v. Mackin*, 37 N. J. Eq. 528; *Williams v. Williams*, 90 Ky. 28, 13 S. W. 250; *Flood v. Prago*, 79 Ky. 607; *McKeen v. Frost*, 46 Me. 239; *Millay v. Wiley*, 46 Me. 230. See *Davis v. Davis*, 6 Lea (Tenn.) 543; *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604.

A proceeding to probate a will is not an "action" by or against an executor, administrator, heir or devisee, as that term is used in the statute. Hence a devisee or heir is competent to prove declarations of the decedent. *Milton v. Hunter*, 13 Bush (Ky.) 163.

A statute disqualifying parties and interested persons and their assignors from testifying in actions where the opposite party sues or defends as guardian of an incompetent as executor, administrator, heir, legatee or devisee of a deceased person, etc., does not apply to a will contest between the beneficiaries under the will and the heirs at law of the decedent. The purpose of the statute is to disqualify the witness only in those proceedings wherein it is sought by the testimony in question to reduce or impair the estate; and the statute has no application to contests between persons claiming as heirs and those claiming as devisees or legatees where the estate itself is in no event to be reduced or repaired. In the latter class of cases "the act of the testator in making the alleged will is the only subject-matter of the investigation. The estate of the testator is not interested. The interests of those claiming to succeed to it either by operation of law or by operation of the will are alone involved. The estate remains intact and undiminished whatever may be the result of the controversy, and the subject-matter of the investigation is not a transaction with nor a statement by the decedent. As to such an investi-

gation, the parties to the suit and those interested in the result thereof are upon terms of equality in regard to the opportunity of giving testimony." *In re Miller's Estate*, 31 Utah 415, 88 Pac. 338, *overruling Atwood's Estate*, 14 Utah 1, 45 Pac. 1036, 60 Am. St. Rep. 878.

In proceedings to probate a will, the estate of the testator is not interested, within the meaning of the statute as to the competency of witnesses to testify as to transactions with or statements by a deceased person whose estate is interested in the result of the suit or proceeding, and all parties in interest are competent to testify to any fact which is relevant and material to the issue involved. *Henry v. Hall*, 106 Ala. 84, 17 So. 187; *Kumpe v. Coons*, 63 Ala. 448; *Birmingham So. R. v. Cuzzart*, 133 Ala. 262, 31 So. 979.

80. *Sisters of Visitation v. Glass*, 45 Iowa 154; *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

The proponent of a will who is also a beneficiary thereunder is not competent on the probate proceeding to testify to transactions with the decedent. *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345.

81. See *infra*, IV, 14.

82. *In re Tobin*, 196 Ill. 484, 63 N. E. 1021; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *In re Perkins' Estate*, 109 Iowa 216, 80 N. W. 335; *In re Wiltsey's Will*, 122 Iowa 423, 98 N. W. 294.

83. *Colorado*.—*In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

Illinois.—*Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713 (but see *Crumley v. Worden*, 201 Ill. 105, 66 N. E. 318).

Iowa.—*In re Goldthorpe's Estate*, 94 Iowa 336, 62 N. W. 845.

Nebraska.—*Davidson v. Davidson*, 96 N. W. 409.

against the living beneficiaries, but as against their representatives, parties to the contest,⁸⁴ though the contrary has been held.⁸⁵ A similar statute, however, which disqualifies the witness as to matters equally within the knowledge of the decedent has been held not to apply to a contested probate of a will.⁸⁶ And the same is true where the protection of the statute applies only to executors and administrators.⁸⁷ And it has been held that the persons named in a will as executor and as legatees and devisees cannot be regarded as such within the meaning of the statute until the will has been established, and that therefore in such a proceeding they are not representatives of the decedent, and the contesting heirs are competent.⁸⁸ A statute applying only to actions or proceedings in which judgment may be rendered for or against the executor, administrator, or guardian, does not cover a proceeding to probate a will.⁸⁹

Contract or Cause of Action in Issue.—A proceeding to probate a will is not within the scope of a statute disqualifying the surviving party to the contract or cause of action in issue and on trial.⁹⁰

(2.) Proceeding To Establish Lost Will.—The statute applies to a contested proceeding to establish a lost will, and the parties thereto are therefore incompetent to testify to transactions or communications with the decedent, except, of course, in those jurisdictions where the statutes are held not to apply to such proceedings.⁹¹

New Hampshire.—Welsh v. Adams, 63 N. H. 344, 1 Atl. 1.

West Virginia.—See Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493.

Wisconsin.—Wollman v. Ruehle, 104 Wis. 603, 80 N. W. 919.

84. *In re Peterson's Will*, 136 N. C. 13, 48 S. E. 561.

85. *In re De Baum's Will*, 4 N. Y. Supp. 342.

86. *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Lautenschlager v. Lautenschlager*, 80 Mich. 285, 45 N. W. 147; *Brown v. Bell*, 58 Mich. 58, 24 N. W. 824; *Schofield v. Walker*, 58 Mich. 96, 24 N. W. 624.

87. *Thompson v. Thompson*, 2 Ohio Dec. 214.

Where the protection of the statute extends only to executors, administrators and heirs, a contesting heir is not incompetent *Nash v. Reed*, 46 Me. 168.

88. *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665 (*distinguishing* numerous cases from other states); *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151. And see *Milton v. Hunter*, 13 Bush (Ky.) 163, carrying this rule still further and holding competent both the beneficiaries in the will and the heirs.

On a proceeding to probate a will, the executor named therein even though he is the proponent is not a party in his representative capacity, and the proceeding is therefore not one by or against an executor. *Schull v. Murray*, 32 Md. 9 (*holding* the executor a competent witness); *Hamilton v. Hamilton*, 10 R. I. 538; *Shailer v. Bumstead*, 99 Mass. 112. See *Martz's Exrs. v. Martz's Heirs*, 25 Gratt. (Va.) 361.

89. *In re Spiegelhalter's Will*, 1 Penne. (Del.) 5, 39 Atl. 465, holding that the probate of a will is not an action by or against the executor in which judgment or decree could be rendered for or against him as executor, and that he is therefore a competent witness in such proceeding. See *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

90. See *infra*, IX, 2, *et seq.*, and *Shailer v. Bumstead*, 99 Mass. 112; *Martz's Exrs. v. Martz's Heirs*, 25 Gratt. (Va.) 361; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Hamilton v. Hamilton*, 10 R. I. 538. But apparently *contra*, see *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522.

91. The legatees, devisees, and heirs at law are all parties to a pro-

(3.) **Action To Set Aside Will.**—An action to set aside a will already probated is governed by the same rule as the case of a contest of the probate, hence the statute is applied to such a proceeding in most states.⁹²

(4.) **Statutes** sometimes provide that they shall not apply to actions or proceedings involving the validity of a will or codicil.⁹³ Such a statute does not apply to an action involving the validity of an alleged oral gift *causa mortis* by decedent.⁹⁴

d. *Distribution and Settlement of Estate.* — (1.) **Generally.** — The statutes sometimes contain provisions governing actions in relation to the settlement of the estates of deceased persons.⁹⁵ Proceedings to settle, partition or distribute an estate are within the scope of the statutes under consideration in this article.⁹⁶ Thus, in a proceeding for partition, a party claiming property by virtue of an alleged gift from or contract with decedent is not competent to establish such claim.⁹⁷

ceeding under § 3791, R. S., to establish a lost will, and are therefore incompetent, under § 4069, S. & B. Ann. Stats., to testify therein as to transactions or communications by them personally with the testator under whom they claim. *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12.

92. *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283; *Rich v. Bowker*, 25 Kan. 6; *Pringle v. Burroughs*, 185 N. Y. 375, 78 N. E. 150; *French v. French*, 14 W. Va. 458.

Contra. — § 506 of the Indiana statute does not apply to a suit to set aside a will, but is intended to apply "to cases where a claim is asserted against a decedent's estate, or where a claim asserted by the representative of the decedent is resisted. We do not regard that statute as prohibiting heirs from testifying in a suit to set aside a will as to the mental capacity of the testator, although his executor is a party to the action." *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

93. See statutes of Ohio and Wyoming, *supra*, I, 2.

94. *Hecht v. Shaffer* (Wyo.), 85 Pac. 1056.

95. A suit for specific performance of decedent's contract to convey is not "in relation to the settlement of his estate" within the meaning of the statute. *Campbell v. Mayes*, 38 Iowa 9; nor is an action whose termination is necessary be-

fore the estate can be settled. *Booth's Exr. v. Vanarsdale*, 9 Bush. (Ky.) 717.

96. *Appeal of McBride*, 72 Pa. St. 480; *Barbee v. Barbee*, 107 N. C. 581, 13 S. E. 215; *Ballinger v. Connable*, 100 Iowa 121, 69 N. W. 438; *Jones v. Day* (Tex. Civ. App.), 88 S. W. 424; *Russell v. Smith*, 115 Iowa 261, 88 N. W. 361. But see succeeding sections.

In an action for partition, the decedent's son-in-law is not competent to testify on behalf of the plaintiff that a conveyance to himself by the decedent was intended as an advancement to the witness' wife. *Carpenter v. Coats*, 183 Mo. 52, 81 S. W. 1089.

In a suit involving the construction of a will, the wife of the decedent, who is a beneficiary under the will, cannot testify against other devisees and distributees under the will as to conversations with the decedent. *Shipley v. Mercantile Tr. & Dep. Co.*, 102 Md. 649, 62 Atl. 814.

On Final Settlement of an Administration, a legatee or distributee contesting the settlement is not a competent witness on her own behalf, under § 2704, code 1874-5, to prove that the decedent made a loan to the administrator, and thereby charge him with the amount. A final settlement is a proceeding within the meaning of the statute. *Harwood v. Harper*, 54 Ala. 659.

97. *Wertz v. Merritt*, 74 Iowa 683,

Exceptions to Report of Distribution.—The trial of exceptions to the personal representative's report of his distribution of the estate is an "action or proceeding" within the meaning of the statute.⁹⁸

(2.) Contest Between Distributees for Estate.—(A.) **GENERALLY.**—In some states, however, it is held that a contest between the distributees of an estate for the distribution thereof, which does not involve any diminution of the estate, is not within the scope of the statute.⁹⁹ A contested proceeding to probate a will, however, is not within this rule;¹ nor does the rule apply where one distributee is claiming in his individual capacity,² nor to an action between one heir and the heirs of his deceased co-heir where the issue is as to the interest of the latter in the estate of his ancestor.³

When Right to Share Is in Issue.—When, however, the status of a party as an heir or distributee is in issue he is not a competent witness against other heirs, as to matters prohibited by the statute.⁴ Thus, where an alleged widow seeks a portion of the estate and her

39 N. W. 103; *Lowery v. Lowery*, 117 Iowa 704, 89 N. W. 1118; *Wolfe v. Kable*, 107 Ind. 565, 8 N. E. 559; *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654.

Where deceased conveyed certain property to his daughter who subsequently reconveyed the same to him, she is not a competent witness in the partition proceedings to prove, as against the other heirs, that the second deed was destroyed by her father's request with the intention of re-investing the title in her. *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212.

A proceeding by a widow to have her distributive share of her deceased husband's estate set apart to her comes within the statute; and a daughter of the decedent claiming that the homestead devised to her was in consideration of services rendered to the decedent and his wife is not a competent witness as to such agreement, as against the widow. *Brandes v. Brandes*, 129 Iowa 351, 105 N. W. 499.

In an action by a widow against the heirs of her deceased husband for partition of the real estate in which the son by cross-complaint claims the land in question under an alleged oral contract with the decedent, the son and his wife are not competent witnesses to establish this contract. *Eastwood v. Crane*, 125 Iowa 707, 101 N. W. 481.

98. *Brillinger v. Connable*, 100

Iowa 121, 69 N. W. 438, where the court says: "The hearing of the exceptions to the report of the executors was not the trial of an issue in an action in which the parties are named as plaintiffs and defendants. It was a proceeding in probate, where the party excepting to the report claimed rights adverse to the other devisees under the will. The statute being applicable to any legal proceeding which is adversary in its character, it applies to such a controversy as this."

99. *Nolen v. Doss*, 133 Ala. 259, 31 So. 969; *Pigg v. Carroll*, 89 Ill. 205; *Mueller v. Rebhan*, 94 Ill. 142; *Heintz v. Dennis*, 216 Ill. 487, 75 N. E. 192; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455. See also *Hoyt v. Davis*, 30 Mo. App. 309; *Jones v. Jones*, 36 Md. 447; *Pierce v. Rollins*, 83 Me. 172, 22 Atl. 110.

1. *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713. But see *Crumley v. Worden*, 201 Ill. 105, 66 N. E. 318; *Milton v. Hunter*, 13 Bush (Ky.) 163.

2. *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320.

3. *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796, *distinguishing* *Pigg v. Carroll*, 89 Ill. 205, and the rule there laid down.

4. *Crumley v. Worden*, 201 Ill. 105, 66 N. E. 318; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071.

marriage with the decedent is in issue, she is not competent to prove it,⁵ though the contrary has been held.⁶

(B.) DETERMINATION OF ADVANCEMENTS. — Where the issue is as to what if any advancements were made to a particular distributee by the decedent, he is incompetent in his own behalf to the extent provided in the statute.⁷ It has, however, been held to the contrary

5. *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220, 86 S. W. 263; *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071.

Nor is a divorced wife competent on her own behalf in an action to set aside the decree of divorce and to obtain part of the estate as heir. *Maher v. Title Guar. & Tr. Co.*, 95 Ill. App. 365.

In such a proceeding it was held that the rule, that the statute does not apply to a mere contest between the distributees of an intestate estate, had no application because the petitioner's status as an heir was in controversy and was not shown until she established her marriage to the decedent, that her right to testify should be denied so long as her relation to the estate as an heir was a controverted question. "We therefore hold that a woman claiming to be the lawful widow of a dead man, whose claim in that regard is denied by others who have interests, or assert interests as heirs, in his estate, is incompetent to testify to the fact of her marriage in a proceeding in which she seeks, as distributee, a portion or all of his personal property, until her status as such widow has been conceded or has been established by the adjudication of a court having jurisdiction of the subject." *In re Maher's Estate*, 210 Ill. 160, 71 N. E. 438, following *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071.

6. In a proceeding by one claiming to be the wife of the decedent to obtain all of the personal estate to which she would be entitled as widow under the statute, she is a competent witness as against the contesting heirs to prove her marriage. Her competency is not affected by § 1794 of the code, since the contest "is between the parties claiming to be distributees of the es-

tate. . . . The estate of the decedent is not interested in the result of this controversy, within the meaning of the statute." *Nolen v. Doss*, 133 Ala. 259, 31 So. 969; citing *Henry v. Hall*, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22; *Snider v. Burks*, 84 Ala. 53, 4 So. 225; *Kumpe v. Coons*, 63 Ala. 448. See also *Birmingham So. R. Co. v. Cuzzart*, 133 Ala. 262, 31 So. 979.

7. *Wolfe v. Kable*, 107 Ind. 565, 8 N. E. 559; *Garrott v. Rives*, 26 Ky. L. Rep. 10, 80 S. W. 519; *Davidson v. Davidson* (Neb.), 96 N. W. 409.

On the trial of exceptions to the executor's report of his distribution of the estate, one of the exceptants whose share had been reduced by advancements claimed that the improvements on the property received by him as an advancement should have been deducted because placed thereon by himself. It was held that he was not a competent witness to prove that he paid for the improvements in question, such testimony necessarily involving a transaction with the decedent. The court says that the witness "is in precisely the same position as though he was making a claim against the estate for the improvements." His position is in effect the same as that of one claiming compensation for services rendered the decedent who is not competent to show the work performed by him. *Ballinger v. Connable*, 100 Iowa 121, 69 N. W. 438.

Under the Kentucky Code, § 606, the plaintiff in a suit to partition the lands of the decedent is not a competent witness to rebut a claim that a conveyance made by the decedent to plaintiff was an advancement, where no one interested in the estate was present at the transaction. This section of the code provides, among other things, that "no person shall testify for himself concerning any verbal statement of, or any

on the ground that the witness and the estate are not adversely interested,⁸ and also on the ground that such a case comes within a statutory provision excepting cases where the parties are claiming by devolution from decedent.⁹ And where the action does not come within the terms of the statute, such distributee is not incompetent.¹⁰

F. FORECLOSURE OF MECHANIC'S LIEN. — Some statutes are held to include proceedings to foreclose a mechanic's lien,¹¹ while others are not.¹²

G. ACTIONS FOR WRONGFUL DEATH. — The competency of the witnesses in an action for wrongfully causing the death of another depends upon the form of the statute governing the right of action, that is, whether this right is given to the personal representative or to the next of kin or survivor of the decedent. Where the former is entitled to sue, in an action by him, the disqualifying statute is held to apply.¹³ But where the statute gives the right to the sur-

transaction with, or any act done or omitted to be done . . . by one who is . . . dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statements, or was present when such transaction took place, or when such act was done or omitted, unless: . . . The decedent, or a representative of, or some one interested in his estate, shall have testified against such person with reference thereto." *Crafton v. Inge*, 30 Ky. L. Rep. 313, 98 S. W. 325.

8. *McClintock's Appeal*, 58 Mich. 152, 24 N. W. 549.

9. *In re Allen's Estate*, 207 Pa. St. 325, 56 Atl. 928.

10. As where the action is by or against him and the statute applies only to actions by or against executors or administrators. *O'Neal v. Breecheen*, 5 Baxt. (Tenn.) 604.

11. *Harnish v. Herr*, 98 Pa. St. 6. See *Kahler v. Carruthers*, 18 Tex. Civ. App. 216, 45 S. W. 160.

In an action to foreclose a mechanic's lien, the sureties on a bond, given to the defendant's intestate by his vendor, being parties to the suit were held incompetent to testify that the intestate assumed the contract out of which the lien arose. *Haberzettler v. Dearing* (Tex. Civ. App.), 80 S. W. 539.

12. *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

13. *Sherlock v. Alling*, 44 Ind. 184; *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243; *Kentucky Stove Co. v. Bryan's Admr.*, 27 Ky. L. Rep. 136, 84 S. W. 537.

In an action by an administrator, both the defendant and the intestate's son are incompetent as to transactions with the decedent. *Cobb v. Owens* (Ala.), 43 So. 826.

In *Forbes v. Snyder*, 94 Ill. 374, which was an action by an administratrix for the wrongful death of her intestate, the court said: "Defendants were offered as witnesses generally as to matters anterior to the death of Snyder, and were held incompetent. This ruling was held to be correct. In this action, the adverse party sues as administratrix, and, in such case, a party or person interested is expressly excepted from the operation of the statute allowing parties to testify on their own motion in their own behalf. But it is insisted that this clause is to be confined to cases wherein the result of the suit must be to increase or diminish the estate of the deceased person, and that the damages in this case do not, in any proper sense, constitute a part of the estate of deceased, are not assets for the payment of debts or for distribution to heirs or devisees. It is true, these damages are not strictly any part of the estate, but they constitute a fund cast upon his next of kin by means of his death. They surely come within the letter of the statute, and,

viving relatives of decedent, in an action by the latter the defendant is a competent witness in his own behalf.¹⁴ This matter is governed by statute in some states.¹⁵

H. ESTABLISHING TRUST. — The complainant in an action to establish a trust in property standing in the name of the decedent is not competent against the latter's representatives to prove the alleged trust,¹⁶ even in those jurisdictions in which the witness is

in our judgment, fall within its spirit. The tongue of Snyder is silent as to the events which led to his death. The same reasons which justify the limitations of the general statute, so as to silence adverse parties where the effect of the proceeding is to increase or decrease the estate, seem equally cogent in a case like the present."

Stockholders of Defendant Corporation. — In an action by an administrator against a corporation for wrongfully causing the death of his intestate, stockholders in the defendant corporation are incompetent against the administrator. *Kentucky Stove Co. v. Bryan's Admr.*, 27 Ky. L. Rep. 136, 84 S. W. 537.

14. *McEwen v. Springfield*, 64 Ga. 159. *Contra.* — *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923 (*overruling Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243). See *Cincinnati & I. R. Co. v. Cregor*, 150 Ind. 625, 50 N. E. 760.

Mann v. Weiland, 81 Pa. St. 243, 256, was an action by the decedent's widow under a statute giving the right of action, not to the personal representatives of the decedent, but to the surviving spouse, children or parents. It was therefore not an action by or against an executor, administrator or guardian, nor was the assignor of the thing in action dead. There was no assignment at all, but the right of action was personal to the plaintiff and was created upon the death of the decedent.

Wrongful Death Caused by Selling Liquor. — In an action by the wife to recover for the death of her husband occasioned by the negligent selling of liquor to him by defendant, the latter is a competent witness in his defence because the wife does not sue as the representative of her husband's estate. *Reget v. Bell*, 77 Ill. 593.

In an action brought by a widow, nominally in the name of her husband's administrator, he having refused to act, for the benefit of herself and infant child, to recover damages caused by the killing of her husband by the defendant, the defendant is a competent witness in his own behalf, even as to transactions with, and statements by, the deceased. The administrator of deceased, while a plaintiff in the suit, was merely a nominal party, and the estate of his intestate had no interest whatever in the result thereof, and no judgment could be rendered either for or against him which could affect the estate of his intestate. *Hale v. Kearly*, 8 Baxt. (Tenn.) 49.

15. *West Virginia Code* 1899, c. 130, p. 875, § 23.

16. *Illinois.* — *Michael v. Mace*, 137 Ill. 485, 27 N. E. 694; *Kelsey v. Snyder*, 118 Ill. 544, 9 N. E. 195 (resulting trust); *Holderman v. Gray*, 130 Ill. 442, 22 N. E. 592.

Iowa. — *Wood v. Brolliar*, 40 Iowa 591; *Hagan v. Powers*, 103 Iowa 593, 72 N. W. 771.

Kentucky. — *Holtheide v. Smith*, 74 S. W. 689; *Pope v. Pope*, 21 Ky. L. Rep. 1376, 55 S. W. 194.

New Jersey. — *Walker v. Hill's Exrs.*, 21 N. J. Eq. 191.

New York. — *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633.

The wife of the deceased is incompetent against the heirs to establish a trust in her favor in the property left by him. *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. 118; *Connelly v. Dunn*, 73 Ill. 218.

Establishment of Trust. — A statute disqualifying a party against the adverse party, who is the representative of a deceased or incompetent person, or claims or defends as heir of such latter person, applies to an action to have a conveyance to the decedent declared a mere trust.

disqualified in actions upon a claim or demand against the estate.¹⁷

I. ACTION ON BENEFIT CERTIFICATE OR INSURANCE POLICY. — a. *Benefit Certificate*. — Members of a benefit association may have a disqualifying interest in an action against the association on a benefit certificate;¹⁸ their competency or incompetency depends upon the nature of the action, that is, whether it is brought by the personal representative of the deceased or by the beneficiary named therein in his own right. In the former case they are incompetent,¹⁹ but in the latter the action is not within the disqualifying statute, plaintiff not being regarded as the representative of the deceased.²⁰

b. *Insurance Policy*. — In an action on a life insurance policy the insurer is not the representative of the decedent,²¹ though it has been held that the beneficiary is.²²

Hubbell v. Hubbell, 22 Ohio St. 208.

17. See *infra*, IX, 1.

18. Cronin v. Royal League, 199 Ill. 228, 65 N. E. 323.

19. A Member of a Benefit Association is incompetent against the administrator of another member in an action on a benefit certificate, being interested in the result. Cronin v. Royal League, 199 Ill. 228, 65 N. E. 328, reversing 101 Ill. App. 479.

20. Hamill v. Supreme Council Royal Arcanum, 152 Pa. St. 537, 25 Atl. 645, holding that where a beneficial association has contracted to pay to the wife of a member a certain sum on the death of her husband, members of the association are competent witnesses, in an action by the widow for the benefit, to show that the husband was not in good standing at the time of his death. The benefit being payable exclusively to the wife, who was still living, she does not claim as the representative of the decedent, but in her own right. The court distinguishes Washington Beneficial Soc. v. Bacher, 20 Pa. St. 425 and Marion Beneficial Soc. v. Com., 31 Pa. St. 82, as decided under the common law when interest was a disqualification.

The wife suing upon a benefit certificate received by her deceased husband from the benefit association does not sue as a representative of his estate. Sherret v. Royal Clan, 37 Ill. App. 446.

Contra. — But in Wallace v. Fraternal Mystic Circle, 127 Mich. 387, 86 N. W. 853, which was an action on a benefit certificate by the bene-

ficiary therein named, it was held that the plaintiff was in effect the decedent's assignee or legatee, since up to the time of his death he retained the right to dispose of his policy and that the plaintiff therefore took by virtue of a right bestowed upon her by deceased, and the officers of the defendant were incompetent under the statute.

21. Insurance Company Not Legal Representative of Insured in Action on Policy. — An insurance company does not defend as the executor, administrator or legal representative of the insured in an action by the beneficiary named in a policy to recover the insurance. Hence the plaintiff is a competent witness in his own behalf to prove transactions with the deceased insured showing the truth of a representation made by the insured to the defendant, and alleged by the latter to be false. Erickson v. Modern Woodmen of America, 43 Wash. 242, 86 Pac. 584.

22. Beneficiary Under Insurance Policy. — § 10,212, Michigan Comp. Laws 1897, applies in an action between two parties, each claiming as beneficiary under a policy of insurance; hence the beneficiary cannot testify as to matters equally within the knowledge of the decedent, since the other party under the rule laid down in Wallace v. Fraternal Mystic Shrine, 127 Mich. 387, 86 N. W. 853, comes within the class of heirs, assigns, devisees and legatees or personal representatives of a deceased person. Great Camp K. of M. v. Savage, 135 Mich. 459, 98 N. W. 26,

IV. PERSONS EXCLUDED.

1. Witness Not a Party Nor Interested. — A witness who is not a party to nor pecuniarily interested in the result of the suit is not incompetent as to transactions with the decedent or other prohibited matters,²³ except in those states and under those statutes where

Moore & Grant, J. J., dissenting.

In an action by a wife on a policy of insurance on the life of her husband, since deceased, she is not a competent witness as to conversations had with the assured. *Dakan v. Union Mut. L. Ins. Co.*, 125 Mo. App. 451, 102 S. W. 634.

The children of a deceased wife are not competent witnesses on behalf of her administrator, in an action by him to recover the insurance of the deceased husband and father to prove the alleged contract between the husband and wife on which the action is based. *Supreme Council Royal Arcanum v. Bevis*, 106 Mo. App. 429, 80 S. W. 739.

23. *Alabama.* — *Morris v. Birmingham Nat. Bank*, 93 Ala. 511, 9 So. 606.

Georgia. — *Morehead v. Allen*, 127 Ga. 510, 56 S. E. 745; *Priester v. Melton*, 123 Ga. 375, 51 S. E. 330; *Logan v. Logan*, 108 Ga. 760, 33 S. E. 30.

Indiana. — *Sullivan v. Sullivan*, 6 Ind. App. 65, 32 N. E. 1132.

Kansas. — *Fry v. Fry*, 56 Kan. 291, 43 Pac. 235.

Kentucky. — *Blackburn v. Hall*, 30 Ky. L. Rep. 134, 97 S. W. 399; *Apperson's Exrx. v. Exchange Bank*, 10 Ky. L. Rep. 943, 10 S. W. 801.

Michigan. — *Finch v. Modern Woodmen of America*, 113 Mich. 646, 71 N. W. 1104; *Waterman Real-Estate Exch. v. Stephens*, 71 Mich. 104, 38 N. W. 685; *McKeown v. Harvey*, 40 Mich. 226.

Minnesota. — *Harrington v. Samples*, 36 Minn. 200, 30 N. W. 671.

Mississippi. — *Jones v. Bank of Carrollton*, 71 Miss. 1023, 16 So. 344.

Missouri. — *McDonald v. Tittmann*, 96 Mo. App. 536, 70 S. W. 502.

Nevada. — *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025.

New Hampshire. — *Wilson v. Russell*, 61 N. H. 354.

New York. — *Farrar v. Farmers' Loan & Tr. Co.*, 85 App. Div. 478, 83

N. Y. Supp. 218; *Matter of McNeany*, 5 App. Div. 456, 38 N. Y. Supp. 1093.

South Carolina. — *Huff v. Latimer*, 33 S. C. 255, 11 S. E. 758.

Tennessee. — *Kelton v. Jacobs*, 5 Baxt. 574.

Washington. — *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646.

One not a party to a proceeding to sell land to pay a claim against the decedent, nor interested in the claim, is not incompetent under §1794, code 1896. *Little v. Marx*, 145 Ala. 620, 39 So. 517.

In *Laack v. Runge*, 104 Wis. 59, 80 N. W. 61, a witness for the defendant testified that by an arrangement with the deceased, goods were sold to the defendant and others by deceased and the amount due therefor was taken out of the amount due on certain work being done by witness for deceased, and by witness taken out of the wages due the defendant, from such testimony it appearing that the amount due deceased from defendant had been deducted from the amount due on witness's contract. It was held that the witness, not being a party to the action, nor the real party in interest, nor a person through or under whom the party offering his testimony derived his interest or title, such testimony was properly admitted.

In *In re Lewis*, 5 App. Div. 178, 39 N. Y. Supp. 26, it was held that the statute did not apply to a witness who was called and testified in behalf of the executor or administrator that certain money from a life insurance policy upon the life of the decedent's husband had been collected by him with her consent and that the same was retained by the witness, it being sought to charge the executor of decedent's estate on an accounting with said money. The

one through whom a party derives his interest is disqualified.²⁴

2. Parties. — A. GENERALLY. — Under most of the statutes parties to an action or proceeding against the representatives or successors of deceased or incompetent persons are disqualified as to certain matters.²⁵

B. BOTH PARTIES DISQUALIFIED. — In some states both parties to the action are disqualified, the decedent's representative as well as the adverse party.²⁶

Co-Party With Such Persons. — Although both parties to an action by or against certain classes of persons are disqualified by the statute, a co-party with a person falling within one of the classes named is not disqualified on his own behalf.²⁷

C. WHO IS OPPOSITE PARTY. — In determining who is an "opposite" party within the meaning of the statute disqualifying such party against the representative of the decedent, the court will look to the real interest of the party rather than to the position he may

witness was not a party to the proceeding or interested in any way in the accounting.

Where the existence of a partnership between decedent and another became material, the latter, who was neither a party nor interested, was held competent to prove it. *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685.

24. See *infra*, IV, 13.

25. See *supra*, I, 2, B, and the following cases:

United States. — *McMullen v. Ritchie*, 64 Fed. 253.

California. — *Roche v. Ware*, 71 Cal. 375, 12 Pac. 284.

Florida. — *Ley v. Edwards*, 21 Fla. 333.

Indiana. — *McConnell v. Huntington*, 108 Ind. 405, 8 N. E. 620.

Maine. — *Burleigh v. White*, 64 Me. 23.

Michigan. — *Connolly v. Keating*, 102 Mich. 1, 60 N. W. 289.

New Jersey. — *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

North Carolina. — *Benedict v. Jones*, 129 N. C. 475, 40 S. E. 223; *Robinson v. McDowell*, 130 N. C. 246, 41 S. E. 287.

West Virginia. — *Robinson v. James*, 29 W. Va. 224, 11 S. E. 920.

26. See statutes of Alabama, Arizona, Arkansas, Delaware, Indiana, Minnesota, North Dakota, South Dakota, Tennessee, Texas and United States. And see *Sachse v. Loeb*

(Tex. Civ. App.), 101 S. W. 450; *Davis v. Davis* (Tex. Civ. App.), 98 S. W. 198; *Tison v. Gass* (Tex. Civ. App.), 102 S. W. 751; *Jarvis v. Andrews*, 80 Ark. 277, 96 S. W. 1064; *Taylor v. Mayhew*, 11 Heisk. (Tenn.) 596; *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389; *Dill v. Webb*, 61 Ind. 85.

27. **Widow Defending Community Interest Merely.** — Where pending a new trial in a suit to restrain the closing of a lane over defendant's land on the ground that the land had been dedicated as a public highway, the defendant died, and by an amended petition the wife and children of defendant were made parties defendant, it was held that the widow's testimony as to an admission made by the plaintiffs in a conversation with the decedent was competent in her own behalf, but incompetent in behalf of the children.

The witness was defending merely her community interest in the land in question and not as executrix or administratrix or as heir of the decedent, nor was she administering the community estate under the statute as his surviving wife; consequently the statute disqualifying both parties in actions by or against the heirs or legal representatives of a decedent had no application to her. *Evans v. Scott* (Tex. Civ. App.), 97 S. W. 116. But see *McDonald v. Harris*, 131 Ala. 359, 31 So. 548.

happen to occupy on the record.²⁸ It has been held, however, under a statute expressly confining the disqualification to those cases enumerated, that a co-party with the representative was competent against him, although his interest was adverse to the estate.²⁹ The opposite party within the meaning of the statute is the real party in interest.³⁰ Where the statute disqualifies both parties as witnesses against each other, it is the interest of the witness which determines and governs his competency, and not his position on the record, and where the interests of co-parties are antagonistic, neither is competent against the other.³¹

D. ACTION AGAINST PARTNERSHIP.—Where an action is permitted to be brought against a partnership as such, the partners are all parties within the meaning of the statute.³²

28. *American Inv. Co. v. Coulter*, 8 Kan. App. 841, 61 Pac. 820; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156; *Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884.

The fact that the witness is on the opposite side of the case does not make him an "opposite party" within the meaning of the statute, if the interest of the witness and the interest of such other party in so far as he is a representative of the estate are really identical. *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4. See *Kingsbury v. Buckner*, 134 U. S. 650, 683. Compare *infra*, X, 7, A, b.

Where the complainant seeks to enforce specific performance of a contract, the benefits of which proceed wholly to other persons, the beneficiaries should be classed as complainants, or cause for making them defendants should be stated in the bill. When a devisee is made a party defendant to a bill to enforce the specific performance of a contract of his testatrix, he is sued in his representative capacity; and the fact that the beneficiaries of a contract sought to be enforced in equity by specific performance are made defendants, and the parties against whom specific performance is asked are also made defendants in the same bill, does not prevent the beneficiaries and the parties against whom the contract is sought to be enforced from being opposite parties. In equity, parties who are in opposition to each other are often brought into court as defendants. In ascertaining the relation of the parties to each

other under the evidence the court will examine the record to ascertain whether they are in fact antagonistic, and will not be controlled by the voluntary classification of parties made by the complainant in drawing his bill. *Kempton v. Bartine*, 59 N. J. Eq. 149, 44 Atl. 461.

29. *New Ebenezer Assn. v. Gress Lumb. Co.*, 89 Ga. 125, 14 S. E. 892.

30. *Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

On an appeal from the allowance of the final account of a special administrator, it was contended that the administrator should have been charged with certain certificates of deposit belonging to the decedent. A witness was permitted to testify that the certificates in question belonged to her by reason of a gift *causa mortis* from the decedent. Her testimony was held properly admitted because she was neither a nominal nor a real party in interest. In determining what the word "the opposite party," used in the statute, mean, the court must look for the real party in interest; and in determining this it must be further determined whether the witness would be concluded by the judgment. The mere fact that the witness has an interest in the matter is not sufficient unless the determination of the proceeding would be *res adjudicata* as to him. *Reed v. Whipple*, 140 Mich. 7, 103 N. W. 548.

31. *Trabue v. Turner*, 10 Heisk. (Tenn.) 447.

32. *Murray v. R. P. Smith & Sons*, 42 Ill. App. 548.

E. PROPER AND NECESSARY PARTIES. — a. *When Parties of Record.* — Parties who are proper but not necessary parties are subject to the same disqualification as other parties,³³ except where the statute requires that the witness shall be a *necessary* party to the issue or record.³⁴

b. *When Not Parties of Record.* — The term party as used in the statute is not confined to those persons who appear as parties on the record, but includes necessary parties who have been omitted therefrom.³⁵ The same rule has been applied to persons who would be proper parties.³⁶

c. *Witness Subsequently Made a Party.* — It has, however, been held that where a witness is subsequently made a party because on his cross-examination it appears that he is the real party in interest, his testimony already given cannot be stricken out even though he was omitted from the record for the express purpose of rendering his testimony competent.³⁷

F. NOMINAL OR DISINTERESTED PARTIES. — In some jurisdictions statutes disqualifying a party to the action are construed to exclude the testimony of parties to the record who have no interest in the matter in litigation, so long as they remain technically parties to the record.³⁸ Under such a statute a merely nominal party is dis-

33. *Herring v. Patten*, 18 Tex. Civ. App. 147, 44 S. W. 50, holding that beneficiaries under the will made parties defendant to an action against the executor, being proper though not necessary parties to the suit, could not testify as to transactions with the decedent on behalf of the executor, since their interests were identical with the latter's. But see *Humphrey v. Sweeting*, 92 Hun 447, 36 N. Y. Supp. 967.

If a party to the action has interest enough in the controversy to be a proper party, he cannot testify as to conversations with a deceased person, even though such interest may be merely contingent and uncertain. *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180.

34. See *supra*, statutes, and *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763.

35. A Necessary Party who has been omitted from the record is nevertheless incompetent. *Alexander v. Hoffman*, 70 Ill. 114; *McKaig v. Hebb*, 42 Md. 227.

36. Proper Party Omitted.

Where a proper party to the suit is omitted for the purpose of making him a competent witness, the court will, nevertheless, treat him as an actual party in determining his competency. *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784.

Contra. — Where a joint maker of a note is not a party to an action, he is a competent witness to the declarations of the payee in reference to the holding of the collaterals given to secure the same. *McMullen v. Ritchie*, 64 Fed. 253.

37. *Snyder v. Harris*, 61 N. J. Eq. 480, 48 Atl. 329, where the disqualification was confined to parties to the record.

38. *Dalton v. Hamilton*, 50 Cal. 422; *Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532; *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. 817. See *Mobile Sav. Bank v. McDonald*, 87 Ala. 736, 6 So. 703; *Oatis v. Harrison*, 60 Ga. 535.

Thus a complainant is not rendered a competent witness in favor of his co-complainants against the representative of the decedent by proof that he has no interest whatever in the subject-matter of the suit, if he

qualified.³⁹ It has been held that where the statute disqualifies parties and interested persons as witnesses against the representative of a decedent, all parties whether interested or not are excluded.⁴⁰ Generally, however, the statutes are construed not to include merely nominal or disinterested parties.⁴¹ A witness cannot be rendered incompetent merely by making him a party to a proceeding in which he has no beneficial interest.⁴² A party to the action, however, who is a party to the transaction in question and interested in the outcome is not a nominal party.⁴³

is still retained as a party. *Guild v. Warne*, 149 Ill. 105, 36 N. E. 635.

39. *Blood v. Fairbanks*, 50 Cal. 420. A statute providing that "no party to the cause shall be allowed to testify," etc., includes nominal parties as well as real parties in interest, and requires the exclusion of their testimony. *Smith v. Humphreys*, 104 Md. 285, 65 Atl. 57, holding that under such a statute a husband who was joined with his wife in an action to recover her property was incompetent as to transactions with the decedent.

40. *Culbertson v. Salinger*, 131 Iowa 307, 108 N. W. 454; *Conger v. Bean*, 58 Iowa 321, 12 N. W. 284.

The testimony of a "party" as to transactions between himself and one since deceased is incompetent under the provisions of § 3639 of the code, though the party has, in fact, no interest in the issue upon which such testimony bears. *Williams v. Barrett*, 52 Iowa 637, 3 N. W. 690.

41. *United States v. Kingsbury v. Buckner*, 134 U. S. 650, 683.

Georgia.—*Hooper v. Howell*, 52 Ga. 315.

Illinois.—See *White v. Ross*, 147 Ill. 427, 35 N. E. 541.

Indiana.—*Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Works v. State ex rel. Holland*, 120 Ind. 119, 22 N. E. 127.

Maryland.—*Neale v. Hermanns*, 65 Md. 474, 5 Atl. 424.

Michigan.—*Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

Minnesota.—*Bowers v. Schuler*, 54 Minn. 99, 55 N. W. 817.

Mississippi.—*Rushing v. Rushing*, 52 Miss. 329.

New Jersey.—*Harrison's Admx. v. Johnson*, 18 N. J. Eq. 420.

Ohio.—*Baker v. Kellogg*, 29 Ohio St. 663.

South Carolina.—*Wood v. Wood*, 25 S. C. 600.

Texas.—*Parker v. Cockrell* (Tex. Civ. App.), 31 S. W. 221.

Wisconsin.—*Anderson v. Langen*, 122 Wis. 57, 99 N. W. 437.

Party, as used in the statute, means a party to the issue and not merely to the record. *Wootters v. Hale*, 83 Tex. 563, 19 S. W. 134.

A husband who had joined in his wife's conveyance and was made a party to her suit against the grantee's legatees to cancel the same, was held competent on her behalf. *Ellis v. Alford*, 64 Miss. 8, 1 So. 155 (the statute provides that "no person shall testify as a witness to establish his own claim").

The Statute in South Carolina while it disqualifies parties and interested persons, by its express terms makes them incompetent only when their examination or the result of the proceeding can in any manner affect their interest. See *supra*, I, 2, B.

42. A senior mortgagee who has been made a party to an action to foreclose a junior mortgage but has no interest in the action, is not incompetent as to communications between himself and the decedent. *Moffatt v. Hardin*, 22 S. C. 9.

43. A bill was filed by an administratrix to obtain possession of a book of deposit and certain sums of money credited therein, alleged to have been deposited in a savings bank by her intestate in his lifetime, to which as his administratrix she claimed to be entitled. The bill charged that a daughter of the intestate, together with her husband, had been active parties in withholding the book of deposit and resisting

G. INTERESTED PERSONS NOT PARTIES OF RECORD. — a. *Generally*. — As to whether the term "party" as used in the statute includes interested persons who are not parties of record, the cases are not in harmony. In some jurisdictions the term is strictly construed to apply only to witnesses who are actually parties to the suit, and not to interested persons.⁴⁴ The fact that the witness was a party to the suit and still has an interest does not change

the payment by the bank to the complainant, of the money deposited. That they had been implicated as thus charged the answers and proof in the case abundantly established. The bill prayed that they might be required to answer. *Held*, that these defendants were not *nominal parties merely*, and were, therefore, incompetent to testify. *Murray v. Cannon*, 41 Md. 466, 475.

44. *United States*. — *Potter v. National Bank*, 102 U. S. 163; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275; *Stephens v. Bernays*, 42 Fed. 488; *Berry v. Sawyer*, 19 Fed. 286.

Arkansas. — *Collier v. Trice*, 79 Ark. 414, 96 S. W. 174; *McRae v. Holcomb*, 46 Ark. 306.

Maine. — *Segar, Admr. v. Lufkin*, 77 Me. 142; *Rawson, Admr. v. Knight, Admx.*, 73 Me. 340.

New Jersey. — *In re McLaughlin's Will*, 59 Atl. 469; *Grant v. Stamler*, 68 N. J. Eq. 555, 59 Atl. 890; *Rairdon v. Sampson*, 67 N. J. L. 346, 51 Atl. 696.

South Dakota. — *Witte v. Koepen*, 11 S. D. 598, 79 N. W. 831.

Tennessee. — *McBrien v. Martin*, 87 Tenn. 13, 9 S. W. 201; *Rielly v. English*, 9 Lea 16; *Fuqua v. Dinwiddie*, 6 Lea 645.

Texas. — *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309 (*distinguished* in *Simpson v. Brotherton*, 62 Tex. 170).

The testimony of officers or directors of a corporation called as witnesses in its behalf, in an action in which it is a party, is not testimony given by the corporation. *New Jersey Trust Co. v. Camden Safe Deposit Co.*, 58 N. J. L. 196, 33 Atl. 475; *In re Bruendl's Will*, 102 Wis. 45, 78 N. W. 169. See *supra*, IV, 9.

In *Mendenhall v. School Dist.* No. 83 (Kan.), 90 Pac. 773, construing § 322 of the Code of Civ. Proc. providing that "no party shall be al-

lowed to testify," etc., to mean merely the actual parties to the action, and not to apply to the officers of the defendant school district, the court says: "Statutes which exclude persons from testifying will be strictly construed in favor of the witness."

Our law excludes the party only. In many states having a similar statute this word has been defined to mean a party to the suit in its strict legal sense. In the case of *Potter v. Third National Bank*, 102 U. S. 163, 26 L. Ed. 111, Justice Harlan, in construing a statute substantially the same as this, said: "The proviso of section 858, Rev. St. U. S. (U. S. Comp. St. 1901, p. 659), excludes only one of the classes described in its first clause—those who are technically parties to the issue to be tried. We are not at liberty to suppose that Congress intended the word "party," as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue." In the case of *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 411, it is said: "The word "party" is unquestionable a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party, plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons."

An Assignor of a claim against decedent's estate who has taken the assignee's note is a competent witness for the latter in an action on the claim, as to transactions with the decedent, although it appears that the assignee cannot and does not expect to pay the note unless he succeeds. The witness holds the note and could

the rule.⁴⁵ Where the statute disqualifying a party recognizes both parties and persons having an interest in the action, the term party is held not to include merely interested persons.⁴⁶ But in some jurisdictions statutes disqualifying parties are not confined in their operation to mere parties of record, but are held to include persons who have an interest in the suit.⁴⁷ Where, however, the disqualification of interest is abolished, the witness, to be incompetent, must be a party.⁴⁸

b. *Persons Bound By Judgment.* — One who though not a party to the record would be bound by the judgment rendered therein is regarded as a party.⁴⁹

c. *Real Parties in Interest.* — Although a statute confining the disability to parties does not include merely interested persons,

sue upon it, and while her credibility would be affected she would still be competent. "The latest utterances of the judges in this state seem to establish the principle that the competency of the witness to speak of transactions with the deceased depends entirely upon the situation of the record." *Harrison v. Patterson* (N. J. Eq.), 50 Atl. 113.

45. *Stanley v. Wilkerson*, 63 Ark. 556, 39 S. W. 1043.

46. *Rairdon v. Sampson*, 67 N. J. L. 346, 51 Atl. 696.

The general manager of a corporation party and its officers, directors and stockholders are not parties and are therefore not disqualified to testify in behalf of their corporation against the representative of a decedent as to transactions between the corporation and the decedent, where the statute removes the disqualification of parties and interested persons except as to a party to the action, or any party for whose immediate benefit such action is prosecuted or defended in actions against the representative of a deceased person as to matters occurring before the latter's death. "The provisions of the Code recognize both parties and persons having an interest, so that it is not permissible to conclude that officers and stockholders in a corporation, because interested, were intended to be comprised in the word 'party.'" *Cockley Mill. Co. v. Bunn*, 75 Ohio St. 270, 79 N. E. 478; citing *Potter v. National Bank*, 102 U. S. 163.

47. *White v. Dakin*, 70 N. H. 632, 47 Atl. 611; *Foster v. Ela*, 69 N. H.

460, 45 Atl. 248; *Clift v. Shockley*, 77 Ind. 297; *Allen v. Baldwin*, 22 Minn. 397; *Whitlow's Admr. v. Whitlow's Admr.*, 22 Ky. L. Rep. 1179, 60 S. W. 182; *Bowers v. Schuler*, 54 Minn. 99, 55 N. W. 817.

In an action affecting the title to land, a person claiming under a deed from the defendant which was unrecorded when the notice of *lis pendens* was filed, being bound by the proceedings, is a party within the meaning of the statute and cannot be examined as to any transaction or communication by him personally with a deceased person under whom the plaintiff claims title. *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486.

In a suit prosecuted by the assigns of a deceased person against the personal representatives of his estate, an heir at law of the decedent, although not a party to the record, is disqualified. *O'Neil v. Greenwood*, 106 Mich. 572, 64 N. W. 511.

In *Indiana* the term "party" used in § 507 of the statute means not merely a party to the record, but a party to the issue. *Owings v. Jones*, 151 Ind. 30, 51 N. E. 82.

48. *Chase v. Pitman*, 69 N. H. 423, 43 Atl. 617.

49. Thus a person who claims under an unrecorded conveyance and has received constructive notice by the filing of a *lis pendens*, is a party to an action affecting the title, within the meaning of the statute, since he is bound by the judgment therein. *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486.

it does apply to the real party in interest even though he is not technically a party to the record.⁵⁰

d. *Person Represented by a Party*. — One who though not technically a party to the action is represented therein by another person is a party within the meaning of the statute disqualifying parties.⁵¹ Thus where the husband represents the community interest of the wife and judgment in the action would bind the community estate, she is regarded as a party.⁵²

H. PARTIES NOT SERVED. — One who though a party to the action has not been served with summons or notice and has not appeared is not rendered incompetent by a statute disqualifying parties.⁵³

I. IMPROPER PARTIES. — One who has been improperly made a party to the action is not for that reason incompetent,⁵⁴ though it has been held necessary to dismiss the action as to him before he can testify.⁵⁵

J. WITHDRAWAL OR SUBSTITUTION. — A party whose place in the action has been taken by another substituted in his stead is no longer a party, and is therefore competent for his successor.⁵⁶ But

50. *Simpson v. Brotherton*, 62 Tex. 170 (*distinguishing* *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309).

51. See *Stallings v. Hinson*, 49 Ala. 92.

52. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Simpson v. Brotherton*, 62 Tex. 170; *Hedges v. Williams*, 26 Tex. Civ. App. 551, 64 S. W. 76, *holding* that in an action by an heir, the wife of the defendant was incompetent under the statute since her husband represented the community interest of both himself and the wife. "As the appellant (husband) was representing the community interest of himself and wife in this suit, she was as much a party thereto and her interest as much affected as if her name had appeared among the parties to the suit."

In an action for conversion brought by an administrator to recover money alleged to belong to decedent's estate, the wife of the defendant is incompetent to testify as to declarations of decedent showing that the money was a gift by him to the defendant. The fact that the excluded testimony of the wife would show the money to be the separate property of the husband, does not change the rule excluding her evidence as

that of a party, since, as the action is one of conversion, the judgment therein, if for the plaintiff, would be collectible out of the community estate of the husband and wife. *Pad-dock v. Lewis*, 13 Tex. Civ. App. 265, 35 S. W. 320.

53. *Giesecke Boot & S. Mfg. Co. v. Seevers*, 85 Iowa 685, 52 N. W. 555; *Hicks v. Williams*, 112 Iowa 691, 84 N. W. 935; *Bunker v. Taylor*, 10 S. D. 526, 74 N. W. 450; *Stevens v. Masterson*, 90 Tex. 417, 39 S. W. 292, 921. See *Trymby, Hunt & Co. v. Address*, 175 Pa. St. 6, 34 Atl. 347.

Contra. — *Williams v. Carr*, 4 Colo. App. 363, 36 Pac. 644. And see *Jenks v. Opp*, 43 Ind. 108.

54. *McRae v. Poor* (Tex. Civ. App.), 48 S. W. 47.

55. *Bilger v. Buchanan* (Tex.), 6 S. W. 408.

56. *The Release of a Guardian* as a party to the record by the substitution of his ward upon the latter's attaining his majority, restores the competency of the guardian to testify. *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656.

The administratrix in whose name the action was begun is a competent witness in favor of her successors substituted for her in the action,

if the party withdrawing nevertheless remains the real party in interest, he is still incompetent.⁵⁷

K. EFFECT OF DISMISSAL, OR DISCONTINUANCE. — The dismissal or discontinuance of the action as to one of the parties thereto relieves him of the statutory disqualification.⁵⁸

L. EFFECT OF DISCLAIMER. — A disclaimer by a party of all interest in the subject-matter of the action removes his disability as a party,⁵⁹ though it has been held that a disclaimer cannot be made merely for the purpose of rendering the party competent.⁶⁰ A disclaimer, however, to be effective must be made before or at the beginning of the trial.⁶¹ Where it is not made until after the witness has testified it does not operate to make competent his previous testimony admitted over objection, though it would qualify him as a witness on a subsequent trial.⁶² Where interest is also a disqualification, a disclaimer of all interest in the matters in controversy and the event of the action which does not operate as a release of the interest of the witness, does not restore his competency.⁶³

against the administrator of a decedent as to transactions between the witness and such decedent. *Snyder v. Fiedler*, 139 U. S. 478.

57. *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

58. *Segar v. Lufkin*, 77 Me. 142; *Mayfield v. Robinson*, 22 Tex. Civ. App. 385, 55 S. W. 399.

The dismissal of the action as to one defendant because he produces a discharge in bankruptcy is a removal of his disability to testify. *Hayden v. McKnight*, 45 Ga. 147.

Where the suit against the "next friend" of infants has been dismissed as to such "next friend," intermediate the two trials of such suit, he is a competent witness in their favor against the representative of a decedent, the provisions of the statute relative to disclaimer having no application to such case. *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656.

59. *Illinois*. — *Mester v. Zimmerman*, 7 Ill. App. 156.

Indiana. — *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763.

Oklahoma. — *Murphy v. Colton*, 4 Okl. 181, 44 Pac. 208.

Texas. — *Eastham v. Roundtree*, 56 Tex. 110; *Britton v. Tischmacher* (Tex. Civ. App.), 31 S. W. 241; *Jones v. Day* (Tex. Civ. App.), 88 S. W. 424; *Barrett v. Eastham Bros.*, 28 Tex. Civ. App. 189, 67 S. W. 198;

Mayfield v. Robinson, 22 Tex. Civ. App. 385, 55 S. W. 399. But see *Bennett v. Virginia Land & C. Co.*, 1 Tex. Civ. App. 321, 21 S. W. 126.

A defendant who disclaims is not thereafter a party to the issues between the plaintiff and an intervenor, within the meaning of the statute disqualifying parties. *Markham v. Carothers*, 47 Tex. 21.

Where persons who are parties to the action but not to the issue disclaim any interest in the subject-matter, they are competent witnesses. *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726.

Where R. and his wife were sued by an administrator, in replevin, R. offered himself as a witness, stating that he neither had nor claimed any interest in the property in controversy; that the same belonged to his wife. *Held*, that this testimony was admissible on that ground, and it was error to exclude him as a witness. *Rushing v. Rushing*, 52 Miss. 329.

60. *Laprad v. Sherwood*, 79 Mich. 520, 44 N. W. 943.

61. *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 58.

62. *Shorten v. Judd*, 53 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

63. *Ivers v. Ivers*, 61 Iowa 721, 17 N. W. 149. In this case the witness executed a paper which was offered in evidence, in which he dis-

M. INTERPLEADER. — A person who has been interpleaded becomes a party to the action and is subject to the disability of parties.⁶⁴

N. CROSS-BILL. — A cross-bill brought by one defendant against his co-defendant is regarded as in the nature of a separate suit; and on the trial of the issues raised thereby the other parties are competent witnesses.⁶⁵

O. CONSOLIDATION OF ACTIONS. — Where two actions have been consolidated, on the trial thereof they are regarded as one for the purpose of determining the competency of the witnesses.⁶⁶

3. Persons Interested. — **A. GENERALLY.** — Statutes in some states disqualify not only parties but interested persons.⁶⁷ Statutes in

claimed all interest in the action or the result thereof. The court held that while interest might be divested by a release or other proper conveyance, the disclaimer did not operate as a release.

Liability for Costs. — The fact that one of the defendants has entered a disclaimer does not destroy his interest where an unfavorable result of the action will render him liable for costs. *Ransom v. Schmela*, 13 Neb. 73, 12 N. W. 926.

^{64.} *Fairfield Sav. Bank v. Small*, 90 Me. 546, 38 Atl. 551.

On the trial of a bill of interpleader between a life insurance company, the administratrix of a deceased policy holder and a party claiming a portion of the fund due on the policy under an alleged assignment, the latter was held to be incompetent to testify in reference to a transaction with the deceased, under both § 858 U. S. Rev. Stat., and § 3854 Code of Georgia, as he was not only interested in the result of, but a party to the action. *Mutual Life Ins. Co. v. Watson*, 30 Fed. 633.

^{65.} *Baldwin v. Trowbridge*, 62 N. J. Eq. 468, 50 Atl. 494. See *Culbertson v. Salinger*, 131 Iowa 307, 108 N. W. 454.

^{66.} In an action by a mortgagee, a corporation, to foreclose a mortgage given by a surviving partner both as a partner and in his individual capacity on partnership property, it appeared that a third party, a bank, had also brought suit for the purpose of setting aside or postponing the operation of the mortgage, as an execution creditor of the surviving

partner individually, and as surviving partner, and that by stipulation the two cases were consolidated. The surviving partner and an officer of the plaintiff in the second suit were permitted over objection to testify as to an alleged agreement between the surviving partner and the deceased president of the mortgagee bank, modifying and changing the effect of the mortgage. It was claimed as to the controversy between the two corporation plaintiffs, the surviving partner though a nominal party, was neither prosecuting nor defending, and hence might properly testify. It was held, however, that the admission of the testimony was error under the statute disqualifying the opposite party in suits by or against a surviving party from testifying as to matters equally within the knowledge of a deceased partner and disqualifying the opposite party in suits by or against a corporation as to matters equally within the knowledge of a deceased officer of the corporation and not within the knowledge of any surviving officer. If the change aimed at by the testimony of the witnesses could be accomplished it would affect the interests of both witnesses. *People's Nat. Bank v. Wilcox*, 136 Mich. 567, 100 N. W. 24.

^{67.} *Alabama.* — § 1794, code 1896; *Drew v. Simmons*, 58 Ala. 463; *McCrary v. Rash*, 60 Ala. 374; *McDonald v. Jacobs*, 77 Ala. 524; *Keel v. Larkin*, 72 Ala. 493.

Colorado. — § 4816, Mill's Ann. St. 1891.

Florida. — § 1095, Rev. St. 1892.

other jurisdictions though not in express terms disqualifying interested persons have been construed to include them.⁶⁸ And in some states the disability is confined to persons who have a direct interest in the action.⁶⁹

Doubtful Interest. — If the interest which it is claimed disqualifies the witness is of a doubtful nature, it goes to his credibility rather than his competency.⁷⁰

B. NATURE OF INTEREST. — a. *Generally.* — These statutes merely continue the common law disability of interest, and a witness who would have been interested at common law is interested under the statutes.⁷¹ Any direct legal interest in the result of the suit is

Georgia. — Vol. 2, code § 5269.

Illinois. — Hurd's Rev. St. 1905, p. 1034, c. 51, § 2; Starr & Curtis Ann. St. 1896, c. 51, § 2.

Iowa. — Ann. code 1897, § 4604; Furenes v. Eide, 109 Iowa 511, 80 N. W. 539.

Kansas. — Park v. Ensign, 10 Kan. App. 173, 63 Pac. 280.

Minnesota. — § 4663, Rev. Laws 1905; Griswold v. Edson, 32 Minn. 436, 21 N. W. 475; Manahan v. Haloran, 66 Minn. 483, 69 N. W. 619; Beard v. First Nat. Bank, 39 Minn. 546, 40 N. W. 482.

New York. — Bliss Ann. code, § 829; Gardner v. Cohen, 31 App. Div. 625, 52 N. Y. Supp. 461.

North Carolina. — § 1631, Rev. St. 1905.

Pennsylvania. — 2 Purdon's Dig. 1905, p. 1495, § 34e; Smith v. Rishel, 164 Pa. St. 181, 30 Atl. 239; *In re Crosetti's Estate*, 211 Pa. St. 490, 60 Atl. 1081, citing Keener v. Zartman, 144 Pa. St. 179, 22 Atl. 889; Tarr v. Robinson, 158 Pa. St. 60, 27 Atl. 859; Gray's Exrs. v. Whitney, 81* Pa. St. 332.

South Carolina. — Rev. St. 1902, Code Civ. Proc., § 400.

Utah. — § 3412, Rev. St. 1898.

Washington. — § 5991, Ballinger's Ann. Codes & Stat.

West Virginia. — Code 1899, c. 130, § 23, p. 875; Robinson v. James, 29 W. Va. 224, 11 S. E. 920.

68. See *supra*, IV, 2, G.

69. See *supra*, IV, 2, F.

"Our statute does not, like those of some of the states, prohibit parties from becoming witnesses against the representatives of a deceased person, but it merely excludes persons who have a direct legal interest in the

outcome of the suit from testifying to transactions or conversations with the deceased." Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

Under § 2765 of the code prior to amendment of 1891, the exception was limited to the parties to the suit and their beneficiaries. By amendment of 1891, in lieu of the words "neither party" the words "no person having a pecuniary interest in result of suit" were inserted. Howle v. Edwards, 97 Ala. 649, 11 So. 748.

70. Wormley v. Hamburg, 40 Iowa 22.

71. Culbertson v. Salinger, 131 Iowa 307, 108 N. W. 454; Off v. Trapp, 109 Ill. App. 49; McCartney v. Kipp, 171 Pa. St. 644, 33 Atl. 233; Goddard v. Leffingwell, 40 Iowa 249; Adams v. Board of Trustees, 37 Fla. 266, 20 So. 266; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. 927; Hall v. Hall, 118 Ill. App. 544.

"Under the stringent rules of the common law all persons '*interested in the event*' of a suit were excluded from testifying in such suit whether their antagonists in interest were living or dead. The purpose of this statute was to remove this common law disability arising from *interest in the event* of litigation, except in cases where one of the parties to any 'transaction or communication' was, at the time of the examination, dead or insane. In the latter cases the disabilities arising from *interest in the event* that were imposed by the common law are, by the statute, retained. But in such cases the statute, disqualifies *those only* who were disqualified by the general rule of the common law. Any exception from the disqualification that was

sufficient to render the witness incompetent to testify therein.⁷²

b. *Direct Interest Essential.*—The disqualifying interest must be a direct and immediate interest in the event of the action, and not an uncertain, remote and contingent interest.⁷³ The relation-

recognized by the rules of the common law would likewise form an exception to the cases intended to be excluded by the proviso to our statute. Where, then, a witness is objected to under the proviso of this statute as being disqualified because of interest in the event of the suit, the true test of his competency is by a resort to the common law. If he was competent by the common law he is competent under the proviso to this statute, and *vice versa.*" *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266.

72. *McCann v. Atherton*, 106 Ill. 31; *Dyer v. Hopkins*, 112 Ill. 168; *Luetchford v. Lord*, 132 N. Y. 465, 30 N. E. 859; *Ryan v. Shaneyfelt*, 146 Ala. 683, 40 So. 223; *Devinney v. Corry*, 52 Hun 612, 5 N. Y. Supp. 289.

In an action by a receiver of a banking partnership against the administrator of one of the deceased partners to establish a claim for moneys taken from the bank by the decedent and a third party, and represented by the note of the latter, the latter is not a competent witness in plaintiff's behalf since he is interested in having the claim established against the decedent's estate. *McElroy v. Allfree*, 131 Iowa 518, 108 N. W. 119.

It was alleged in plaintiff's complaint that her husband, pursuant to her directions, purchased for her and with her money, certain shares of stock, taking a certificate in his name as trustee, which certificate he delivered to her, but subsequently and without authority from her, took the same and transferred it to his father, defendant's testator. In an action to recover the value of the stock, plaintiff's husband, as a witness in her behalf, after testifying to the purchase of the stock, taking the certificate, the delivery thereof to plaintiff and his subsequent unauthorized delivery thereof to testator, was asked to state the circumstances and the agreement under which he delivered the stock into the posses-

sion of his father. Such testimony was held incompetent since the witness was interested, being liable to plaintiff unless she recovered from decedent. *Redfield v. Redfield*, 110 N. Y. 671, 18 N. E. 373.

On a bill filed by the guardian of minor children of a deceased mortgagor, against the legal representatives of such mortgagor and assignee of the mortgage, to enjoin the sale of the mortgaged lands under a power therein, and to cancel the mortgage on the ground of the payment of the mortgage debt, a purchaser from the mortgagor of a part of the land conveyed in the mortgage is not, under the provisions of statute as amended by act of 1890-91, a competent witness to prove that he paid the mortgage debt, or any part thereof, to the mortgagee for the mortgagor; such purchaser having a direct interest in cancellation of mortgage. *Hagan v. Easter*, 111 Ala. 480, 18 So. 308.

A person who has recovered from the principal for the misfeasance of the agent is not interested, in an action by such principal against the estate of such deceased agent to recover the amount previously paid such injured person. *Jones v. Bank of Carrollton*, 71 Miss. 1023, 16 So. 344.

Where plaintiff sued decedent's estate upon a note signed by one R., decedent and himself, which note he alleges he signed as surety only for decedent, and that the note sued on was a renewal of another note to which R. was principal, but that it was agreed that when the note was made, because of some transactions between decedent and R., the decedent was to be the principal, it was held that R. having a pecuniary interest in the result of the suit was incompetent to give his version of such transaction, which relieved him of any responsibility and placed it upon the estate of the decedent. *Thornburg v. Allman*, 8 Ind. App. 531, 35 N. E. 1110.

73. *Alabama.*—*Manegold v. Mas-*

ship of the witness to the action must be such that he will either gain or lose by the direct legal operation and effect of the judgment or decree,⁷⁴ or that the record will be legal evidence for or against

sachusetts Life Ins. Co., 131 Ala. 180, 31 So. 86.

Florida. — *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266.

Iowa. — *Wormley v. Hamburg*, 40 Iowa 22.

Minnesota. — *Perine v. Grand Lodge*, 48 Minn. 82, 50 N. W. 1022; *Bowers v. Schuler*, 54 Minn. 99, 55 N. W. 817; *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673.

Nebraska. — *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771.

New Hampshire. — *Weston v. Elliott*, 72 N. H. 433, 57 Atl. 336.

New York. — *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251; *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427; *Scherrer v. Kaufman*, 1 Dem. 39; *In re Hanley*, 44 Hun 559.

North Carolina. — *Jones v. Emory*, 115 N. C. 158, 20 S. E. 206.

"The rule is that it is the real and actual interest that disqualifies a witness, and not the belief, understanding, or feeling, in regard to such interest. *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999.

"Under the common law the *interest*, in order to exclude a witness must have been some legal, certain and immediate interest, however minute in the *result* of the cause, or in the *record* as an instrument of evidence. Where actual gain or loss would result, simply and immediately from the verdict and judgment, the witness was deemed incompetent by reason of his interest; as, where he was a party, though but a nominal party, to the suit; or was a party in beneficial interest; or *quasi* a party, from having entered into a rule of court or agreement that another cause, to which he was a party should abide the same result with that in which he proposed to give evidence. A witness was also incompetent by the common law where the record would, if his party succeeded, be evidence of some matters of fact to entitle him to a legal advantage, or repel a legal liability. In *Greenleaf on Evidence*, § 390, it is

said that '*the true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence, for or against him, in some other action. It must be present, certain and vested interest, and not an interest uncertain, remote, or contingent.*'" *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266.

"The disqualifying interest must be direct and certain—one that would charge the witness with a liability or exempt him from one—but a mere uncertain, remote or contingent interest would not disqualify one from being a witness." *New York Life Ins. Co. v. Johnson's Admr.*, 24 Ky. L. Rep. 1867, 72 S. W. 762.

Direct Interest—Meaning of.

The words "person having a direct interest in the event of such action, suit or proceeding," as used in the statute disqualifying such persons as witnesses, had a well defined meaning in the law of evidence at the time of the enactment of the statute, and it is therefore presumed that they are used in the statute to express that meaning. *Off v. Trapp*, 109 Ill. App. 49, *holding* that "the rule was where the event of the suit if adverse to the party adducing the witness would render the latter liable either to a third person or to the party himself, there was a direct interest on the part of the witness in the event of the suit, and this without regard to whether the liability arose from an express or implied legal obligation to indemnify."

⁷⁴ *Florida*. — *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266; *Atlantic Coast Line R. Co. v. Mallard*, 44 So. 366.

Illinois. — *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Thompson v. Wilson*, 56 Ill. App. 159.

Iowa. — *Culbertson v. Salinger*, 131 Iowa 307, 108 N. W. 454; *German-American Sav. Bank v. Hanna*, 124 Iowa 374, 100 N. W. 57.

Minnesota. — *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685.

him in some other action.⁷⁵ It is not necessary, however, that the witness be connected in any way with the action or the parties

New York.—Albany County Sav. Bank *v.* McCarty, 149 N. Y. 71, 43 N. E. 427; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Connelly *v.* O'Connor, 117 N. Y. 91, 22 N. E. 753.

Pennsylvania.—Appeal of Stone, 16 Atl. 731; Dickson *v.* McGraw, 151 Pa. St. 98, 24 Atl. 1043; Wolf *v.* Carothers, 3 Serg. & R. 240.

Where a decree in favor of the party offering the witness will result in establishing the validity of a lease held by the latter on the property in question, he is interested and therefore incompetent. Miller *v.* Meers, 155 Ill. 284, 40 N. E. 577.

In an action for damages caused by flooding land, a witness who holds a mortgage on the land is not *prima facie* interested in the result of the suit, there being nothing to show that his mortgage security would be affected by the success or failure of the plaintiff. Southern R. Co. *v.* Leard, 146 Ala. 349, 39 So. 449. (Interest in this action was sought to be shown as affecting the credibility of the witness.)

Where one of the defendants, if the plaintiff is successful, will be compelled to account for and pay over to plaintiff certain moneys he claims to have already paid to one of the defendants, he is a person interested in the event of the action. Kroh *v.* Heins, 48 Neb. 691, 67 N. W. 771.

75. *Florida.*—Adams *v.* Board of Trustees, 37 Fla. 266, 20 So. 266; Atlantic Coast Line R. Co. *v.* Malard, 44 So. 366.

Illinois.—First Nat. Bank *v.* Bressler, 38 Ill. App. 499; McClure *v.* Otrich, 118 Ill. 320, 8 N. E. 784; Thompson *v.* Wilson, 56 Ill. App. 159.

Iowa.—German American Sav. Bank *v.* Hanna, 124 Iowa 374, 100 N. W. 57; Culbertson *v.* Salinger, 131 Iowa 307, 108 N. W. 454.

Michigan.—Reed *v.* Whipple, 140 Mich. 7, 103 N. W. 548.

Minnesota.—Marvin *v.* Dutcher, 26 Minn. 391, 4 N. W. 685.

New York.—Albany County Sav. Bank *v.* McCarty, 149 N. Y. 71, 43

N. E. 427; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Connelly *v.* O'Connor, 117 N. Y. 91, 22 N. E. 753.

North Carolina.—Williams *v.* Johnston, 82 N. C. 288; Jones *v.* Emory, 115 N. C. 158, 20 S. E. 206.

Pennsylvania.—Appeal of Stone, 16 Atl. 731.

West Virginia.—Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927. But see Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

In Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836, it was held that the mother was competent in an action by the son to establish her marriage with his father, although if this fact were established she would be entitled to dower in the land sued for. The reason being that the judgment in favor of the son would not be evidence in favor of the mother in an action for dower, and she therefore had no interest in the result.

An attorney, who is not a party to a suit by an administrator to recover certain moneys alleged to belong to his intestate, and which money is alleged to have been wrongfully collected and transferred to the defendant by the attorney without authority so to do, is not prevented by § 829 of the Code of Civil Procedure from testifying as to his authority, as he is not a party to the action and did not have a disqualifying interest in the result. Any judgment obtained in the case at bar would not be admissible against the witness charging him with liability. Lecour *v.* Importers' & Traders Nat. Bank, 61 App. Div. 163, 70 N. Y. Supp. 419.

In an action brought by an heir-at-law of a deceased grantor, to set aside deeds, because of incompetency of the decedent, and for fraud and undue influence, other heirs, not parties to the action, are not interested in the event thereof within the meaning of the statute, and may testify fully in the case. The success of the plaintiff would not affect them, as the deeds would still be valid against them. At most they are only inter-

thereto, provided the result of the action will in some way directly affect his pecuniary interests.⁷⁶

c. *Contingent Interest*. — (1.) *Generally*. — A mere contingent interest is not sufficient to disqualify the witness, but the interest must be a vested one.⁷⁷

ested in the questions involved. *Hobart v. Hobart*, 62 N. Y. 80.

In an action by an administrator against a savings bank to recover money deposited in the defendant bank by deceased, where the defendant alleges a gift *causa mortis* and payment to the donee, the donee is a competent witness in behalf of the defendant to prove payment of such gift, the donee not being an interested party. *Podmore v. Seamen's Bank*, 35 Misc. 379, 71 N. Y. Supp. 1026.

Where a father had given his son money borrowed from a third person, and the son had afterwards repaid a certain portion thereof from a sense of duty rather than because of any legal obligation, in an action against the father by the lender's administrator to recover the amount loaned, it was held that the son was competent witness for the defendant since he had no legal interest in the action. *Bixley v. Wormly*, 44 Iowa 347.

If a judgment pronounced in the pending action will be legal evidence for or against the witness in another action, then such witness has a direct legal interest in the result of the suit. *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949.

76. *Direct Benefit Enough*. — In an action against the heirs of plaintiff's grantor to enforce an alleged dedication of streets, a person owning land fronting on the alleged street is not a competent witness for the plaintiff since the adjudication would benefit him, and he is therefore an interested person within the meaning of Rev. St. 1903, c. 51, § 2, providing that no person directly interested in the event is competent against the heir. *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19.

But upon an indictment for obstructing a public highway, testimony of abutting lot owners was held competent as to admissions of the original dedicator of the street,

since deceased, such persons not being parties to the action, nor "interested in the event thereof." *State v. Eisele*, 37 Minn. 256, 33 N. W. 785.

Where the witness, though estopped from claiming the property in question from the representative, would be free to claim the same from the party in whose behalf he is testifying, he is interested within the meaning of the statute. *Sorensen v. Sorensen*, 68 Neb. 483, 98 N. W. 837 (but see other opinions on rehearing, 68 Neb. 500, 509, 100 N. W. 930, 103 N. W. 455).

77. *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043; *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266; *Scherrer v. Kaufman*, 1 Dem. (N. Y.) 39; *Connor v. Mayor*, etc. of New York, 64 Hun 635, 19 N. Y. Supp. 85; *Zerbe v. Reigart*, 42 Iowa 229.

Contingent Liability for Costs.

Where a guardian is not liable for costs unless such liability is imposed by the court as punishment for his bad faith or mismanagement in the action, such contingent liability does not make him an interested witness. *In re Van Alstine*, 26 Utah 193, 72 Pac. 942.

An interest in the estate of a deceased person, which under the will is contingent upon the death of two other persons without issue, does not disqualify the witness. *Semmes v. Worthington*, 38 Md. 298.

In an action against an administrator by the endorsee of a promissory note, the residuary legatee of the original payee, who has given a bond to pay the debts of the testatrix, is not disqualified as a witness under § 16, c. 224 of the P. S. His indirect and contingent liability, if any, to pay the note, gave him no right to make defence to the pending suit, "to control the proceedings, to appeal from the judgment, or to take exceptions to the rules of the court, produce testimony or cross-examine witness," nor make him lia-

(2.) **Heirs Expectant.** — The heirs expectant of a party to an action against the representative of a decedent have no pecuniary interest in the recovery by reason of their relationship, and are therefore not incompetent to testify on behalf of such party as to transactions with the deceased.⁷⁸

d. *Pecuniary Interest.* — It must be a pecuniary interest in some way affecting the property of the witness.⁷⁹

e. *Interest in Property Involved* in an action does not make the witness interested within the meaning of the statute, where it appears that he has no interest in the result of the suit.⁸⁰

ble for costs. Therefore the witness, not having any of the above rights, was competent to testify. *Smith v. Wells*, 70 N. H. 49, 46 Atl. 51.

78. *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836; *Bird v. Jacobus*, 113 Iowa 194, 84 N. W. 1062; *Porter v. White*, 128 N. C. 42, 38 S. E. 24; *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. 118. See *infra*, IV, 3, B, i.

On a bill filed to have a deed executed by the complainant to her husband annulled and canceled upon the ground that said deed was procured by undue influence of the husband upon the wife, the relations of the complainant, though they will inherit her estate should she die intestate, are competent to testify to a statement to complainant by the husband, who had died subsequent to the execution of said deed; such witness not being parties to the suit and having no pecuniary interest in the result thereof. *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836.

79. Alabama Code 1896, § 1794 ("no person pecuniarily interested in the result," etc.); *Manegold v. Massachusetts Mut. Life Ins. Co.*, 131 Ala. 180, 31 So. 86; *Cobb v. Owens* (Ala.), 43 So. 826; *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673; *Bowers v. Schuler*, 54 Minn. 99, 55 N. W. 817; *Birmingham Min. R. Co. v. Tennessee Coal, Iron & R. Co.*, 127 Ala. 137, 28 So. 679.

In an action by an administrator for wrongful death, his intestate's son being under the statute pecuniarily interested in the result of the suit is not a competent witness as to transactions with the decedent. *Cobb v. Owens* (Ala.), 43 So. 826.

80. *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043.

Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629. This was an action to recover damages to land. A witness who was interested in the land but was in no way interested in the damages recovered was held not to be interested in the result of the suit within the meaning of the statute, and therefore not incompetent against the representative of an insane person as to transactions with the incompetent.

In an action to foreclose a mortgage, the defendants' son is not interested in the result of the action within the meaning of the statute disqualifying interested persons as to transactions with a decedent merely because he lives on the premises without paying rent. "The fact that he is the son of defendants and that they permit him to reside on their land, while it may go to his credibility does not affect his competency as a witness to testify to a transaction with plaintiff's intestate." *Bennett v. Best*, 142 N. C. 168, 55 S. E. 84.

In the trial of an action to recover land, a person living as a member of plaintiff's household on the land and aiding in her support, is not a party so "interested in the action" as to be incompetent to testify in regard to a transaction with a deceased father of the defendants. *Jones v. Emory*, 115 N. C. 158, 20 S. E. 206.

In *Muir v. Miller*, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032, which was an action by an administrator against certain heirs of his intestate to recover certain notes and securities given them by the decedent as the result of a property division made by him before his death, it was held that an heir who though interested in the property in a general way,

f. *Mere Interest in Question Involved.* — The mere fact that the witness has an interest in the questions involved in the suit does not disqualify him.⁸¹ Thus the fact that he is a party to another action involving the same principles or issues,⁸² or that he has a similar claim against the estate based upon the same or a similar state of facts,⁸³ does not make him incompetent.

g. *Conflicting Interests.* — Where it appears that the interests of the witness are conflicting, his testimony must be excluded if there is nothing to show on which side of the controversy his interests preponderate.⁸⁴ Where, however, it appears that the interests of the witness are equally balanced, he is in effect a disinterested person and therefore competent,⁸⁵ unless disqualified by reason of be-

though not in the pending action, was a competent witness for the plaintiff, since any interest he might have was too contingent and uncertain to disqualify him.

81. *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043; *German-American Sav. Bank v. Hanna*, 124 Iowa 374, 100 N. W. 57; *Adams v. Board of Trustees*, 37 Fla. 266, 20 So. 266; *Meislahn v. Meislahn*, 56 App. Div. 566, 67 N. Y. Supp. 480; *Hobart v. Hobart*, 62 N. Y. 80; *Crothers v. Crothers*, 40 W. Va. 169, 20 S. E. 927; *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427.

"The liability to a like action, or his standing in the same predicament with the party, if the verdict cannot be given in evidence for or against him, is an interest in the question only," and does not exclude the witness." *German-American Sav. Bank v. Hanna*, 124 Iowa 374, 100 N. W. 57, quoting 1 Greenl. Ev. (13th Ed.) § 389.

82. *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784.

83. *Similar Claim.* — The fact that the witness has a claim against decedent's estate almost precisely similar in facts and in its legal aspect, does not make him interested in the result. *Clark v. Gibbons*, 56 Ill. App. 357. But see *Wills v. Wood*, 28 Kan. 400.

The fact that the witness has a claim against the estate based upon an agreement with the decedent similar to the one in controversy does not make him interested. *Weston v. Elliott*, 72 N. H. 433, 57 Atl. 336.

Where plaintiff sued the adminis-

tratrix for services rendered decedent as a nurse, another nurse who alternated with plaintiff in nursing is a competent witness to prove the character and extent of services rendered by plaintiff. *Todd v. Martin* (Cal.), 37 Pac. 872.

84. On the contest of a will, one of the legatees whose interest under the law is a life interest in one-third of the residuary estate, and who was also an heir entitled to one-fifth absolutely of the entire estate, in case the will was defeated, was offered as a witness in favor of the contestants and objected to on the ground of interest. A ruling admitting her testimony was held error on the ground that there was no evidence as to whether her interest as legatee was greater or less than her interest as heir, and that she appeared throughout the proceedings anxious to defeat the will. *In re Lasak*, 131 N. Y. 624, 30 N. E. 112.

Contra. — In *In re Worth's Will*, 129 N. C. 223, 39 S. E. 956, there being nothing to show which interest of the witness was greater, he was held competent. See also *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, holding it to be the court's duty to determine which interest was the stronger.

85. *Georgia.* — *Hidell v. Dwinell*, 89 Ga. 532, 16 S. E. 79; *Crawford v. Parker*, 96 Ga. 156, 23 S. E. 196; *Lasseter v. Simpson*, 77 Ga. 61, 3 S. E. 243.

Illinois. — *Baker v. Updike*, 155 Ill. 54, 39 N. E. 587; *White v. Ross*, 147 Ill. 427, 35 N. E. 541; *Sconce v. Henderson*, 102 Ill. 376; *Remann v. Buckmaster*, 85 Ill. 403.

ing a party.⁸⁶ But even where the interests are apparently balanced, if the witness has indicated that he regards one as of more value to himself than the other, he cannot be considered disinterested.⁸⁷ Where one of the conflicting interests is greater than the other, testimony of the witness opposed to the stronger interest is competent.⁸⁸

h. *Privileged Witness*. — The fact that the testimony of the witness is privileged does not give him a disqualifying interest where he chooses to waive his privilege and testify.⁸⁹

i. *Relationship to Party or Interested Person*. — Mere relationship to a party or interested person while it may give the witness an interest in the case is not of itself sufficient to disqualify the witness.⁹⁰ The relationship may, however, be such as to give him

Iowa. — *Goddard v. Leffingwell*, 40 Iowa 249.

Missouri. — *Thompson v. Brown*, 121 Mo. App. 524, 97 S. W. 242.

South Carolina. — *Griffin v. Earle*, 34 S. C. 246, 13 S. E. 473.

Contra. — In *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771, where the witness had interests on both sides of the case, the court says: "It is not material on which side of the case her greater interests lie, since her competency as a witness is not to be determined by the weighing of her conflicting interests. A direct legal interest in the event of an action disqualifies a witness from testifying to transactions or conversations with the deceased, whether such interest be great or small."

⁸⁶. *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736, 6 So. 703.

⁸⁷. A widow who has elected to take under the will is incompetent as against contesting heirs, even though it appear that if the will be annulled a prior will would be entitled to probate, under which her interest is substantially the same. The possible probating of the other will cannot make her competent. *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410.

⁸⁸. *Lasseter v. Simpson*, 77 Ga. 61, 3 S. E. 243.

⁸⁹. *Thompson v. Wilson*, 56 Ill. App. 159, so holding in case of one who waived his privilege with respect to self-incriminating matter.

⁹⁰. *Jackson v. Gallagher*, 128 Ga. 321, 57 S. E. 750; *German-American Sav. Bank v. Hanna*, 124 Iowa 374, 100 N. W. 57; *Frick v. Kabaker*, 116

Iowa 494, 90 N. W. 498; *Curtis v. Hoxie*, 88 Wis. 41, 59 N. W. 581; *Anderson v. Hance*, 49 Mo. 159. But see *infra*, IV, 27.

Thus in an action by an executor, a brother of the defendant not a party to the suit and having no interest adverse to the plaintiff's testator is a competent witness. His relationship to the defendant goes to his credibility and not his competency. *Fowler v. Smith*, 153 Pa. St. 639, 25 Atl. 744.

In an action by a son against the administrator of his father's estate to recover for board furnished and services rendered to the decedent, the plaintiff's wife and son not being heirs or legatees of the deceased nor beneficiaries of his estate, nor having any pecuniary interest therein, are not disqualified from testifying for the plaintiff as to an alleged agreement on the part of the decedent to pay for the services rendered him. "The mere fact of their relationship to the plaintiff did not disqualify them." *Meyers v. Meyers* (Ala.). 37 So. 451, *citing* *Hill v. Helton*, 80 Ala. 528, 1 So. 340; *Harraway v. Harraway*, 136 Ala. 500, 34 So. 836.

The testimony of a daughter of a claimant against the estate is not incompetent in his behalf. *Wilson v. Wilson's Estate*, 80 Mich. 472, 45 N. W. 184.

Where a testator's will provided for the payment of a legacy to his son out of the shares given to the daughter's children, and that a debt from this daughter to the son should thereby be discharged, the daughter

a pecuniary interest which will be sufficient to disqualify him.⁹¹

j. *Distinguished From Interest Affecting Credibility*. — It is a universal rule and usually provided in the enabling statutes that the interest of a witness may be shown to affect his credibility.⁹² But in this case it is proper to show not only an interest which would disqualify the witness at common law or under the exceptions to the enabling statutes, but also other interests not of a nature affecting the competency of the witness though tending to affect his credibility.⁹³

C. EXTENT OF INTEREST. — a. *Generally*. — The extent of the interest of the witness is not material so long as it is of a character recognized by law.⁹⁴

b. *Liability for Costs*. — Where an unfavorable termination of the action will render the witness liable for costs, he has sufficient interest to disqualify him,⁹⁵ except where the statute provides that

is not an incompetent witness in proceedings by her children to prevent the payment of this legacy to the son on the ground that it had been redeemed by payment of the debt by the testator himself. *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376, *affirming* 61 Ill. App. 625.

In *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52, it was held that although the plaintiff's daughter resided with, and was dependent upon, the plaintiff for support, the daughter was not by reason of these facts to be excluded from testifying.

91. See *infra*, IV, 27.

92. See article "CREDIBILITY," Vol. III.

93. See *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043; *Hobart v. Hobart*, 62 N. Y. 80.

94. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201.

95. *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282; *Ransom v. Schmela*, 13 Neb. 73, 12 N. W. 926.

In an action where the husband joins his wife as co-plaintiff in a suit brought in her right, he is incompetent to testify in her behalf as to transactions with a person deceased at the time the evidence is offered, for if defeated in the action he will be liable for the payment of costs. *Dunn v. Duncan*, 22 Ky. L. Rep. 1867, 61 S. W. 1011.

Liability for costs is sufficient to make incompetent his testimony in "his own behalf," though his liability on the cause of action has been dis-

charged in bankruptcy. *Tunstall's Admr. v. Withers*, 86 Va. 892, 11 S. E. 565.

An indemnity to the party liable to the costs, by a co-party, is not a release and does not therefore render such person competent. *Kennedy v. Evans*, 31 Ill. 258.

Surety on Prosecution Cost Bond.

A surety on a prosecution bond for costs is interested in the event of the action, and therefore incompetent as to transactions or communications with the decedent. *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. 27.

At Common Law any pecuniary interest, however small, such as liability for costs, rendered the witness incompetent. See the following cases:

United States. — *Stein v. Bowman*, 13 Pet. 219; *Bridges v. Armour*, 5 How. 94.

California. — *Lucas v. Payne*, 7 Cal. 92.

Florida. — *Patterson v. Cobb*, 4 Fla. 481.

Illinois. — *Kennedy v. Evans*, 31 Ill. 258.

Kentucky. — *Chenoweth v. Fielding*, 2 Metc. 517; *Walker v. McKnight*, 15 B. Mon. 467, 61 Am. Dec. 190.

Maryland. — *Foley v. Mason*, 6 Md. 37; *Owings v. Emery*, 7 Gill 405; *Selby v. Clayton*, 7 Gill 240; *Wade v. Lynch*, 21 Md. 534.

Massachusetts. — *Sears v. Dillingham*, 12 Mass. 358; *Fox v. Whitney*, 16 Mass. 118; *Adams v. Leland*, 7 Pick. 62.

the mere liability for costs shall not be a disqualifying interest.⁹⁶

D. WHEN INTEREST IS ADVERSE TO PARTY OFFERING. — It has been held that although the interest of the witness is adverse to that of the party offering him, he is nevertheless incompetent.⁹⁷

E. TRANSFER, RELEASE OR EXTINGUISHMENT OF INTEREST. — a. *Generally.* — As a general rule the removal or extinguishment of the disqualifying interest of the witness restores his competency.⁹⁸ Such extinguishment, however, must be complete and not partial.⁹⁹ It may be effected by a *bona fide* transfer or assignment of such interest,¹ or by a release thereof.² The extinguishment or release

Mississippi. — Scott v. Watkins, 2 Smed. & M. 233.

Pennsylvania. — Wood v. Ludwig, 5 Serg. & R. 446.

South Carolina. — Bellamy v. Cains, 3 Rich. 354; Gray v. Ottolengui, 12 Rich. 101.

Virginia. — Cogbill v. Cogbill, 2 Hen. & M. 467.

One who is a mere trustee without any beneficial interest in the issues was nevertheless incompetent at common law, if liable for costs. Phillips v. Bucks, 1 Vern. (Eng.) 230; Dowdeswell v. Nott, 2 Vern. (Eng.) 317; Bauerman v. Radenius, 7 T. R. (Eng.) 659; Rex v. Governor, etc. of Poor, 3 East (Eng.) 7; Hawkins v. Hawkins, 2 Law Repos. (N. C.) 627.

96. Palmer v. Farrell, 129 Pa. St. 162, 18 Atl. 761.

97. In Donnell v. Braden, 70 Iowa 551, 30 N. W. 777, it was contended that since the interest of the witness was against that of the party offering him, the statute excluding interested persons should not apply; "that the common law definition of an 'interest' should prevail; that the statute should be construed in accordance therewith, and held to be applicable only to witnesses who are interested in favor of the party introducing them." The court says: "There is, to say the least, force in this argument; but, as we understand, this precise question was determined in Ivers v. Ivers, 61 Iowa 721. That the witnesses are within the letter of the statute must, we think, be conceded, and, as a construction has been placed thereon, we are content to follow it, without stating our reasons at length; and therefore it must be held that the wit-

nesses were incompetent to testify." See Ivers v. Ivers, 61 Iowa 721, holding the heir incompetent against the administrator, on the ground of his interest in the estate.

98. Wood v. Crawford, 75 Ga. 733; Warren v. Steer, 112 Pa. St. 634, 5 Atl. 4; Bower v. Thomas, 69 Ga. 47.

Where the statute disqualifies a predecessor in interest or title as a witness in behalf of his successor in interest, the fact that his interest has been disposed of does not, of course, render him competent. O'Brien v. Weiler, 140 N. Y. 281, 35 N. E. 587. And see fully *infra*, IV, 13.

99. Keener v. Zartman, 144 Pa. St. 179, 22 Atl. 889.

Partial Extinguishment. — In an action by a client against the administrator of his attorney to recover money alleged to have been paid the decedent for plaintiff on an execution, the execution debtor is not competent for plaintiff to prove payment to the decedent, although the latter offers to release him from further liability on the judgment. The witness would still be liable to the administrator for the decedent's fees which were secured by a lien on the judgment. Daniel v. Burts, 72 Ga. 143.

1. Keener v. Zartman, 144 Pa. St. 179, 22 Atl. 889; Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 849.

2. Grand United Order v. Merklin, 65 Md. 579, 5 Atl. 544; McFerrer v. Mont Alto Iron Co., 76 Pa. St. 180; Squire v. Greene, 47 App. Div. 636, 62 N. Y. Supp. 48.

An executor who is also a legatee under a will is not rendered incompetent in reference to transactions

of the interest must, however, be made in good faith and not merely a colorable one for the purpose of rendering the witness competent.³ The *bona fides* of such a transaction is a matter to be determined by the trial court.⁴ It has been held that a release or assignment of interest made during the pendency of the action does not render the witness competent.⁵

b. *Discharge in Bankruptcy or Insolvency.*—A discharge in bankruptcy⁶ or insolvency⁷ which destroys the liability of the wit-

ness with his testator because of his interest in the event where he has produced a release under seal of all his interest as such legatee. *In re Wilson*, 103 N. Y. 374, 8 N. E. 731.

A legatee who has executed a valid release of all his interest in the estate may properly be examined as a witness. *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874.

3. *Morgan v. Lehigh Val. Coal Co.*, 215 Pa. St. 443, 64 Atl. 633; *Buck v. Estate of Haynes*, 75 Mich. 397, 42 N. W. 949.

The disclaimer or release by the witness of his interest merely for the purpose of making him a witness does not render him competent under the Illinois statute. *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324; *Dyer v. Hopkins*, 112 Ill. 168; *Christiansen v. Dunham Towing & W. Co.*, 75 Ill. App. 267; *Watte v. Thayer*, 56 Ill. App. 282; *Darragh v. Stevenson*, 183 Pa. St. 397, 39 Atl. 37.

Colorable Assignment.—In an action where an attorney for the plaintiff sought to testify as to certain conversations had with the deceased, it was shown that the attorney had a written contract whereby he was to receive one-fourth of the amount recovered in the action; that after the commencement of the action and before his examination as a witness he had assigned the agreement to two parties, one residing in Iowa and the other in Minnesota, such assignment being in writing and stating a valuable consideration; it was also shown that neither of the parties to whom such assignment was made was an attorney, and that witness was to continue to prosecute the action. The court held that such assignment was merely colorable, and not made in good faith, but to enable the witness to become competent and to evade the provision of

the statute against witnesses testifying where they are interested in the event of the action, where such testimony relates to or concerns any conversation with, or admission of, any deceased party or person relative to any matter at issue between the parties. *Tretheway v. Carey*, 60 Minn. 457, 62 N. W. 815.

4. *Morgan v. Lehigh Val. Coal Co.*, 215 Pa. St. 443, 64 Atl. 633.

In *Christiansen v. Dunham Towing & W. Co.*, 75 Ill. App. 267, a stockholder in defendant corporation called as a witness in its behalf against the administrator who had, previous to the first trial, transferred his stock at its face value to the president of defendant corporation, and intermediate the two trials had received the same back at its face value and held it until a second trial was assured and then re-transferred it to the same person at its face value, was held competent upon his testimony that he had not been interested in defendant company since the last transfer. The determination of the interest of the witness was held to be a question for the trial judge, and his conclusion should not be set aside unless clearly wrong. Since the matter was in doubt the ruling was affirmed.

5. *Magemau v. Bell*, 13 Neb. 247, 13 N. W. 277.

Contra.—*Freeman v. Spalding*, 12 N. Y. 373.

6. *Reynolds v. Callaway*, 31 Gratt. (Va.) 436.

In an action by the executor of the payee of a note against the maker, the guarantor of the note is competent to prove that it had been paid where his liability as guarantor has been discharged by a prior proceeding in bankruptcy. *Pattison v. Cobb*, 212 Pa. St. 572, 61 Atl. 1108.

7. Grand United Order O. F. v.

ness on the contract or cause of action in issue removes his disqualifying interest and renders him competent unless he is a party to the action and incompetent for that reason.⁸ But where the witness is incompetent regardless of interest, a discharge in bankruptcy does not make him competent.⁹

c. *Statute of Limitations.* — Where the interest of the witness consists in a liability on a cause of action against which the statute of limitations has run, he is not incompetent,¹⁰ though the contrary has been held on the ground that the liability is not thereby terminated since the defense of the statute is waived unless pleaded.¹¹

4. Interest or Liability of Witness Fixed. — A. **GENERALLY.** Where the disqualifying interest consists of a possible liability, after this liability has become fixed and determined so that the result of the action cannot affect it, he is no longer regarded as interested within the meaning of the statute.¹² It has been held, however, that although a party's interest in the suit has terminated by an adjudication or settlement of his rights, if he continues a party he is still incompetent.¹³

Merklin, 65 Md. 579, 5 Atl. 544.

8. Tunstall's Admr. v. Withers, 86 Va. 892, 11 S. E. 565.

In Greely v. Willey, 71 N. H. 240, 51 Atl. 918, it was held that the mere fact that a defendant of record has obtained a discharge in bankruptcy does not render him a competent witness for his co-defendant in an action prosecuted by the administrator of a deceased plaintiff.

9. Thus it has been held under a statute disqualifying the surviving party to the contract or cause of action in issue and on trial that such survivor is incompetent though neither a party to nor interested in the action, and therefore that a discharge in bankruptcy of his liability on the contract does not make him competent. Oatis v. Harrison, 60 Ga. 535. But see IX, 2.

10. Shepherd, H. & Co. v. Crawford, 71 Ga. 458.

In an action on a note where a defense of the statute of limitations is made, and plaintiffs for the purpose of tolling the statute prove payments made by an endorser, who is a stranger to the suit, such endorser is a competent witness in favor of the representatives of the deceased payee and against the maker to prove that the witness is a guarantor and not a co-maker, since the witness has no interest in either event, his cause

of action against the maker, whether as co-maker or guarantor being barred by the statute of limitations. Thompson v. Brown, 121 Mo. App. 524, 97 S. W. 242.

11. Culbertson v. Salinger, 131 Iowa 307, 108 N. W. 454.

12. Ford v. O'Donnell, 40 Mo. App. 51; Starret v. Burkhalter, 86 Ind. 439.

One defendant is a competent witness for a co-defendant in an action by an administrator on a note payable to the intestate where the witness testifies that he has already been sued on the debt and judgment obtained against him, and that he therefore no longer has any interest in the litigation. Walker's Admr. v. Turley, 28 Ky. L. Rep. 809, 90 S. W. 576.

Mortgagors whose mortgage to a decedent has been foreclosed, and their liability to the estate fixed by the judgment, are not persons interested in the event of an action between mortgagees to determine priority of the mortgages, within code, § 4604, prohibiting persons so interested from testifying against an executor to a transaction between witness and deceased. Clinton Sav. Bank v. Underhill, 115 Iowa 292, 88 N. W. 357.

13. In a suit for partition to which the widow and heirs were parties, the widow was held an in-

B. EFFECT OF DEFAULT. — Where a party to the action, otherwise incompetent, has defaulted, he is held by some courts to be thereby rendered competent.¹⁴ And where the witness is regarded as interested in spite of his default he is still incompetent,¹⁵ unless the disability of interest no longer obtains.¹⁶ Thus where the effect of his testimony would be to destroy the basis of a judgment against himself as well as against his co-party, he is incompetent for the latter.¹⁷ But where default fixes the liability of a party regardless

competent witness as to transactions and communications with the decedent showing that a transfer to one of the heirs was a gift and not an advancement, although it appeared that her distributive share had been determined in probate before the partition suit began. "The witness was a party to the suit, and under the express language of the statute she was an incompetent witness."

In *Conger v. Bean*, 58 Iowa 321, relied upon by appellant, the case as to the witness had in effect been dismissed. The widow was a proper party to this suit, and she was never dismissed therefrom. True, while this suit was pending she secured an allotment of her share in the probate court, but plaintiffs have appealed from that order to this court, and there is no reason for saying that she was not a party or interested in this suit. Her testimony was inadmissible." *Ellis v. Newell*, 120 Iowa 71, 94 N. W. 463.

14. *Baker v. Kellogg*, 29 Ohio St. 663; *Bell v. Wilson*, 17 Ohio St. 640; *Scherer v. Ingberman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; *Upton v. Adams*, 27 Ind. 432; *Bunker v. Taylor*, 13 S. D. 433, 83 N. W. 555; *Hoskinson v. Miller*, 104 Pa. St. 175. *Contra*. — *Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532.

In an action on a joint and several promissory note against a principal and surety, the defaulting principal is not a competent witness, at common law, for the surety to prove that after the note became due, the payee for a valuable consideration paid by the principal, extended its time of payment without the knowledge or consent of the surety. *Wing v. Andrew*, 59 Me. 505.

15. *Baker v. Jerome*, 50 Ohio St. 682, 35 N. E. 1113. See *Mobile Sav.*

Bank v. McDonnell, 87 Ala. 736, 6 So. 703.

In an action upon a note against the maker and his surety, the maker is an incompetent witness as to transactions between himself and a decedent even though he has not put in an answer to the complaint, since he is interested in the event of the action. *Church v. Howard*, 79 N. Y. 415 (followed in *Hill v. Hotkin*, 23 Hun (N. Y.) 414, which, however, questions the correctness of the reasoning on the ground that the witness having defaulted, his surety could only recover the amount of the judgment and not any costs that he afterward incurred by continuing the action without his principal's consent).

16. *Chase v. Pitman*, 69 N. H. 423, 43 Atl. 617.

17. *Dick v. Williams*, 130 Pa. St. 41, 18 Atl. 615. This was an action on a note by the deceased holder's administrator against partners, as such, whose firm name was signed to the note. One of the defendants who had defaulted was held incompetent on behalf of the other to prove that the firm name was signed by the witness, and that the note was for his individual debt. It was contended that the witness having defaulted his liability was fixed and he was no longer interested, and that his testimony was against his own interest because it tended to show that he alone was liable on the note. The court held that since the action was based wholly on a partnership liability, it would fail as to both parties defendant notwithstanding the default, if the testimony of the witness were true, since this showed an individual and not a partnership liability, and that therefore the witness was really testifying in his own in-

of the outcome of the action as to the other parties, his interest is destroyed and he is a competent witness.¹⁸

C. JUDGMENT OR NON-SUIT. — A party against whom judgment has been entered at the time his testimony is offered is not a party within the meaning of the statute.¹⁹ So where a party has confessed judgment, or a stipulation for judgment against him has been entered, he becomes a competent witness notwithstanding a statute excluding all parties whether interested or not.²⁰ A party who at the trial has suffered a non-suit has no longer any interest in the result and is therefore not subject to the disqualification.²¹

5. **Adverse Interest.** — Interest as used in the statutes means an interest which is adverse to that of the party against whom the testimony is offered.²² In some jurisdictions the statute provides that the interest of the witness, to disqualify him, must be adverse to the right of the deceased or incompetent person,²³ or adverse to

terest. See also *Swanzy v. Parker*, 50 Pa. St. 441.

18. *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427. See also *Brown v. Brown*, 29 Hun (N. Y.) 498.

19. *Clinton Sav. Bank v. Underhill*, 115 Iowa 292, 88 N. W. 357; *Hoskinson v. Miller*, 104 Pa. St. 175. See *Starret v. Burkhalter*, 86 Ind. 439.

Where the suit is against one maker and the executor of a deceased maker of a note before a justice, and the former submits to the judgment of the justice and the latter appeals, the former is not a party to the cause in the circuit court so as to exclude him as a witness under the above rule. *Fuqua v. Dinwiddie*, 6 Lea (Tenn.) 645.

20. Where an administrator and another are sued jointly, the filing of a stipulation for judgment against the latter renders him a competent witness for the plaintiff. *Culbertson v. Salinger*, 131 Iowa 307, 108 N. W. 454. But where the witness has filed a cross-complaint which seeks relief against defendant administrator, he still remains incompetent.

In an action by an administrator against several defendants, where one of the defendants withdrew his answer upon a stipulation that judgment might be rendered against him, he was held to be no longer a party to the action within the spirit of the statute, and therefore competent. The court says: "That he

was technically a party cannot be denied. But after the filing of the stipulation referred to, his rights were virtually concluded. It is true, judgment does not appear to have been rendered against him as the stipulation provided, but it could have been rendered. After the filing of the stipulation, the rendition of judgment was a mere formality. It appears to us that the case was not essentially different from what it would have been if judgment had already been rendered. . . . In our opinion, he was not a party within the meaning of the statute, and the court did not err in admitting his deposition." *Conger v. Bean*, 58 Iowa 321, 12 N. W. 284. See also *Bouton v. Welch*, 59 App. Div. 288, 69 N. Y. Supp. 407.

21. One of the plaintiffs who at the trial has disclaimed interest in the matter and suffered a non-suit has no interest in the result of the suit, and is therefore not incompetent to testify to transactions with the decedent. *Tarr v. Robinson*, 152 Pa. St. 60, 27 Atl. 859.

22. *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673.

23. *Purdon's Dig.* 1905, p. 1495, § 34e; *Grove's Appeal*, 155 Pa. St. 619, 26 Atl. 766; *Brown v. Carey*, 149 Pa. St. 134, 23 Atl. 1103; *Crothers v. Crothers*, 149 Pa. St. 201, 24 Atl. 190; *Kyte v. Foran*, 167 Pa. St. 252, 31 Atl. 575; *Rine v. Hall*, 187 Pa. St. 264, 40 Atl. 1088.

In a proceeding by an executor to

the estate.²⁴ Where the statute disqualifies interested persons when the adverse party is the representative of the decedent, the interest to disqualify the witness must be adverse to the representative,²⁵ though it has been held to the contrary.²⁶

Parties must be adverse in interest to the person against whom their testimony is excluded,²⁷ except where merely nominal parties are incompetent.²⁸

6. Effect of Insolvency — A. OF WITNESS. — The insolvency of the witness does not remove his incompetency.²⁹

B. OF ESTATE. — a. *Generally*. — Where the estate is insolvent, a person who would otherwise have been entitled as an heir or dis-

establish his own claim against the estate, legatees under the will are not incompetent against the executor as to matters occurring in the lifetime of the decedent, since their interest is not adverse to the right of the decedent as is required by the statute to make the witness incompetent. *Gerz v. Weber*, 151 Pa. St. 396, 25 Atl. 82.

²⁴. *Lewis v. Buskirk*, 14 Ind. App. 439, 42 N. E. 1118; *Walker v. State*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *Bibb v. Hunter*, 79 Ala. 351.

Stat. 1894, § 506, providing that in proceedings in which an executor is a party, a necessary party whose interest is adverse to the estate shall not testify against the estate, does not prohibit one from testifying in his own behalf as to a conversation with decedent when decedent's estate is not a party adversely interested in the controversy. *Hankey v. Downey*, 10 Ind. App. 500, 38 N. E. 220.

²⁵. *Hageman v. Powell's Estate* (Neb.), 107 N. W. 749; *following Parker v. Wells*, 68 Neb. 647, 94 N. W. 717; *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220, *quoting* from the latter: ("Having in view the common law as to competency, and the mischief which this statute sought to prevent, it should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify when the person interested adversely to the witness' interest is the representative of a deceased person"), and *distinguishing Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771, on the ground that there the witness had conflicting legal in-

terests on both sides of the controversy, and the court refused to weigh them for the purpose of ascertaining the preponderancy.

²⁶. *Burton v. Baldwin*, 61 Iowa 283, 16 N. W. 110, where the court in discussing this matter, says: "It is true, she has no interest in common with the other defendants against the plaintiff, but such adverse interest does not seem to be necessary in order to the exclusion of the testimony. In *Blood v. Fairbanks*, 50 Cal. 420, a party who had no interest against the executor was excluded as a witness, under a statute substantially the same as ours. See also, as bearing by analogy upon the question under consideration, *Eckford v. Dekay*, 6 Paige's Ch. 565; *Woodhouse v. Simmons*, 73 N. C. 30; *Taylor v. Kelley*, 80 Pa. St. 95. The appellee cites and relies upon *Baker v. Kellogg*, 29 Ohio St. 663. The decision in that case was made under a statute which renders a party incompetent to testify where the adverse party is an executor or administrator, or one claimant as heir of a deceased person. The decision is based upon the language of the statute, which is materially different from ours."

²⁷. See *supra*, IV, 2, C, and IV, 2, F, and *Baker v. Kellogg*, 29 Ohio St. 663; *Kingsbury v. Buckner*, 134 U. S. 650; *Halliburton v. Carson*, 100 N. C. 99, 5 S. E. 912, 6 Am. St. Rep. 565; *Trabue v. Turner*, 57 Tenn. 447; *Hill v. McLean*, 10 Lea (Tenn.) 107.

²⁸. See *supra*, IV, 2, F.

²⁹. *Thornburg v. Allman*, 8 Ind. App. 531, 35 N. E. 1110.

tributee to a portion thereof is not interested within the meaning of the statute.³⁰

b. *Effect on Competency of Donee of Real Estate.* — Where, under the law, the land given away by the decedent before his death is, in the absence of other assets, subject to the debts left unpaid by him, his donee is interested in defeating such debts.³¹

7. **Statute Disqualifying "Person."** — Where a statute provides that no person shall testify for himself, etc., the term "person" includes both parties and interested persons.³²

8. **Subscribing or Attesting Witnesses.** — A statute disqualifying parties and interested persons does not apply to the testimony of the subscribing or attesting witnesses in proof of the execution of the will,³³ even though they are parties to the proceeding or interested in the event,³⁴ since the law requires their testimony on this point.

30. *Lathrop v. Hopkins*, 29 Hun (N. Y.) 608; *Gidney v. Logan*, 79 N. C. 214.

31. In an action by one administrator against another administrator to recover an indebtedness, a son of defendant's intestate, to whom such intestate had given a farm before his death, is not a competent witness for the defendant where there is no personalty in the defendant's estate, because in such case the land claimed by the witness would be subject to the debt, and the witness is therefore interested adversely to plaintiff's intestate. *Keener v. Zartman*, 144 Pa. St. 179, 22 Atl. 889.

32. A person though not a party to the action cannot testify as to the prohibited matters if he is interested in the result. (*Hinkson v. Wigglesworth*, 20 Ky. L. Rep. 1161, 48 S. W. 1079; *Whitlow v. Whitlow*, 22 Ky. L. Rep. 1179, 60 S. W. 182.) Thus the distributees of an estate are not competent witnesses for the administrator. *Manion v. Lambert*, 10 Bush (Ky.) 295. Nor are the beneficiaries of a fund competent for the trustee. *Hopkins v. Faerber*, 86 Ky. 223, 5 S. W. 749.

Action Against Executor for Legacy. — In an action by a legatee against the executor to recover a legacy, the residuary legatee is not a competent witness for the executor to prove that the legacy in question had been satisfied by a payment to plaintiff by the testator, under § 606, Civ. Code Prac. *Bright's Exrs. v.*

Bright's Legatees, 30 Ky. L. Rep. 834, 99 S. W. 901, following a previous opinion in the same case reported in 25 Ky. L. Rep. 742, 76 S. W. 365.

33. *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *In re Peterson's Will*, 136 N. C. 13, 48 S. E. 561.

34. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687, holding that a legatee under the will who was a party to the contested proceeding to probate the will, and who was a subscribing witness, was competent to prove the execution thereof. The court says that the statute requiring subscribing witnesses expressly declares that they shall be competent to prove the will, and that furthermore it was questionable whether the attesting witness is a party to the act of execution. "We are clearly of the opinion that the disqualifying enactment, directly repugnant to the law requiring the presence of attesting witnesses at the trial of an issue involving the validity of the will to prove its execution when accessible and mentally able to give evidence, does not comprehend this class of witnesses who are denominated witnesses of the law and not of a party, and who become such to establish the execution and validity of the instrument necessarily after death. It would be absurd to require persons to attest a will in order to prove it when the maker was dead, and then reject the testimony because of the death, under another part of

9. Corporations. — A. MEMBER OR STOCKHOLDER OF CORPORATION PARTY OR INTERESTED. — As to whether a member or stockholder of a corporation, which is a party or interested, has such an interest in the action as to disqualify him, the cases are not in harmony. In some jurisdictions such a witness is held to be interested within the meaning of the statute,³⁵ especially where he is the real party in interest.³⁶ In others his interest is regarded as too

the law, enacted at the same time."

35. Georgia. — *Clements v. Western Lodge* No. 91, F. & A. M., 101 Ga. 62, 28 S. E. 494.

Illinois. — *Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N. E. 1109; *Albers Com. Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799; *Thrasher v. Pike*, 25 Ill. 340; *National Woodenware & C. Co. v. Smith*, 108 Ill. App. 477.

Iowa. — *First Nat. Bank v. Owen*, 52 Iowa 107, 2 N. W. 980.

Kentucky. — *Storey v. First Nat. Bank*, 24 Ky. L. Rep. 1799, 72 S. W. 318.

Mississippi. — *Mitchell v. Tishomingo Sav. Inst.*, 56 Miss. 444.

Missouri. — *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816.

North Carolina. — *Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253 (cashier and stockholder in bank).

West Virginia. — *Huntington & K. Land D. Co. v. Thornburg*, 46 W. Va. 99, 33 S. E. 108.

In an action against a corporation for the wrongful death of plaintiff's intestate, stockholders of the defendant corporation are not competent to testify as to conversations and transactions had with the decedent. *Kentucky Stove Co. v. Bryan's Admr.*, 27 Ky. L. Rep. 136, 84 S. W. 537 (citing *Storey v. First Nat. Bank*, 24 Ky. L. Rep. 1799, 72 S. W. 318).

In an action against a bank by the representative of a deceased person, the president of the bank, as a stockholder in the same, has a direct legal interest, and is excluded from testifying in behalf of the bank as to a transaction with a deceased person against an assignee of the deceased. *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813 (citing *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949).

In the case of *Keller v. West*,

Bradley & Cary Mfg. Co., 39 Hun (N. Y.) 348, it was held that a witness, being a stockholder of said corporation and an interested party, was incompetent to testify as to transactions with the decedent. The court said that the witness "had in this manner a direct and certain interest to be promoted by his testimony, and for that reason it was not competent for him to relate what had been said and done between himself and the testator. It has been said that the true test of the interest of a witness is whether he will gain or lose by the legal operation and effect of the judgment, and if he will, the extent of his interest is not important. . . . And that a stockholder in a private corporation (except banks), entitled to dividends upon his stock, has this interest in a litigation for or against his company that may result in a judgment for the payment of money either to or by it, has been held in adjudged cases."

In *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 152, 41 N. W. 547, the court held that testimony of the plaintiff's agent as to a conversation had with the agent of the corporation, who was deceased at the trial of the action, was incompetent for the reason that such witness was a member of a co-partnership which was a stockholder in the plaintiff corporation, and he was, therefore, directly interested in the result of the action.

36. In an action for unlawful detainer, it was held that the rule prohibiting the introduction in evidence of conversations held between a deceased person and a party in interest, will exclude the testimony of a stockholder in a corporation, which is a party to an action brought by the representatives of a decedent's estate upon a lease, when such stockholder, at the time of the alleged conversation, which was prior to the forma-

remote and contingent.³⁷ Such witnesses, however, are not parties within the meaning of the statute.³⁸ It has been held that the members of an incorporated church have no such interest in the church property as to disqualify them on the ground of interest in an action involving such property,³⁹ though a contrary rule has been

tion of the corporation to which he had assigned the lease, was the real party in interest. The court in holding said testimony incompetent, said: "To hold otherwise would, for practical purposes, be to ignore the spirit of the statute, by permitting one, whom the law from considerations of public policy requires to remain silent as to any transaction had by him with a deceased person, to evade the statute and avoid the disability imposed by it and become an effective witness merely by assigning his interest in the subject-matter of the action, or by forming a corporation in which he might be the president and only stockholder, and thus by indirection accomplish that which the law prohibits to be done. *Gilmore v. H. W. Baker Co.*, 12 Wash. 468, 41 Pac. 124.

37. *Rust v. Bennett*, 39 Mich. 521; *Bank of Southwestern Georgia v. McGarrah*, 120 Ga. 944, 48 S. E. 393, following *Cody v. First Nat. Bank*, 103 Ga. 789, 30 S. E. 281. See *New Jersey Trust & Safe Dep. Co. v. Camden Safe Dep. & Tr. Co.*, 58 N. J. L. 196, 33 Atl. 475; *In re Bruendl's Will*, 102 Wis. 45, 78 N. W. 169; *Ullman v. Brunswick, T. G. & L. Co.*, 96 Ga. 625, 24 S. E. 409.

Policy Holder in Mutual Insurance Company.—In *New York Life Ins. Co. v. Johnson's Admr.*, 24 Ky. L. Rep. 1867, 72 S. W. 762, it was held that a policy holder in a mutual company who thus participates in the profits of the company may testify for the company as to the transaction with the decedent, on the ground that a disqualifying interest to exclude the witness must be direct and certain, and that an uncertain or remote interest will not disqualify.

Banking Corporation.—By express provision of §829, Bliss Ann. Codes (N. Y.), a stockholder or officer in any banking corporation which is a party or interested is not an interested person within the meaning of the act.

38. *Downes v. Maryland & D. R. Co.*, 37 Md. 100.

39. **Members of Incorporated Church.**—In an action by a church corporation to recover land which the defendant claimed by possession through her testator, it was held that members of the church had no such interest in the controversy as disqualified them from testifying to conversations between them and the testator. "The objection is based on the theory that the members of the church corporation are really the owners of the property conveyed to the church, and a judgment for or against the corporation would be conclusive upon them, and they are the real parties. We are of the opinion that the interest of a member of the church was too uncertain and remote to bring them within the statute. In Kentucky where the statute is substantially the same as ours, stockholders in ordinary corporations are held to be disqualified. *Storey v. Nat. Bank (Ky.)*, 72 S. W. 318, but this rule was held not to apply to a policy holder in a mutual insurance company, for the reason that the interest must be direct and certain, and not remote, uncertain, or contingent. *New York Life Ins. Co. v. Johnson's Admr. (Ky.)*, 72 S. W. 762. The statute of California is similar to ours, and it is there held that it does not disqualify stockholders and officers of corporations, discussing cases to the contrary and showing differences in the statutes. *Merriman v. Wickersham (Cal.)*, 75 Pac. 181. *Mr. Greenleaf*, vol. I, §390, says that the true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote or contingent. Neither of these witnesses, as members of the church, had any

laid down in a case in which the property of a fraternal organization was involved.⁴⁰

B. OFFICERS AND DIRECTORS. — The testimony of an officer or director of a corporation party is not the testimony of the corporation, and therefore not incompetent under a statute disqualifying parties.⁴¹ Such persons, necessarily being members or stockholders, their disability on the ground of interest is the same as that of the latter.⁴² But officers of a charitable or religious corporation who serve without pecuniary reward are not interested in an action by or against such organization.⁴³ When they act as agent for the corporation in the transaction in question they are incompetent under some statutes.⁴⁴

vested or certain interest in the property. The property belonged to the corporation. As long as the corporation existed the members had no vested title. In the contingency of a dissolution of the corporation, they might, if then members, become entitled. But their interest at the time of the trial, whatever it was, was remote, uncertain, and contingent, and not such as to disqualify them as witnesses." *Crosby v. First Presby. Church* (Tex. Civ. App.), 99 S. W. 584.

40. In the absence of evidence to the contrary, it will be presumed that the members of a corporation owning property are pecuniarily interested in the result of a lawsuit involving the title to a portion of such property. *Clements v. Western Lodge No. 91, F. & A. M.*, 101 Ga. 62, 28 S. E. 494.

41. *New Jersey Trust & Safe Dep. Co. v. Camden Safe Dep. & Trust Co.*, 58 N. J. L. 196, 33 Atl. 475; *Twohy Mercantile Co. v. McDonald's Estate*, 108 Wis. 21, 83 N. W. 1107. See also *Ullman v. Brunswick Title, G. & L. Co.*, 96 Ga. 625, 24 S. E. 409.

"An officer differs not at all from an agent, except that he usually has a pecuniary interest. That, however, does not bring him within the terms of the legislation." *In re Bruendl's Will*, 102 Wis. 45, 78 N. W. 169.

42. See *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813; *Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253; *Lyon's Exrx. v. Logan County Bank's Assignee*, 25 Ky. L. Rep. 1668, 78 S. W. 454; *Ullman v. Brunswick Title G. & L. Co.*, 96 Ga. 625, 24 S. E. 409.

The president of a savings institution is a competent witness, either under the common law or by the statute, to establish a claim of such institution against the estate of a deceased person, by testimony and conversations occurring in the lifetime of the decedent. *Mitchell v. Tishomingo Savings Inst.*, 56 Miss. 444.

Persons who are directors and stockholders of a corporation are incompetent to testify against the administrator and heirs at law of a deceased person in favor of such corporation as to any communication or transaction had with such deceased person in their official capacity as such directors. *Huntington & K. Land Devel. Co. v. Thornburg*, 46 W. Va. 99, 33 S. E. 108.

In an action by a corporation against a decedent's estate, the secretary of plaintiff, not shown to have any interest in the result, is not incompetent to testify to a personal transaction with deceased, within code, § 4604, prohibiting such testimony by a party or one interested in the result. *University of Chicago v. Emmert*, 108 Iowa 500, 79 N. W. 285.

43. *In re O'Rourke*, 12 Misc. 248, 34 N. Y. Supp. 45, it was held that § 829, prohibiting a party to an action from testifying in reference to transactions with deceased persons was not intended to exclude officers or trustees of religious or charitable institutions who serve without pay, and therefore the testimony of the treasurer of such an institution is competent to testify in regard to a parol agreement between an intestate and a charitable institution.

44. See *infra*, IV, 11, E, and IX,

C. PUBLIC AND QUASI CORPORATIONS. — The officers of a public⁴⁵ or a quasi corporation⁴⁶ which is a party to the action are not parties within the meaning of the statute, nor interested.

10. Member or Officer of Unincorporated Association. — A member of an unincorporated association having a pecuniary interest in its debts and credits has a disqualifying interest in any action, the direct result of which is to increase the debts or credits of such association,⁴⁷ though the contrary has been held.⁴⁸

11. Agent. — A. GENERALLY. — The agent of a party or interested person, in the absence of express statutory provision, is not incompetent even though he conducted the transaction in question with the decedent.⁴⁹ In some states, however, statutes provide that

2, and Waterman Real Estate Exch. v. Stephens, 71 Mich. 104, 38 N. W. 685.

^{45.} Connor v. Mayor, etc., of New York, 64 Hun 635, 19 N. Y. Supp. 85.

In Keigher v. St. Paul, 73 Minn. 21, 75 N. W. 732, an action to recover on contracts made by decedent for sprinkling the defendant's streets, it was held that the defendant's comptroller was competent to testify as to certain conversations had with decedent; that the witness was not a party to the action nor interested in the result thereof.

In a suit upon the relation of a county auditor to foreclose a school fund mortgage executed during his term of office, the relator is not a party in interest within the meaning of the statute prohibiting parties from testifying as witnesses where heirs, administrators or parties. Works v. State *ex rel.* Holland, 120 Ind. 119, 22 N. E. 127.

^{46.} See Mendenhall v. School District (Kan.), 90 Pac. 773; Gass' Heirs v. Gass' Exrs., 3 Humph. (Tenn.) 278.

^{47.} Cronin v. Royal League, 199 Ill. 228, 65 N. E. 323 (*reversing* 101 Ill. App. 479); Fink v. Hey, 42 Mo. App. 295. See Hamill v. Supreme Council Royal Arcanum, 152 Pa. St. 537, 25 Atl. 645.

Officers of a Mutual Benefit Society are competent both at common law and under the statute, in an action by the beneficiary of a deceased member, to prove notice of an assessment. Reichenbach v. Ellerbe, 115 Mo. 588, 22 S. W. 573.

^{48.} In Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W.

1022, an action brought against the defendant on a policy of insurance on the life of a deceased master workman, a member of a subordinate lodge, who became such after the death of the deceased, was held a competent witness as to conversations had with the deceased in his lifetime.

^{49.} *Alabama.* — Davis v. Davis, 93 Ala. 173, 9 So. 736.

California. — City Sav. Bank v. Enos, 135 Cal. 167, 67 Pac. 52.

Florida. — Adams v. Board of Trustees, 37 Fla. 266, 20 So. 266.

Georgia. — Jackson v. Bennett, 98 Ga. 106, 26 S. E. 53.

Kansas. — Carroll v. Chipman, 8 Kan. App. 820, 57 Pac. 979.

Kentucky. — Lyon's Exrs. v. Logan County Bank's Assignee, 25 Ky. L. Rep. 1668, 78 S. W. 454; Brooks v. Spain, 22 Ky. L. Rep. 1178, 60 S. W. 184; Cobb's Admr. v. Wolf, 96 Ky. 418, 29 S. W. 303.

Michigan. — Gustafson v. Eger, 132 Mich. 387, 93 N. W. 893; Doolittle v. Gavagan, 74 Mich. 11, 41 N. W. 846.

Minnesota. — Darwin v. Keigher, 45 Minn. 64, 47 N. W. 314.

New York. — Littman v. Coulter, 16 N. Y. Supp. 87, 40 N. Y. St. 871; Savercool v. Wilsey, 5 App. Div. 562, 39 N. Y. Supp. 413.

Ohio. — Shaub v. Smith, 50 Ohio St. 648, 35 N. E. 503.

South Carolina. — Blakely v. Frazier, 11 S. C. 122.

Texas. — Colonial & U. S. Mtg. Co. v. Thedford, 21 Tex. Civ. App. 254, 51 S. W. 263.

An agent who conducted a transaction with the decedent is not an incompetent witness on behalf of his

a person who acted as agent in a particular transaction with decedent shall not be competent for his principal as to such matter.⁵⁰ Such a statute does not disqualify the witness on behalf of the other party,⁵¹ nor is the witness incompetent merely because he acted in a clerical capacity for his principal.⁵² The statute applies only to

principal in an action against the decedent's estate. *Brown v. Click*, 58 W. Va. 172, 53 S. E. 16; *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894.

In an action against an administrator to foreclose a mortgage given by the deceased mortgagor, it appeared that a release had been given by the mortgagee to a real estate agent to be delivered to the mortgagor on payment of the note to the assignee thereof, and that this release had been wrongfully delivered without payment. The real estate agent was held a competent witness to these facts, since he was neither a party to the action nor connected with the subject of the action as a person from, through, or under whom either party derived any interest or title, or sustained any liability. He was a mere stranger to the action and therefore not within the terms of Rev. Stat. 1898, § 4069, disqualifying a person "from, through, or under whom" the mortgagor "derives his interest or title." *Franklin v. Killilea*, 126 Wis. 88, 104 N. W. 993.

Agent of Life Insurance Company.

The agent of a life insurance company has no such interest in the result of a suit by an administrator against his principal on a life insurance policy as disqualifies him as a witness. Hence he may testify on behalf of the defendant as to a transaction between himself and the insured. "There is no disqualification of any witness by the statute because of any relation he may sustain to the parties to the action, so long as his relations are not such as render him a beneficial party, though not named on the record." The statute is not based on the theory that the agent would testify falsely on behalf of his principal as to transactions with the decedent, but merely that the temptation to false testimony would affect the principal only because of his pecu-

niary interest. *Manegold v. Massachusetts Mut. Life Ins. Co.*, 131 Ala. 180, 31 So. 86; *Hanf v. Northwestern Masonic Aid Assn.*, 76 Wis. 450, 45 N. W. 315; *Fidelity & C. Co. v. Goff's Exrx.*, 17 Ky. L. Rep. 214, 30 S. W. 626.

In an action by administrator of a deceased landlord, a witness who, acting as agent for the deceased, was present at a settlement between her and the defendant, may testify as to the conversation between them, although he was appointed by her will trustee of a particular fund bequeathed to one of her grandchildren; that fund not being involved in the suit, and no other interest on the part of witness being shown. *Cromwell v. Horton*, 94 Ala. 647, 10 So. 358.

50. *Welsh v. Brown*, 8 Ind. App. 421, 35 N. E. 921; *Foster v. Honan*, 22 Ind. App. 252, 53 N. E. 667; *Storie v. Grand Trunk E. Co.*, 134 Mich. 297, 96 N. W. 569; *Thompson v. Ray*, 92 Ga. 540, 17 S. E. 903; *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. 315. See *Florida Cent. & P. R. Co. v. Usina*, 111 Ga. 697, 36 S. E. 928.

Act No. 30, p. 36, Pub. Acts 1903, provides that no person who shall have acted in the making or continuing of a contract with any person who may have died shall be a competent witness in any suit involving such contract. Under this section the agent cannot testify as to the nature of the contract in an action by his principal against the representatives of the other party deceased. *Albring v. Ward*, 137 Mich. 352, 100 N. W. 609. See also *Passmore v. Passmore's Estate*, 60 Mich. 463, 27 N. W. 601. But see *Detroit United R. v. Smith*, 144 Mich. 235, 107 N. W. 922; *Doolittle v. Gavagan*, 74 Mich. 11, 41 N. W. 846.

51. *Foster v. Honan*, 22 Ind. App. 252, 53 N. E. 667.

52. The fact that witness wrote deceased's name to a contract at his request and in his presence, the dece-

transactions in which the witness was acting as agent,⁵³ and to such conduct or communications as were within the scope of his authority as agent.⁵⁴

B. AGENT OF DECEASED. — The agent of the deceased person in the transaction in question is not an interested person within the meaning of the statute, and is therefore competent to testify on behalf of the adverse party,⁵⁵ unless he has an interest in the contro-

dent making his mark, does not make the witness an agent to the making of the contract within the meaning of the statute providing that an agent in the making of the contract with deceased cannot testify on behalf of his principal against the representatives of decedent, in an action involving said contract. *Tre-main v. Severin*, 16 Ind. App. 447, 45 N. E. 620. See *infra*, IX, 2, G, p.

A Clerk or Stenographer in the office of the general agent of an insurance company is not an "officer or agent" of the company within the meaning of the statute. *Krause v. Assurance Soc.*, 105 Mich. 329, 63 N. W. 440.

53. To render incompetent the evidence of an agent or attorney of a sane or surviving party as to transactions with the insane or deceased adverse party, the agency or confidential relationship must have existed at the time of the transaction testified about. (*Sanders, Swann & Co. v. Allen*, 124 Ga. 684, 52 S. E. 884), and the incompetency extends only to transactions or communications had by him with the deceased while acting as agent. *Murphey v. Bush*, 122 Ga. 715, 50 S. E. 1004; *Hidell v. Dwinell*, 89 Ga. 532, 16 S. E. 79. See *Holston, Admr. v. Southern R. Co.*, 116 Ga. 656, 43 S. E. 29; *Cody v. First Nat. Bank*, 103 Ga. 789, 30 S. E. 281.

In an action by the administratrix for damages for the death of decedent, alleged to have been caused by the negligence of defendant, testimony by the superintendent of a factory, relating to the circumstances of the accidental death of decedent, of which he was a passive spectator, and in which no act of his own as agent was involved, should not be excluded. *Storrie v. Grand Trunk E. Co.*, 134 Mich. 297, 96 N. W. 569.

A General Agent in the transaction of his principal's business is not

incompetent to testify to a particular transaction or communication at which he was present, but in which he took no part, as agent or otherwise. *McCamy v. Cavender*, 92 Ga. 254, 18 S. E. 415.

54. In *Brennan v. Railroad Co.*, 93 Mich. 156, 53 N. W. 358, it was held that the statute includes only those who are authorized in the matter with reference to which testimony is given, to act for the corporation; and therefore a conductor and brakeman could properly testify that they had cautioned deceased about coupling cars the evening before the accident. But in an action by the administrator for damages for the death of decedent, alleged to have been caused by the negligence of the defendant employer, testimony by the latter's superintendent relating to warnings and directions given by him to such employee who was killed should be excluded. *Storrie v. Grand Trunk Elev. Co.*, 134 Mich. 297, 96 N. W. 569.

An agent of a benefit society who is not charged with any duty with respect to giving notices of assessments is not precluded from testifying, in an action for death benefits, to an admission by deceased of the receipt of notice of an assessment; the statute operating to exclude the testimony of such agents only as were authorized to act in the matter to which the testimony relates. *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263, 80 N. W. 6.

55. *Ketchum v. Holdem*, 88 Hun 482, 34 N. Y. Supp. 870; *Garrett v. Trabue*, 82 Ala. 227, 3 So. 149.

In a suit to quiet title, the agent of the plaintiff's vendor from whom plaintiff purchased, not having any interest in the suit is not barred after the death of his principal from testifying as to his authority. *O'Neil v. Wilcox*, 115 Iowa 15, 87 N. W. 742.

versy adverse to the representative or successor of the decedent.⁵⁶

C. EMPLOYEE OF PARTY OR PERSON INTERESTED. — A witness is not incompetent merely because he is an employee of a party or person interested.⁵⁷ Thus in an action for wrongfully causing the death of another, the defendant's employee although the alleged cause of the death is a competent witness for the defendant.⁵⁸

D. ATTORNEY. — An attorney of a party or interested person is not for that reason incompetent.⁵⁹ But where his fee in the pending action is contingent upon its successful termination, he has a dis-

56. *Roberts v. Remy*, 56 Ohio St. 249, 46 N. E. 1066.

In an action against an administrator on a contract with the decedent, alleged to have been made through the latter's agent, such agent is not a competent witness against the administrator to prove that he made the contract on behalf of the decedent, since he is interested in shifting the liability for the contract from himself to the estate of the deceased. *Skeen v. Moore*, 120 Ga. 1057, 48 S. E. 425.

57. *Lake Shore & M. S. R. Co. v. Rohlfis*, 51 Ill. App. 215; *City Sav. Bank v. Enos*, 135 Cal. 167, 67 Pac. 52; *Slavens v. Northern Pac. R. Co.*, 97 Fed. 255, 38 C. C. A. 151; *Horne v. McRae*, 53 S. C. 51, 30 S. E. 701.

In an action by a mortgagee against the widow of the deceased mortgagor, payment of the mortgaged debt being suggested and pleaded, the plaintiff's son, who was in his employment as clerk when the mortgage was given and held himself out to the public as partner, permitting the business to be conducted in his name under the style of A. & Son, though he had no interest in it, may testify to transactions with the deceased mortgagor in reference to the mortgage debt, not being within the statutory disqualification, either as party or interested witness, where it is not shown that there were any debts, nor that the father was not able to meet the liabilities. *Huckaba v. Abbott*, 87 Ala. 409, 6 So. 48.

58. *Illinois Cent. R. Co. v. Welton*, 52 Ill. 290.

In an action against an employer for damages for the wrongful death of his employee, another employee who was the alleged cause of the death is a competent witness for the

defendant employer as to the transaction, since he is not an interested witness under the statute making such witnesses incompetent against an administrator. *Feitl v. Chicago City R. Co.*, 211 Ill. 279, 71 N. E. 991; *Parker's Admr. v. Cumberland, T. & T. Co.*, 25 Ky. L. Rep. 1391, 77 S. W. 1109.

59. *Propst v. Fisher*, 104 N. C. 214, 10 S. E. 295; *Paine v. Kerr*, 66 Hun 636, 21 N. Y. Supp. 880.

Where an attorney was employed to procure a bond for one charged with a criminal offense, and did so, taking from the person so charged a deed to indemnify him against loss on account of said bond, and afterward the defendant in such criminal case borrowed money from another to settle the same, and the attorney, at the request of the defendant, quit-claimed the property to the lender as security for such money, it was held that in a controversy as to the title of the land between the estate of the lender and that of the defendant in the criminal case, both being dead, such attorney was a competent witness to prove the above recited facts, and also an admission by the lender that the money he advanced upon such quit-claim deed had all been repaid. *Rodgers v. Moore*, 88 Ga. 88, 13 S. E. 962.

An attorney at law employed to collect a promissory note and who has no contract with his client as to what fees will be charged, but expects to look to his client for reasonable compensation, is not interested in the case so as to disqualify him from testifying as a witness for the plaintiff. This is true although the witness may have testified that he had no other fee reserved except the ten per cent. in the note sued upon.

qualifying interest,⁶⁰ even though there has been a colorable assignment of his contingent fee,⁶¹ though this does not make him incompetent where mere interest is not a ground of disqualification.⁶²

E. AGENT OF CORPORATION. — In the absence of an express statutory provision⁶³ the disqualifying statutes do not apply to a corporation agent,⁶⁴ even though such a rule in effect exempts corpo-

Jackson *v.* Bennett, 98 Ga. 106, 26 S. E. 53.

60. Mott *v.* Bernard, 97 Mo. App. 265, 70 S. W. 1093.

In Smick *v.* Beswick's Admr., 24 Ky. L. Rep. 276, 68 S. W. 439, it was held that an attorney who was to receive a contingent fee could not testify for the plaintiff as to a transaction between the plaintiff and the decedent. The attorney being equally interested with his client in the result of the case, every rule of law which closed the mouth of the client would apply equally to the attorney.

In an action against an administrator, the plaintiff's attorney, who has no contingent fee but does not know that he will receive anything if plaintiff fails to recover, has no such interest as renders him incompetent as a witness for plaintiff. Birge *v.* Rhinehart, Admr., 36 Iowa 369.

61. Tretheway *v.* Carey, 60 Minn. 457, 62 N. W. 815.

62. Mott *v.* Bernard, 97 Mo. App. 265, 70 S. W. 1093.

63. Brennan *v.* Railroad Co., 93 Mich. 156, 53 N. W. 358; Krause *v.* Assurance Soc., 99 Mich. 461, 58 N. W. 496; *s. c.* on subsequent appeal, 105 Mich. 329, 63 N. W. 440; Maxwell *v.* Imperial Fertilizer Co., 103 Ga. 108, 29 S. E. 597; First Nat. Bank *v.* Cody, 93 Ga. 127, 19 S. E. 831; Flach *v.* Gottschalk Co., 88 Md. 368, 41 Atl. 908, 71 Am. St. Rep. 418, 42 L. R. A. 745; Merriman *v.* Wickersham, 141 Cal. 567, 75 Pac. 180, and see *supra*, IV, 11, A.

A statute disqualifying an agent of a corporation, in a suit between it and the representatives of a deceased person, does not extend to an agent of a partnership. De Mary *v.* Burtenshaw's Estate, 131 Mich. 326, 91 N. W. 647.

64. Parker's Admr. *v.* Cumberland T. & T. Co., 25 Ky. L. Rep. 1391, 77 S. W. 1109; Fidelity & C. Co. *v.* Goff's Exrx., 17 Ky. L. Rep.

214, 30 S. W. 626; Hanf *v.* Northwestern Masonic Aid Assn., 76 Wis. 450, 45 N. W. 315; Manegold *v.* Massachusetts Life Ins. Co., 131 Ala. 180, 31 So. 86. See *In re* Bruendl's Will, 102 Wis. 45, 78 N. W. 169, and *supra*, IV, 9, B, and IV, 11, A.

In an action between a loan corporation and the heirs of a deceased borrower, the manager of the corporation is not inhibited by article 2302, Revised Statutes, from testifying as to conversations had by him with such borrower, since the statute excludes the testimony of parties only, and not their agents. The court said: "It will be observed that the statute only excludes parties to the suit, not their officers, agents or attorneys; and while corporations can act only through their officers, agents, and attorneys, yet in the absence of a statute prohibiting them from testifying in such cases, it is error to exclude their testimony. Indeed, we can see no more reason for excluding their evidence than there is for excluding that of an agent or attorney of a private individual who might have made the contract for his principal with the deceased, or have had the conversation with him sought to be established. Colonial & U. S. Mtg. Co. *v.* Tnedford, 21 Tex. Civ. App. 254, 51 S. W. 263.

A corporation agent is neither interested nor a party to the litigation by the corporation. Parker's Admr. *v.* Cumberland T. & T. Co., 25 Ky. L. Rep. 1391, 77 S. W. 1109; Atlantic Coast L. R. Co. *v.* Mallard (Fla.), 44 So. 366.

The Cashier and Assistant Cashier of a bank are competent to testify in an action by the bank against the administrator. Parties and assignors are disqualified, but not those employed by such parties or assignors. City Sav. Bank *v.* Enos, 135 Cal. 167, 67 Pac. 52.

rations from the disqualifying statutes⁶⁵ since they can act only through an agent.

12. Co-Party With Representative or Protected Party.—Where the statute disqualifies the adverse party in actions by or against the representatives of a decedent, co-parties with such representatives are not incompetent⁶⁶ unless they are in reality adverse parties;⁶⁷ and the rule is the same where the statute provides that neither party to such an action shall be competent against the other.⁶⁸

13. Predecessor in Interest or Title.—A. STATUTE.—a. *Generally.*—Statutes of varying phraseology frequently provide in substance that a party's predecessor in interest or title shall be incompetent to testify in his behalf against the representative of a decedent as to certain matters.⁶⁹ To disqualify a witness on this

65. San Antonio Light Pub. Co. v. Moore (Tex. Civ. App.), 101 S. W. 867.

It has been contended "that as a corporation can act only by an agent, the exception can have no application to a corporation unless the agent who acts for it is excluded. This may be true, but in view of the fact that a number of exceptions have from time to time been added to the (enabling) statute and, in view of the fact that in some states the agents of corporations are in such cases expressly excluded, the contention tends to establish only a *casus improvisus* which is no warrant for judicial legislation." Cockley Mill Co. v. Bunn, 75 Ohio St. 270, 79 N. E. 478.

66. Coryell v. Stone, 62 Ind. 307.

67. See *supra*, IV, 2, C, and *infra*, X, 7, A, b.

68. Evans v. Scott (Tex. Civ. App.), 97 S. W. 116. But see McDonald v. Harris, 131 Ala. 359, 31 So. 548.

69. Iowa.—McClanahan v. McClanahan, 129 Iowa 411, 105 N. W. 833; Culbertson v. Salinger, 131 Iowa 307, 108 N. W. 454.

Kentucky.—Neale, Admr. v. Neale, 18 Ky. L. Rep. 343, 36 S. W. 526; Alexander's Exrs. v. Alford, 89 Ky. 105, 20 S. W. 164; Hagins v. Arnett, 23 Ky. L. Rep. 809, 64 S. W. 430; Harpending's Exrs. v. Daniel, 80 Ky. 449; Huff v. Miniard, 24 Ky. L. Rep. 2272, 73 S. W. 1036; James v. Walker, 24 Ky. L. Rep. 468, 68 S. W. 1106. But see Shoptaw v.

Ridgeway's Admr., 22 Ky. L. Rep. 1495, 60 S. W. 723.

New York.—Rank v. Grote, 110 N. Y. 12, 17 N. E. 665; O'Brien v. Weiler, 140 N. Y. 281, 35 N. E. 587; Whitman v. Foley, 125 N. Y. 651, 26 N. E. 725; Garvey v. Owens, 37 Hun 498; Geissmann v. Wolf, 46 Hun 289. See Podmore v. Seaman's Bank, 35 Misc. 379, 71 N. Y. Supp. 1026; Swan v. Morgan, 88 Hun 378, 34 N. Y. Supp. 829.

North Carolina.—Carey v. Carey, 104 N. C. 171, 10 S. E. 156; Mason v. McCormick, 80 N. C. 244; s. c. 75 N. C. 263.

South Carolina.—Earle v. Harrison, 18 S. C. 329.

Utah.—Clawson v. Wallace, 16 Utah 300, 52 Pac. 9.

Wisconsin.—Laack v. Runge, 104 Wis. 59, 80 N. W. 61; Lehman v. Sherger, 68 Wis. 145, 31 N. W. 633.

In a proceeding by an administrator for the settlement of his account, a person whose alleged claim against the estate he has paid cannot testify for him to prove the validity of such claim, since the witness is the person from whom the administrator derives his title within the meaning of the statute. Dawson v. Hemelrick, 33 W. Va. 675, 11 S. E. 31.

Former Executor or Administrator. In an action between the personal representatives of two estates a former executor or administrator of one of such estates is not the predecessor in interest of his successor within the spirit and meaning of the statute, and is therefore competent. Banning v. Gotshall, 62 Ohio St. 210,

ground the relation must clearly appear.⁷⁰ In the absence of a statutory provision such a witness is not disqualified,⁷¹ unless for some reason he be interested in the action.⁷² A statute disqualifying persons through whom a party or interested person derives any interest or title by assignment or otherwise refers to any interest or title in or to the subject-matter of the action,⁷³ though not to a mere contingent interest which never vested.⁷⁴ Under such a

56 N. E. 1030. Compare *Snyder v. Fiedler*, 139 U. S. 478.

70. *Whitman v. Foley*, 125 N. Y. 651, 26 N. E. 725. See also *Olcott v. Kohlsaat*, 55 Hun 607, 8 N. Y. Supp. 116.

71. *Rielly v. English*, 9 Lea (Tenn.) 16; *Rothschild v. Hatch*, 54 Miss. 554; *Million v. Ohnsorg*, 10 Mo. App. 432; *Alden v. Goddard*, 73 Me. 345; *Snyder v. Fiedler*, 139 U. S. 478; *Smith v. Estate of Smith*, 91 Mich. 7, 51 N. W. 694. See *Rosser v. Georgia Pac. R. Co.*, 102 Ga. 164, 29 S. E. 171.

The assignor of a claim for services rendered the decedent is competent for his assignee, since he is not a party to the action. *Cullen v. Woolverton*, 65 N. J. L. 279, 47 Atl. 626.

Where, however, the assignor is a party to the action, he is incompetent for the assignee (*De Roux v. Girard's Exr.*, 112 Fed. 89, 50 C. C. A. 136), even though he is on the record and adverse party. *Ketcham v. Hill*, 42 Ind. 64.

Contra.—The grantor or vendor of the subject-matter in issue if he would have been incompetent in his own behalf is incompetent for his grantee, since the purpose of the statute would otherwise be defeated by fraudulent practices. *Boykin v. Smith*, 65 Ala. 294; *Hodges v. Denny*, 86 Ala. 226, 5 So. 492. See *Wisdom v. Reeves (Ala.)*, 18 So. 13; *Louis v. Easton*, 50 Ala. 470; *Fitzgerald v. Williamson*, 85 Ala. 585, 5 So. 309; *Gilmore v. H. W. Baker Co.*, 12 Wash. 468, 41 Pac. 124; *Sublett v. Hodges*, 88 Ala. 491, 7 So. 296; *Drew v. Simmons*, 58 Ala. 463; *Glover v. Gentry*, 112 Ala. 500, 20 So. 386; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

72. See *supra*, IV, 3, and *infra*, IV, 13, B, and *Kells v. Webster*, 71 Minn. 276, 73 N. W. 962.

Grantors With Covenants of Warranty are interested to sustain the title of their grantee and therefore incompetent in his behalf against the representative of a decedent. *King v. Worthington*, 73 Ill. 161; *McCann v. Atherton*, 106 Ill. 31; *Ferbrache v. Ferbrache*, 110 Ill. 210. See also *Young v. Cunningham*, 57 Mich. 153; *Hornsby v. Davidson*, 21 Ky. L. Rep. 1531, 55 S. W. 684. So also a lessee who, in the assignment of the lease binds himself on all the covenants in the lease, is incompetent for his assignee in an action by the lessor's executors against such assignee for a breach of the covenant. *Whitney v. Shippen*, 89 Pa. St. 22.

In an action to have the executors of a mortgagee cancel a certain mortgage in so far as it was a lien upon the plaintiffs' property, the evidence of a witness who was not a party to the record, but who had once owned an interest in the property and which interest he had conveyed to one of the plaintiffs by a deed, absolute in form, but accompanied by a contemporaneous agreement, providing that in case of the payment of a certain indebtedness, said property was to be reconveyed, was held to be adversely interested to defendants, and was not, therefore, competent to testify in relation to transactions with decedent. *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642.

73. *Lyon v. Snyder*, 61 Barb. (N. Y.) 172.

74. Where a note was given to an attorney for collection who agreed to receive one-half of the amount collected for his services, but he returned the note to the executor of his client without collecting anything, it was held that the attorney never had any interest or property in the note, and under § 590

statute, however, the disqualification of the witness extends to the whole subject-matter of the action and is not confined to transactions or matters relating merely to the interest or title assigned.⁷⁵

A Judgment Creditor derives his interest or title from the judgment debtor within the meaning of the statute disqualifying a person from or under whom a party or interested person derives any interest or title by assignment or otherwise.⁷⁶

b. Interest. — (1.) **Generally.** — The fact that the witness has no present interest in the action does not render him competent.⁷⁷ The method by which the transfer of interest occurs is immaterial and may consist in a mere release.⁷⁸

(2.) **Mere Equitable Interest.** — Such a statute does not apply to testimony of one who at some prior time was the holder of a mere equitable interest in the property in controversy.⁷⁹

of the code, he was a competent witness to prove the conversation he had with the maker. *White v. Beaman*, 96 N. C. 122, 1 S. E. 789.

75. *Lyon v. Snyder*, 61 Barb. (N. Y.) 172, where the court says, in answer to the contention that the witness should be incompetent to testify to rights or interests not derived through the assignment: "The provision of the code is broader. It excludes such a person from being examined as a witness in the action. The prohibition is not limited to an examination in respect to those matters pertaining to the parts of the action assigned, but extends to the entire action. He cannot be examined at all as a witness in that action if the party has derived any interest or title from, through or under him."

76. In an action brought to foreclose a mortgage given by the defendant Wolf to one Daniel Heyman, since deceased, such mortgage having been assigned to plaintiff by Wolf himself, who was executor of Heyman's will, testimony of Wolf in reference to personal transactions had with the deceased mortgagee, tending to prove that the mortgage was fraudulent and without consideration, was offered in behalf of the defendant Cormier, who became a judgment creditor of the said Wolf after the giving and recording of the said mortgage, was incompetent, under § 829 of the Code of Civil Procedure, as the judgment creditor derived title through Wolf, his judg-

ment debtor, according to the meaning of that section. *Geissmann v. Wolf*, 46 Hun (N. Y.) 289, following *Taylor v. Meldrum*, 6 N. Y. Civ. Pro. 235.

77. Where a mortgagor, after conveying the mortgaged premises, has been made a party defendant to an action to foreclose the mortgage, he is not competent to testify in favor of his grantee as to a personal transaction between himself and the plaintiff's intestate, although no money judgment is asked against him and he has failed to answer. *Smith v. Hathorn*, 25 Hun (N. Y.) 159. But see *Gregg v. Hill*, 80 N. C. 285; *Brown v. Cave*, 23 S. C. 251, and *Banning v. Gotshall*, 62 Ohio St. 210, 56 N. E. 1030.

A Release by the Assignee to the assignor of all liability arising by virtue of the assignment of the chose in action does not remove such assignor's incompetency for his assignee. *White v. Heavner*, 7 W. Va. 324.

78. *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587.

79. *Zerbe v. Reigart*, 42 Iowa 229. This was a suit against an administrator to compel the specific performance of an alleged contract by the decedent to convey certain real estate to the plaintiff. It appeared that plaintiff, the original owner, had sold to A. but conveyed the property to B. in trust, to be reconveyed to A. upon his paying to B. a certain sum which he owed the latter. A. paid the debt due B., but

c. *Assignor*. — Where the statute disqualifies every person from, through or under whom a party or interested person derives any interest or title by assignment or otherwise, it includes an assignor of such person.⁸⁰ The assignor of the thing in action is expressly disqualified by some statutes.⁸¹ A wife who merely joins in a conveyance with her husband is not an assignor within the meaning of the statute,⁸² nor is an accommodation endorser the assignor of

being unable to pay plaintiff the balance plaintiff repurchased the property by returning the consideration and canceling the debt. Plaintiff having no money, A. borrowed for plaintiff from decedent the necessary money and had B. convey the property to the decedent as security for the loan to the plaintiff under an agreement by the decedent to reconvey to plaintiff when the debt was paid. The deposition of A. offered on behalf of plaintiff was excluded on the ground that he was, within the meaning of the statute, a person from, through or under whom the plaintiff derived his interest or title. This was held error on the ground that plaintiff did not derive or claim any interest or title directly from, through or under A., who had never held more than an equitable interest in the property. The court says: "As the witness is not interested, and hence would have been competent at common law, his testimony ought not to be rejected unless it comes clearly within the prohibition of this section, for the evident purpose of the chapter upon the subject of evidence is to enlarge and not to abridge the sources of testimony."

Without undertaking to put a definite construction upon this section (3639), which is very peculiar in some respects, it seems to us that it could not have been the intention in an action against the administrator or heir, concerning real estate, to exclude the testimony of any person, although not interested in the result of the suit, who, at any prior time, may have been the holder of the equitable interest."

80. *Lyon v. Snyder*, 61 Barb. (N. Y.) 172; *Parcell v. McReynolds*, 71 Iowa 623, 33 N. W. 139; *Healy v. Malcolm*, 66 App. Div. 501, 73 N. Y. Supp. 259; *Shields v. Smith*, 104 N. C. 57, 10 S. E. 76; *White v.*

Heavner, 7 W. Va. 324; *McMurray v. McMurray*, 63 Hun 183, 17 N. Y. Supp. 767.

In *Mississippi* one who has assigned his claim against an estate is incompetent to prove such claim if the assignment occurred after decedent's death. *Jones v. Sherman*, 56 Miss. 559. See *Reinhart v. Evans*, 48 Miss. 230.

In *Pennsylvania* the assignor of a chose in action is incompetent. See *Barbour v. Wiehle*, 116 Pa. St. 308, 9 Atl. 520; *Tinstman v. Croushore*, 104 Pa. St. 192.

81. See statutes of California, Idaho, Indiana, Kansas, Michigan, Montana, Oklahoma and South Carolina; also *Frey v. Vignier*, 145 Cal. 251, 78 Pac. 733. And see *Woodruff v. Cox*, 2 Bradf. (N. Y.) 223; *Crosby v. Nichols*, 3 Bosw. (N. Y.) 450; *McConnell v. McCracken*, 14 Wis. 83; *McHose v. Cain*, 22 Wis. 486 (holding that the term "assignor of a thing in action" does not include one who transfers a note by indorsement or delivery.)

One entitled to have property devised to her, who yields her claim and consents to its being devised to her children, is an assignor within the meaning of § 10,212 Comp. Laws 1897, prohibiting an assignor of a cause of action from testifying to matters equally within the knowledge of deceased, and, in an action by her children, cannot testify to promises made by the deceased to her to leave it to them. *Berry v. Adams*, 122 Mich. 17, 80 N. W. 792

82. *Miller v. McDowell*, 63 Kan. 75, 64 Pac. 980.

A wife who joins in a conveyance by her husband, since deceased, for the purpose of relinquishing her dower, does not become a grantor within the meaning of the statute disqualifying a person from whom a party or interested person derives his

one to whom the maker has transferred the note in violation of his agreement with such endorser.⁸³

Meaning of "Assignor."—Under a statute disqualifying an assignor, a witness to come within the meaning of that term must be the assignor of the claim or demand sued on.⁸⁴

d. *Grantor*.—The grantor is incompetent for his grantee under such a statute,⁸⁵ and in some states the grantor is expressly disqualified.⁸⁶

e. *Mortgagor and Mortgagee*.—A mortgagor is a person from whom a mortgagee derives his title within the meaning of the statute disqualifying any person from, through or under whom any party or interested person derives any interest or title.⁸⁷ But a mortgagor does not derive his title or interest from the mortgagee, although the mortgage has been paid and canceled,⁸⁸ nor does a pledgee derive title from the pledgee.⁸⁹

f. *Husband and Wife*.—In an action by a husband for the value of services rendered by his wife, she is not his assignor as he is entitled to the value of her services by virtue of his marital rights.⁹⁰ On the other hand, where the wife brings such an action and it appears that by agreement with her husband he has relinquished to her his rights in the matter, he is her assignor within the meaning of the statute,⁹¹ though it has been held under such circumstances

interest or title. *Clawson v. Wallace*, 16 Utah 300, 52 Pac. 9. Compare *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

83. *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142.

84. **Assignor**.—In *Frey v. Vignier*, 145 Cal. 251, 78 Pac. 733, which was an action by the lessees of a mill on a contract executed by the decedent, the owner, to reconstruct a certain portion of the mill which had been destroyed, a witness offered by plaintiff, who had prior to the execution of the contract in question assigned his interest in the lease to the plaintiffs, was objected to as incompetent on the ground that he was an assignor within the meaning of the statute disqualifying assignors in actions on a claim or demand against the estate of a decedent; it was held that since he was not a party to the contract he was not an assignor of the claim or demand sued on.

85. *Smith v. Cross*, 90 N. Y. 549; *Beck v. Cook*, 27 Misc. 185, 57 N. Y. Supp. 653; *Smith v. Hathorn*, 25 Hun (N. Y.) 159; *Hall v. Bond*, 68 App. Div. 293, 74 N. Y. Supp. 5.

86. See *supra*, I, 2, B.

87. *Clinton Sav. Bank v. Underhill*, 115 Iowa 292, 88 N. W. 357.

88. *Carey v. Carey*, 108 N. C. 267, 12 S. E. 1038, overruling the opinion on a previous appeal in 104 N. C. 171, 10 S. E. 156.

89. *Wilson v. Law*, 7 N. Y. St. 672.

90. *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122; *Hopkins v. Clark*, 90 Hun 4, 35 N. Y. Supp. 360. But see *Ashworth v. Grubbs*, 47 Iowa 353.

91. *Stackable v. Stackable's Estate*, 65 Mich. 515, 32 N. W. 808.

But in an action by a married woman for board furnished and services rendered the decedent where all the supplies were provided by her, and the arrangement was entered into and carried out with the consent of the husband, it was held that he was not her assignor within the meaning of the statute, and was therefore competent on her behalf. *Slack v. Norton*, 111 Mich. 213, 69 N. W. 497, *distinguishing* *Stackable v. Stackable's Estate*, 65 Mich. 515, 32 N. W. 808, relied upon by defendant on the ground that in the latter case the husband was the head of the house-

that the wife suing on the claim is not the assignee of her husband.⁹²

B. GRANTOR. — The grantor in a deed to one since deceased is not competent in his own behalf as to prohibited matters, in an action to set aside the deed,⁹³ or to have it declared a mortgage.⁹⁴

C. MORTGAGOR. — The mortgagor is not a competent witness in his own behalf in an action against the representatives of the deceased mortgagee,⁹⁵ as in an action to set aside the mortgage;⁹⁶ and the same is true in an action against him to foreclose the mortgage.⁹⁷

D. EFFECT OF COVENANTS OF WARRANTY. — Where the grantor, vendor, or assignor of an incompetent party would be liable on an express or implied covenant or warranty of title, he may have such an interest in the controversy as to render him incompetent.⁹⁸

hold, and as such furnished the family supplies, and the claim for board therefore belonged to him, unless he assigned it to his wife; while in the case at bar the wife herself kept a boarding-house, bought her own supplies and conducted her own business.

92. *Sands v. Sparling*, 82 Hun 401, 31 N. Y. Supp. 251.

In an action against an executor to recover for services rendered defendant's testatrix, it was shown that according to an agreement between the plaintiff and her husband such services were to be performed and the meals furnished for and upon her separate account, and whatever she received therefor was to be her own separate property. *Held*, that under such circumstances the claim presented against the estate was the property of the plaintiff, and she did not hold the same as the assignee of her husband, and therefore he was, under § 829 of the code, a competent witness to testify in her behalf. *Lashaw v. Croissant*, 88 Hun 206 34 N. Y. Supp. 667.

93. *Turner's Trustee v. Washburn*, 25 Ky. L. Rep. 2198, 80 S. W. 460; *Conklin v. Yates*, 16 Okla. 266, 83 Pac. 910; *Gardiner v. Gardiner*, 134 Mich. 90, 95 N. W. 973; *Montgomery v. Simpson*, 31 N. J. Eq. 1.

In an action by an assignee in insolvency against the representative of his assignor's deceased grantee, to set aside the deed, the assignor is incompetent for the assignee, on the ground of interest, as to transactions with the decedent. *Kells v. Webster*, 71 Minn. 276, 73 N. W. 962.

In an action by a grantor's creditors attacking a conveyance of land made by him to defendant's intestate, the grantor under subsection 2 of section 606 of the Code Civ. Proc., is incompetent to testify for plaintiffs as to a transaction had with his deceased grantee. *Norfleet's Admr. v. Logan*, 21 Ky. L. Rep. 1200, 54 S. W. 713.

94. *Porter v. White*, 128 N. C. 42, 38 S. E. 24.

95. *Warrick v. Hull*, 102 Ill. 280.

96. In an action to reform and cancel a mortgage given by a son to his father, brought after the death of the father, the son is an incompetent witness to an agreement that he should only be required to pay interest during his father's life, and upon his death the same should be canceled. *Sauer v. Nehls*, 121 Iowa 184, 96 N. W. 759.

The plaintiffs, makers of a note and trust deed, are not competent witnesses against the administrator of the payee in a suit to cancel the note and mortgage as barred by the statute of limitations. *Sartor v. Wells*, 39 Colo. 84, 89 Pac. 797.

97. *Knight v. Coleman*, 117 Ala. 266, 22 So. 974; *Junkins v. Lovelace*, 72 Ala. 303; *Hoadley v. Hadley*, 48 Ind. 452 (*holding* the mortgagor incompetent in an action by the representative of one mortgagee, to testify for another mortgagee who had intervened, as to the dates of delivery of the mortgages); *Goodwin v. Bentley*, 30 Ind. App. 477, 66 N. E. 496; *Yerkes v. Blodgett*, 48 Mich. 211, 12 N. W. 218.

98. The Grantor in a deed with

14. Decedent's Successor in Interest or Title. — A. GRANTEE.

One claiming against the representative or distributees or successors of the decedent as the latter's grantee is not competent in support of his claim;⁹⁹ thus in an action by one of such persons to set aside the deed the defendant is incompetent.¹

B. THE VENDEE in an alleged contract of sale with one since deceased is incompetent to prove the contract.²

C. ASSIGNEE. — The assignee of the decedent is incompetent in his own behalf to prove the assignment.³ But a grantee of land

covenants of warranty is not competent for his grantee in an action involving title to the land, because of interest. *King v. Worthington*, 73 Ill. 161; *McCann v. Atherton*, 106 Ill. 31; *Ferbrache v. Ferbrache*, 110 Ill. 210; *Young v. Cunningham*, 57 Mich. 153, 23 N. W. 626; *Hornsby v. Davidson*, 21 Ky. L. Rep. 1531, 55 S. W. 684. See *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313.

Vendor of Personal Property. Every vendor of personal property impliedly warrants title to the vendee and is therefore interested in maintaining his own and the vendee's title. *Gray's Exrs. v. Whitney*, 81* Pa. St. 332.

Common Grantor or Assignor. — It has been held that where both parties to the action are claiming under different deeds from the same grantor, his interest is equally balanced, and he is therefore competent to testify as to the consideration for the deed to one grantee though the latter is dead. *Allen v. Davis*, 65 Ga. 179. But for a contrary suggestion in case of a common assignor, see *Brumbach v. McLean*, 187 Pa. St. 602, 41 Atl. 480.

99. *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Walls v. Ritter*, 180 Ill. 616, 54 N. E. 565; *Leavitt v. Leavitt*, 179 Ill. 87, 53 N. E. 551; *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. 870; *Leathers v. Ross*, 74 Iowa 630, 38 N. W. 516; *Cochrane v. Breckenridge*, 75 Iowa 213, 39 N. W. 274.

The grantee of a mortgagor, since deceased, is incompetent in his own behalf in an action to have the mortgage canceled. *Foote v. Beecher*, 78 N. Y. 155.

1. *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848; *Peirson v. McNeal*,

137 Mich. 158, 100 N. W. 458; *Hobart v. Hobart*, 62 N. Y. 80.

Contra. — In an action by an administrator to set aside a deed made by plaintiff's intestate to the defendants as fraudulent against the creditors of deceased, it was held that in such case the administrator is acting for the creditors and not as the representative of the deceased, but on the contrary the defendants are supporting the deceased and defending his act, and the defendants are therefore competent witnesses to testify as to conversations with the decedent relative to the giving of such deed. The administrator is in fact only a nominal party, and the creditor is the real party in interest. *Miller v. Davis*, 60 Hun 198, 14 N. Y. Supp. 725.

2. *Hogg v. Combs*, 29 Ky. L. Rep. 559, 93 S. W. 670; *Goodlett v. Kelley*, 74 Ala. 213.

Under the statute disqualifying a person in his own behalf as to transactions with the decedent, a vendee of land conveyed by the decedent is not a competent witness to prove the terms of the contract of conveyance. *Jones v. Tennis Coal Co.*, 29 Ky. L. Rep. 623, 94 S. W. 6.

The vendee in an executory contract of sale is not competent to testify to conversations with the deceased vendor as to the land covered by the contract. *Bargo v. Bargo*, 27 Ky. L. Rep. 680, 86 S. W. 525.

3. The assignee of certain mortgages is not a competent witness as to the assignments in an action by the representative of the deceased assignor to set aside the assignments, under the statute disqualifying the opposite party as to matters equally within the knowledge of the deceased. *Peirson v. McNeal*, 137 Mich. 158, 100 N. W. 458.

is not an "assignee" within the meaning of a statute disqualifying the latter.⁴

D. DONEE. — One claiming as the decedent's donee against the representatives or beneficiaries of his estate are not competent as to prohibited matters.⁵ The donee, however, is not incompetent for a party to an action to which he is not a party to prove the gift.⁶

15. Person for Whose Benefit Action Is Prosecuted. — Some statutes disqualify persons for whose immediate benefit the action is prosecuted. Such a provision is confined in its operation to those persons only who are immediately and absolutely entitled to the results or proceeds of the litigation, and not to those who may ultimately be entitled thereto from some party to the action. Thus it does not apply to the beneficiaries of the estate, who are only entitled to their distributive shares after due administration and upon the distribution of the estate.⁷

Action for Wrongful Death. — In an action for wrongful death brought by the personal representative under a statute providing that the proceeds shall be distributed to the widow and next of kin, as in the case of intestacy, such beneficiaries are not the persons for whose immediate benefit the action is prosecuted within the meaning of the statute disqualifying such persons.⁸

16. Competency of Representative or Protected Party. — A. GENERALLY. — As a general rule the statutes are deemed to be for the protection of the estate of the deceased or incompetent person or their successors in interest, and therefore such protected persons

The assignee of an insurance policy is not competent in a contest with the assured's administrator for the insurance money to testify as to the consideration for the assignment. *Reinhardt v. Mark's Admr.*, 20 Ky. L. Rep. 388, 93 S. W. 32.

4. *Wisconsin Bank v. Morley*, 19 Wis. 62.

5. *Thomas v. Tilley*, 147 Ala. 189, 41 So. 854; *Lowery v. Lowery*, 117 Iowa 704, 89 N. W. 1118; *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735; *James v. James*, 81 Tex. 373, 16 S. W. 1087; *McLean v. Weeks*, 65 Me. 411.

In an action against the executor of an estate to recover the value of certain notes alleged to have been given to plaintiff by deceased in his lifetime, it was held, that a donee is incompetent as a witness to prove the delivery to himself of a gift by the donor, the latter being dead when the testimony is offered. *Lee v. Patton*, 50 W. Va. 20, 40 S. E. 353.

6. Thus where a savings bank is

sued for money deposited by decedent and claims to have delivered the same pursuant to a gift *causa mortis*, the alleged donee is competent for the bank to prove the gift. *Podmore v. Seamen's Bank*, 35 Misc. 379, 71 N. Y. Supp. 1026.

7. *Quin v. Moore*, 15 N. Y. 432; *Freeman v. Spaulding*, 12 N. Y. 373, holding the residuary legatee a competent witness for the executor in a suit by the latter to recover moneys claimed to be due the estate. The court says that this provision of the statute "applies only to a person into whose hands the money collected in the suit will necessarily go when it is received, or who might take it from the sheriff or the attorney as his own. It does not apply where the money cannot immediately, although it may ultimately, go into his hands."

8. *Quin v. Moore*, 15 N. Y. 432, holding that the widow was not disqualified in such case, and following *Freeman v. Spaulding*, 12 N. Y. 373.

are competent witnesses,⁹ unless their interests or testimony are adverse to the estate,¹⁰ or unless the adverse party is also one protected by the statute.¹¹ A statute providing that no person or that no party or interested person shall be competent as to certain matters when the adverse or opposite party is one of certain specified classes of persons does not serve to disqualify the latter persons.¹² A statute disqualifying the surviving party to the contract or cause of action does not render incompetent the representative of the deceased party.¹³

B. STATUTE DISQUALIFYING BOTH PARTIES.—Where the statute makes both parties incompetent, it disqualifies the representative or successor of the decedent as well as the adverse party.¹⁴ Where

9. *California*.—*Todd v. Martin*, 37 Pac. 872.

Florida.—See *Sanderson v. Sanderson*, 17 Fla. 820.

Georgia.—*McIntyre v. Meldrim*, 40 Ga. 490; *Crenshaw v. Robinson*, 37 Ga. 118.

Illinois.—*Illinois Cent. R. Co. v. Reardon*, 157 Ill. 372, 41 N. E. 871, *affirming* 56 Ill. App. 542; *Boyd v. Jennings*, 46 Ill. App. 290; *Illinois Cent. R. Co. v. Reardon*, 157 Ill. 372, 41 N. E. 871.

Indiana.—*Bischof v. Mikels*, 147 Ind. 115, 46 N. E. 348; *Cincinnati, H. & I. R. Co. v. Gregor*, 150 Ind. 625, 50 N. E. 760.

Iowa.—*Stiles v. Estate of Botkin*, 30 Iowa 60; *Schmid, Admr. v. Kreismer, Admr.*, 31 Iowa 479.

Kansas.—*McCartney v. Spencer*, 26 Kan. 62; *Jaquith v. Davidson*, 21 Kan. 341.

Maine.—*Nash v. Reed*, 46 Me. 168; *Gunnison v. Lane*, 45 Me. 165.

Maryland.—*Johnson v. Heald*, 33 Md. 352; *Bantz v. Bantz*, 52 Md. 686.

New Hampshire.—*Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317.

New York.—*McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081.

North Carolina.—*Williams v. Cooper*, 113 N. C. 286, 18 S. E. 213; *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24.

Pennsylvania.—*In re Crosetti's Estate*, 211 Pa. St. 490, 60 Atl. 1081.

South Carolina.—*Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807.

An administrator, who is seeking to collect assets of the estate of his intestate and who is also a creditor thereof, is not incompetent to testify

as to communications or transactions between him and the deceased in regard to property claimed as belonging to the estate. *Moore v. Cline, Admr.*, 115 Ga. 405, 41 S. E. 614.

Surviving Partner.—In an action brought by a surviving partner and the widow, as administratrix, of the deceased partner, on an account owing to said partnership before the death of the decedent, the surviving partner plaintiff is a competent witness. *Anthony v. Stinson & Hurd*, 4 Kan. 211. But see *Holmes v. Brooks*, 68 Me. 416.

In a contest upon a claim filed against the estate of a decedent, testimony of the administrator identifying the signature of the intestate is competent as his interest is not adverse to the estate, nor is he an incompetent witness as to such matters in favor of the estate. *Shirts v. Rooker*, 21 Ind. App. 420, 52 N. E. 629.

10. *In re Crosetti's Estate*, 211 Pa. St. 490, 60 Atl. 1081.

11. As to whether representatives and protected parties are incompetent in such case, see *infra*, IV, 16, C.

12. *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4; *Bradley v. Kavanagh*, 12 Iowa 273; *Romans v. Hay's Admr.*, 12 Iowa 270; *Terhune v. Henry*, 13 Iowa 99; *Moore v. Machin*, 124 Mich. 216, 82 N. W. 892; *Pendill v. Neuberger*, 64 Mich. 220, 31 N. W. 177; *Haskell v. Hervey*, 74 Me. 193. But see *Conner v. Root*, 11 Colo. 183, 17 Pac. 773.

13. *McIntyre v. Meldrim*, 40 Ga. 490, and see *infra*, IX, 2.

14. *Hinchman v. Parlan & Orendorff Co.*, 74 Fed. 698; *Sachse v.*

a statute disqualifies persons having a pecuniary interest in the result of the suit as witnesses against a party to whom their interest is opposed, as to transactions with a decedent whose estate is interested in the result of the suit, the representatives of the estate and those pecuniarily interested in it are equally incompetent with the adverse party, since the terms of the statute when they are clear and unambiguous must be followed regardless of what the court may think of its policy.¹⁵

C. BOTH PARTIES PROTECTED. — a. *Competency of Representative*. — Where the party adverse to the representative is also a person protected by the statute, some courts hold that the representative is not thereby disqualified.¹⁶ In other jurisdictions, how-

Loeb (Tex. Civ. App.), 101 S. W. 450; Jarvis v. Andrews, 80 Ark. 277, 96 S. W. 1064. See Millay v. Wiley, 46 Me. 230; Moore v. Maxwell, 18 Ark. 469; Thom v. Wilson's Exr., 24 Ind. 323; Markel's Admr. v. Spittler's Admr., 28 Ind. 488; Goodwin v. Goodwin, 48 Ind. 584.

In a suit by an administrator *de bonis non* against an independent executor alleging abandonment of the trust and refusal to account for estate funds, the defendant executor cannot testify on his own behalf to transactions with his deceased testatrix, both parties being incompetent under the Texas statute. Grothaus v. Witte, 72 Tex. 124, 11 S. W. 1032.

15. Adler v. Pin, 80 Ala. 351. But see *infra*, IV, 16, D.

In McDonald v. Harris, 131 Ala. 358, 31 So. 548, it was held that under such a statute in an action against the executor on a claim against the decedent, the executor and heirs were not competent witnesses as to statements by the deceased. The court disapproves of a contrary dictum in Austin v. Bean, 101 Ala. 133, 147, 16 So. 41 and says: "Where legislative purpose is clearly expressed, as in this statute, there can be no occasion for looking beyond the terms employed for a contemplation on the part of the law-makers which would exclude from its operation cases plainly within its language. The effect of a statute is to be determined by its own terms, when they are clear and unambiguous and within organic competency, and not upon considerations of the wisdom of excluding this or that

state of facts from the field of its operation. The proposition quoted above from the opinion in Austin v. Bean is opposed to the statute as it is plainly written, and this is all there is necessary to say in repudiation of it. But it is also opposed to the rationale of the enactment in its application to cases like this one. Under it the plaintiff's mouth would be closed as to transactions with and statements by the deceased, while those interested in the estate would be free to detail such transactions and statements, in violation of the manifest policy of the statute to seal the lips of all parties interested in the result of the suit when the lips of one of them have been sealed in consequence of the death of an original party to the transaction."

16. Kentucky. — Swinebroad v. Bright, 25 Ky. L. Rep. 742, 76 S. W. 365 (but see Manion's Admr. v. Lambert's Admx., 10 Bush 295; Hobb's Exr. v. Russell's Exr., 79 Ky. 61).

Michigan. — Penny v. Croul, 87 Mich. 15, 49 N. W. 311; Duryea v. Granger, 66 Mich. 593, 33 N. W. 730; *In re Mower's Appeal*, 48 Mich. 441, 12 N. W. 646. But see Sheldon v. Carr, 139 Mich. 654, 103 N. W. 181, and O'Neil v. Greenwood, 106 Mich. 572, 64 N. W. 511 (*contra*).

Mississippi. — Buckingham v. Weston, 54 Miss. 526.

Rhode Island. — Kenyon v. Peirce, 17 R. I. 794, 24 Atl. 825.

South Carolina. — Colvin v. Phillips, 25 S. C. 228.

Vermont. — Atkins v. Atkins, 69 Vt. 270, 37 Atl. 746.

Prior to the revision of 1900,

ever, he is disqualified to the same extent as any other witness.¹⁷ And where he is also a real party in interest, as an heir or devisee, he is subject to the same disqualification as any other witness against an adverse party protected by the statute.¹⁸ The rules of course apply only to actions or proceedings which are within the scope of the statute.¹⁹

b. *Of Other Protected Persons.* — Even though a representative may be held competent in an action against another protected person, the interested persons whom he represents, or who are opposed to him, are nevertheless incompetent in their own behalf,²⁰ and in an action between parties who are both protected and who are both real parties in interest, neither is competent against the other.²¹

D. INTEREST. — a. *Generally.* — Where the representative has no

where both parties to the action were representatives, each was competent against the other. *Haines v. Watts*, 55 N. J. L. 149, 26 Atl. 572; *Lodge v. Hulings*, 64 N. J. Eq. 761, 53 Atl. 564. Subsequent thereto, however, a contrary rule has been enforced. *Lodge v. Hulings*, 64 N. J. Eq. 761, 53 Atl. 564.

17. *Colorado.* — *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

Illinois. — *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713.

Iowa. — *Schmid, Admr. v. Kreismer, Admr.*, 31 Iowa 479.

Kansas. — *Roach v. Roach*, 69 Kan. 522, 77 Pac. 108; *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71.

Kentucky. — *Hobbs v. Russell*, 79 Ky. 61.

Maryland. — *Bowie v. Bowie, Admx.*, 77 Md. 311, 26 Atl. 405.

Missouri. — *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522.

New York. — *Poucher v. Scott*, 33 Hun 223; *Gennerich v. Ulrich*, 58 Hun 609, 12 N. Y. Supp. 353.

North Carolina. — *In re Petersen's Will*, 136 N. C. 13, 48 S. E. 561.

Wisconsin. — *Quinn v. Quinn*, 130 Wis. 548, 110 N. W. 488; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919; *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12.

18. *Rich v. Bowker*, 25 Kan. 7; *Cornell v. Cornell*, 12 Hun (N. Y.) 312; *Manion's Admr. v. Lambert's Admx.*, 10 Bush (Ky.) 295. See *Duryea v. Granger's Estate*, 66 Mich. 593, 33 N. W. 730.

In a suit by the administrator to recover a bank-book of one who claims it as executrix and sole lega-

tee, the defendant sought to testify in reference to conversations and transactions between the testator and intestate. *Held*, that the administrator not having elected to testify, the defendant's testimony was inadmissible as to such conversations and transactions. *Perkins v. Perkins*, 68 N. H. 264, 38 Atl. 1049.

The deposition of an administrator who is the heir of his intestate is not competent in his own behalf as to transactions had by his intestate with a person deceased at the time such evidence is offered. *Witt v. Thomas*, 19 Ky. L. Rep. 847, 42 S. W. 338.

In *Hobbs v. Russell*, 79 Ky. 61, it was held that an executor who was also one of the devisees, when sued as executor, could not testify for himself as to a transaction between himself and a decedent. This case was followed in *Witt v. Thomas*, 19 Ky. L. Rep. 847, 42 S. W. 338, where the administrator was also the sole heir at law. But see *Swinebroad v. Bright*, 25 Ky. L. Rep. 742, 76 S. W. 365.

19. See *supra*, III, 6, E, c.

20. *Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83; *Swinebroad v. Bright*, 25 Ky. L. Rep. 742, 76 S. W. 365; *In re Crosetti's Estate*, 211 Pa. St. 490, 60 Atl. 1081. See also *Perkins v. Perkins*, 68 N. H. 264, 38 Atl. 1049.

21. *Campbell v. Brown*, 183 Pa. St. 112, 38 Atl. 516.

Where both parties claim as grantees of the deceased, neither is competent against the other. *Rudolph v. Rudolph*, 207 Pa. St. 339, 56 Atl. 933.

personal pecuniary interest in the action, he is not incompetent,²² unless expressly disqualified by the statute.²³ And the fact that he is also beneficially interested, as where he is an heir or legatee, does not serve to disqualify him,²⁴ unless his interest is adverse to the estate which he represents,²⁵ or unless the adverse party is also one entitled to the protection of the statute.²⁶ An executor is not a beneficiary under the will merely because provision is made therein to compensate him for his services.²⁷

b. *When Representative Sued Individually Defends as Representative.* — It has been held that although the representative has been sued as an individual, if he defends as the representative of the decedent he is not personally interested and is therefore not incompetent against the adverse party protected by the statute.²⁸

c. *Interest Adverse to Estate.* — The representative of a deceased or incompetent person when seeking to establish his own claim or defense against the estate represented by him is disqualified as a witness in his own behalf to the same extent as any other party

22. *Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83; *Dicus v. Childress*, 128 Ala. 617, 29 So. 617.

The executor and his bondsman, in an action against him to recover a legacy, are competent to testify as to statements and declarations of the testator to show that a payment made by him to plaintiff was intended in satisfaction of such legacy. The executor has no interest in the result, the controversy really being between the devisees under the will as to which of them is entitled to the part of the estate in question. *Swinebroad v. Bright*, 25 Ky. L. Rep. 742, 76 S. W. 365.

23. See *supra*, IV, 2, B.

24. The executor, although a residuary legatee, is competent against a person seeking to establish a claim against the estate. *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081.

25. See *infra*, IV, 16, D, c, and *Guldin's Admrs. v. Guldin*, Admr., 97 Pa. St. 411.

26. *Perkins v. Perkins*, 68 N. Y. 264, 38 Atl. 1049; *Witt v. Thomas*, 19 Ky. L. Rep. 847, 42 S. W. 338; *McDonald v. Harris*, 131 Ala. 358, 31 So. 548; *Duane v. Paige*, 82 Hun 139, 31 N. Y. Supp. 310.

An executor, who is also a devisee, is incompetent in an action against him by heirs to set aside the will. *Rich v. Bowker*, 25 Kan. 7.

One suing as executor and resid-

uary legatee of decedent is incompetent in his own behalf where the adverse party is one to whom the protection of the statute extends. *Cornell v. Cornell*, 12 Hun (N. Y.) 312.

27. *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

28. In *Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83, an executor was sued in his individual character by the administrator of the estate of the widow of the testator for the conversion of certain bonds received from her after the testator's death, but before his will was probated. The executor inventoried the bonds as the property of the estate and never claimed any personal interest in them. The administrator claimed they were delivered by the widow to the executor for safe keeping, and she had received them as a gift from her husband during his lifetime. The executor denied this, claiming that the bonds were delivered to him with the understanding that he received them as the property of the estate, and with the free will and consent of the widow. By a divided court, it was held that the real issue as to the ownership of the bonds was between the two estates and that the executor was not disqualified as a witness from testifying as a witness under How. Stat. § 7545, which prohibits the opposite

or person in a similar position.²⁹ This rule applies even though

party, in a suit prosecuted or defended by the heirs or personal representatives of a deceased person, from testifying to facts which, if true, must have been equally within the knowledge of the decedent, but that the heir of the widow was so disqualified.

²⁹. *Alabama*. — *Davis v. Tarver*, 65 Ala. 98; *Strange v. Graham*, 56 Ala. 614.

Florida. — *Sanderson v. Sanderson*, 17 Fla. 820.

Georgia. — *Finch v. Creech*, 55 Ga. 124; *Fulcher v. Mandell*, 83 Ga. 715, 10 S. E. 582; *Stanford v. Murphy*, 63 Ga. 410.

Indiana. — *Goodwin v. Goodwin*, 48 Ind. 584; *Ginn v. Collins*, 43 Ind. 271.

Iowa. — *Duffield v. Walden*, 102 Iowa 676, 72 N. W. 278 (claiming property formerly belonging to decedent).

Maine. — *Preble v. Preble*, 73 Me. 362.

Mississippi. — *Haralson v. White*, 38 Miss. 178; *Gordon v. McEachin*, 57 Miss. 834 (claim originating during decedent's lifetime); *Troup v. Rice*, 55 Miss. 278.

New Hampshire. — *Perkins v. Perkins*, 58 N. H. 405.

New Jersey. — *Tichenor v. Tichenor*, 43 N. J. Eq. 163, 10 Atl. 867; *Smith v. Burnet*, 34 N. J. Eq. 219, 35 N. J. Eq. 314.

North Carolina. — *Grier v. Cagle*, 87 N. C. 377; *Whitesides v. Green*, 64 N. C. 307.

Pennsylvania. — *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562; *In re Brene-man's Estate*, 65 Pa. St. 298.

West Virginia. — *Kimmel v. Shroyer*, 28 W. Va. 505.

"In such case, the executor acts *suo jure*, and against the interest of the creditors, legatees, heirs, and all persons interested in the estate, whereas, in all other cases he is trustee for them, and is supposed to be the proper party to defend the estate against groundless and unjust demands. It follows that in case of his own claim, any party adversely interested may appear and oppose, and in like manner appeal." Shaw,

C.J., in *Wiley v. Thompson*, 9 Met. (Mass.) 329.

Where the personal representative in his account charges the estate with his own claim against it and the allowance of the charge is objected to by the beneficiaries, the competency of the representative as a witness in his own behalf is governed by the same rule as that of any other claimant.

"The statutes requiring an executor or administrator to verify the account of his administration by his oath, and to submit to examination on oath before the probate court upon any matter relating to his account, do not make him a competent witness generally in his own behalf. Gen. Stats., ch. 98, §9; *Bailey v. Blanchard*, 12 Pick. (Mass.) 166. The competency of the appellant in this case, therefore, depends upon the statutes making parties to the record competent witnesses. . . . The appellant was not a competent witness within the letter or spirit of this statute. The contract or cause of action in issue and on trial was his claim for services alleged to have been rendered by him to the testatrix in her lifetime. If the claim had been made against the estate of the deceased by any other person than the executor, it must have been prosecuted by action at law, in which the claimant could not have testified in his own favor. An executor having a demand against his testator cannot proceed by action at law because he cannot sue himself, but the appropriate manner of presenting his claim for adjudication is to charge it in his probate account, of which notice is given, so that any person interested in the estate may appear and dispute it. . . . The party plaintiff to the contract in issue and on trial, as well as the plaintiff of record, was the appellant in his individual right. The party defendant was the estate of which the appellant was executor, but which was necessarily represented in this proceeding by the party objecting to the appellant's claim. The statute regulating the competency of parties to the record

he is a party to the action in his representative capacity,³⁰ but of

as witnesses applies equally to probate proceedings and to actions at law. The fact that the appellant was obliged to make his individual claim by stating it in his account rendered to the court of probate, instead of in a declaration in an action at common law, gave him no right to testify in his own favor since the death of the person whom he alleged to have made the contract which was the foundation of his claim. As the appellant, in seeking the allowance of this item in his account, was prosecuting a claim in his private behalf, and not acting only in a representative capacity, he was not made a competent witness by statute 1864, ch. 304, § 1." *Ela v. Edwards*, 97 Mass. 318.

On an appeal from the decree admitting the plaintiff's account as administrator, the plaintiff sought to testify to a certain understanding between himself and his intestate, in reference to the ownership of certain stock certificates, and claimed he was entitled to testify as a matter of right as well as on the ground that injustice might be done without his testimony. *Held*, that an administrator acting in his individual right and against the interests of the estate, as in the case of the settlement of his personal claim or administration account, stands like any other party claiming adversely to the estate. In such case, the estate is the defendant, and is necessarily represented by the parties opposing the administrator's claim, and the administrator cannot testify as a matter of right. The facts in this case were not such as to take it out of the general rule, and permit the plaintiff to testify as a matter of justice, and, therefore, his testimony was properly excluded. *Tuck v. Nelson*, 62 N. H. 469.

In a Proceeding To Sell Land the administrator is incompetent as to transactions with decedent in support of his own claim. *Davis v. Tarver*, 65 Ala. 98.

In an action, by creditors of an estate in which there is a deficiency of assets to meet debts, to set aside alleged fraudulent conveyances of

property during his lifetime by the deceased to the party executrix of the estate, and subject such property to the payment of debts of deceased, the executrix is incompetent, under the provisions of § 329 of the Code of Civil Procedure, to testify to the transaction or agreement from which the conveyance originated. *David Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877.

In *In re Neil's Estate*, 35 Misc. 254, 71 N. Y. Supp. 840, it was held that an administrator is incompetent to testify as to payments made by his intestate on a claim presented by himself, against the intestate.

Proceedings for Removal.—An administrator is not a competent witness in his own behalf in the proceedings by an heir for his removal when his appointment depends upon the validity of his alleged claim against the estate. *Henderson v. Treadway*, 69 Ill. App. 357.

30. *Taylor v. Mayhew*, 11 Heisk. (Tenn.) 596. See also *Shipley v. Mercantile Tr. & Dep. Co.*, 102 Md. 649, 62 Atl. 814; *Wilson v. Terry*, 70 N. J. Eq. 231, 62 Atl. 310.

In an action by a husband in his individual capacity and as administrator of his deceased wife against the sisters and heirs of the decedent to have a deed from himself to his wife declared a mortgage, plaintiff is not a competent witness in his own behalf individually to establish his claim. In such a proceeding the interest of the administrator is adverse to that of the mortgagor because it seeks to compel the administrator to account to the plaintiff under the mortgage. "Regularly, therefore, the representative would be a party defendant in such suit, not a party complainant. And the fact that plaintiff is himself the representative and must therefore be complainant in that character does not make the evidence given by complainant tending to establish his claim against the personal estate evidence given by the representative on his own behalf, *i. e.*, on behalf of the estate." *Wilson v. Terry*, 70 N. J. Eq. 231, 62 Atl. 310, *distinguishing*

course has no application to a proceeding in which the adverse party is not one protected by the statute.³¹

To Explain His Debt to Decedent.—A representative is incompetent to explain or disprove an apparent indebtedness to the decedent.³²

d. Against Interest.—(1.) **Generally.**—The administrator is competent to testify against his own interest,³³ or the interest of the estate which he represents.³⁴

(2.) **As Against Protected Co-Party.**—It has been held that while a protected party may, so far as he himself is concerned, testify for the adverse party as to conversations between himself and the decedent, he cannot do so as against his co-parties also entitled to the protection of the statute.³⁵ This rule, however, seems to conflict with the general rule, elsewhere stated,³⁶ that testimony against interest is competent.

E. IN ACTIONS INVOLVING VALIDITY OF WILL.—a. *Generally.* Whether the personal representative of the decedent is incompetent in an action or proceeding involving the validity of the will, depends upon whether such a proceeding is deemed to be within the statute,³⁷ and if so, whether the representative is held to be a party to³⁸ or interested in³⁹ such proceeding within the meaning of the statute, and whether merely being a party is sufficient to disqualify him.⁴⁰

b. *On Probate or Contest of Will.*—(1.) **As Party.**—As to

McKinley v. Coe, 66 N. J. Eq. 70, 57 Atl. 1030.

31. Thus an executor, who, in his individual capacity, has entered a traverse to the return of the commissioners assigning dower to the widow in certain lands, and who denies the decedent's title, is competent in his own behalf since the estate is not represented and would not be bound by any judgment rendered. *Flowers v. Flowers*, 92 Ga. 688, 18 S. E. 1006.

32. A son executed a mortgage to his father and duly acknowledged delivery before a master in chancery, and thereafter caused it to be registered. After his father's death, being the executor of his father's will, he admitted that he was then indebted to his father's estate, among other moneys, in the amount of the mortgage. Four years thereafter, while the estate remained unsettled, he wrote upon the mortgage that he as executor had received payment in full of both principal and interest, and then caused the registry of the mortgage to be canceled. *Held*, that in such case he was not competent to show by his own testimony that the

mortgage was a mere security for his payment of notes that the testator had endorsed for him. *Terhune v. Oldis*, 44 N. J. Eq. 146, 14 Atl. 638.

33. *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243. See *infra*, VII.

34. *Robnett v. Robnett*, 43 Ill. App. 191 (for opposite party).

35. *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771, holding that one of the plaintiff heirs of the decedent could not testify against her co-plaintiffs as to transactions with the decedent on behalf of the defendants claiming as the decedent's donees, even though her interest was adverse to such defendants, and citing *LeClare v. Stewart*, 8 Hun (N. Y.) 127; *Howell v. Taylor*, 11 Hun (N. Y.) 214; *Cornell v. Cornell*, 12 Hun (N. Y.) 312; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235; *Gifford v. Sackett*, 15 Hun (N. Y.) 79; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156.

36. See *infra*, VII.

37. See *supra*, III, 6, E, c.

38. See *infra*, IV, 16, E, b, (1.).

39. See *infra*, IV, 16, E, b, (2.).

40. See *supra*, IV, 2, F.

whether an executor who is the proponent of the will for probate is a party to the proceedings within the meaning of the statute, and therefore incompetent as such, the cases are not in harmony, some holding that he is⁴¹ and others that he is not.⁴² The fact that the executor as well as the adverse party is incompetent by virtue of the statute does not disqualify him in such a proceeding, since he is not yet executor.⁴³

(2.) **Interest.**—The mere fact that a person is named in the will as executor does not give him a disqualifying interest in a proceeding for its probate,⁴⁴ though it is held to the contrary.⁴⁵ He is not an interested witness merely because he would be entitled to compensation as executor.⁴⁶ Where, however, the executor is also a beneficiary under the will he is an interested witness and incompetent as such,⁴⁷ unless the statute is deemed not to apply to such a proceeding.⁴⁸

(3.) **Estoppel.**—It has been held that on the contest of a will the contestant is estopped to deny the competency of the executor to

41. *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688; *Smith v. Smith*, 168 Ill. 488, 48 N. E. 96; *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124.

An executor in a nuncupative will proposing it for probate is not competent to prove the will. *Watts v. Holland*, 56 Tex. 54.

42. *Delaware.*—*In re Spiegelhalter's Will*, 1 Penne. 5, 39 Atl. 465.

Maryland.—*Schull v. Murray*, 32 Md. 9.

New Jersey.—*In re McLaughlin's Will*, 59 Atl. 469; *Grant v. Stamler*, 68 N. J. Eq. 555, 59 Atl. 890.

New York.—*In re Will of Wilson*, 103 N. Y. 374, 8 N. E. 731; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874.

Tennessee.—See *Davis v. Davis*, 6 Lea 543.

43. *McKeen v. Frost*, 46 Me. 239; *Millay v. Wiley*, 46 Me. 230.

44. *In re Gagan's Will*, 20 N. Y. Supp. 426; *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522.

45. An executor is interested in sustaining the will of his testator and is therefore incompetent against the contesting heirs. *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620.

46. *In re Will of Wilson*, 103 N.

Y. 374, 8 N. E. 731; *Rugg v. Rugg*, 83 N. Y. 592; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238; *In re Folts' Will*, 71 Hun 492, 24 N. Y. Supp. 1052.

On a will contest, the person named as executor in the will is not thereby rendered an incompetent witness under § 4367 Rev. Stat. 1899. But the fact that the will directs and empowers him to collect certain notes, and after payment of certain debts apply the remainder according to verbal instructions known only to himself, gives him a substantial interest in sustaining the will, "and we are not prepared to say that he was a competent witness." *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522 (*citing Miltenberger v. Miltenberger*, 78 Mo. 27), *holding*, however, that the plaintiff contesting the will was estopped to deny the competency of the executor on the ground of his interest, and at the same time deny the validity of the will appointing him.

47. An executor, who is also a devisee under the will, is incompetent to testify in his own behalf in an action by the heirs at law against the executor and devisees to set aside the will. *Rich v. Bowker*, 25 Kan. 7.

48. See *supra*, III, 6, E, c.

A statute disqualifying an executor, interested in the estate, from

testify on the ground of interest, while at the same time denying the validity of the will appointing him.⁴⁹

(4.) **Executor Named in Prior Will.** — A person named as executor in a prior will and who is not entitled to compensation for such services, is not an interested witness in a contested proceeding to probate a later will.⁵⁰

F. ACCOUNTING. — a. *Generally.* — An accounting by the representative of a deceased or incompetent person is a proceeding to which the disqualifying statutes apply;⁵¹ and the representative is incompetent in so far as his interests are adverse to the interests of the estate;⁵² hence where it is sought to charge him with the value of property omitted from the inventory,⁵³ or to compel him

proving the will, has no application to a contested proceeding. *Hays v. Ernest*, 32 Fla. 18, 13 So. 451.

49. *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522.

50. In a proceeding against an executor and legatee by heirs of the decedent to set aside the will, the executor named in a prior will was held a competent witness for the contestants although objected to as an interested party, and therefore incompetent against the executor and legatee. It appeared, however, that the witness under a prior agreement with the decedent for a consideration then paid was legally obliged to act as executor without compensation, and therefore would not be benefited if the later will were set aside and the former one in which he was named as executor were admitted to probate. It further appeared that the witness had filed the prior will but would not be liable for the costs thereof in the event that the later will was declared valid, because in so doing he had acted in good faith and not for his own interest. *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19.

51. *Trowbridge v. Stone's Admrs.*, 42 W. Va. 454, 26 S. E. 363; *In re Woodward*, 69 App. Div. 286, 74 N. Y. Supp. 755; *Tichenor v. Tichenor*, 43 N. J. Eq. 163, 10 Atl. 867. But see *In re Raab's Estate*, 16 Ohio St. 274; *Bolton v. Smead*, 38 Barb. (N. Y.) 141 (*holding* the contrary under a former statute).

52. *Miller v. Montgomery*, 78 N. Y. 282; *In re Smith*, 75 App. Div. 339, 78 N. Y. Supp. 130; *Sanderson v. Sanderson*, 17 Fla. 820; *Ela v. Ed-*

wards, 97 Mass. 318. See also *Granger v. Bassett*, 98 Mass. 462.

In *Smith v. Burnet*, 34 N. J. Eq. 219, 35 N. J. Eq. 314, the court held that where, upon exceptions being filed to an account of an executor on the ground that he has not charged himself with certain shares of stock, the executor claims the stock by virtue of a gift from the deceased, he is not a competent witness to prove a delivery to him of the stock by the deceased.

On an accounting between the executor and the legatees he is incompetent to prove that his own note in favor of the decedent, inventoried by him, was an advancement by the testator, though he is competent to show why it was inventoried. *Williams v. McDowell*, 54 Ga. 222.

53. On a proceeding to require an executor to disclose assets of the estate alleged to be in his possession, and which he has not inventoried, he is not a competent witness in his own behalf against the petitioning heir or legatee as to facts occurring before the testator's death. *Booth v. Tabbenor*, 23 Ill. App. 173.

An executrix is not a competent witness in her own behalf as to transactions with her decedent in a proceeding to charge her with money claimed by her, but alleged to belong to the decedent. *Carlin v. Carlin* (N. J.), 64 Atl. 1018, *following Smith v. Burnet*, 35 N. J. Eq. 314.

The representative is not a competent witness to prove a contract or transaction with the decedent whereby the witness acquired title from the decedent to the property in question. *In re Irwin's Estate*, 160 Pa.

to inventory the same,⁵⁴ or to charge him with a debt due the decedent,⁵⁵ he is subject to the statutory disqualification. He may, however, explain the items of his account.⁵⁶ In a proceeding to require him to disclose assets, he is incompetent in his own behalf under the statute.⁵⁷ But the disability only extends to matters prohibited by the statute, such as transactions with decedent or matters occurring before the latter's death; the representative is therefore competent to explain his accounts and conduct as such where his testimony does not relate to prohibited matters.⁵⁸ Thus he is competent to prove his payment of a legacy to a legatee, since deceased.⁵⁹ So, too, he is competent on behalf of other parties in whose claims he is not interested.⁶⁰

b. *To Establish a Claim Already Paid.* — Where the representative has allowed and paid a claim against the estate, he has been held incompetent in his own behalf to afterwards establish such claim for the purpose of securing credit for the disbursement,⁶¹

St. 82, 28 Atl. 505. In this proceeding creditors of a decedent claimed that the administratrix should be surcharged with the value of two horses omitted from the inventory. The testimony of the administratrix, who was also decedent's wife, that prior to her husband's death she acquired ownership of the horses in question through a contract with the decedent and gave them to her sons, was held improperly admitted. The fact that the interest of the witness was not adverse to that of the decedent was held not a proper test of her competency, the ground of disqualification being that the other party to the contract, her husband, was dead.

54. *Tygard v. Falor*, 163 Mo. 234, 63 S. W. 672.

55. *Bierly's Estate*, 81 Pa. St. 419; *Strange v. Graham*, 56 Ala. 614; *Tichenor v. Tichenor*, 43 N. J. Eq. 163, 10 Atl. 867; *Whitesides v. Green*, 64 N. C. 307; *Strange v. Graham*, 56 Ala. 614.

In a proceeding by legatees to charge the executor with debts due the estate, such legatees are competent witnesses as to matters occurring in the life of the testator, but the executor is not competent as to such matters. *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562.

56. On final settlement of the accounts of the administrator, the creditors seeking to charge him with the rent of the land which belonged

to the intestate, and which the administrator himself had cultivated the last year of the intestate's life, the administrator may testify that certain bales of cotton with which he charged himself in the account, were on account of the rent of the lands that year. *Strange v. Graham*, 56 Ala. 614. See *Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185.

57. *Booth v. Tabbenor*, 23 Ill. App. 173. But see *Cooke v. Cooke*, 29 Md. 538.

58. *Finch v. Creech*, 55 Ga. 124; *Stewart v. Glenn*, 58 Mo. 481; *Strange v. Graham*, 56 Ala. 614.

An administrator is competent to prove the debts of estate showing the necessity of selling property to pay them. *Finch v. Creech*, 55 Ga. 124.

59. *Granger v. Bassett*, 98 Mass. 462; *Bassett v. Granger*, 103 Mass. 177.

60. On the trial of exceptions made by some of the heirs to his report for failing to inventory certain property claimed by them to be a part of the estate, the administrator is a competent witness in favor of other heirs who claim that the property in question had been given to them by their deceased ancestor. *Yokem v. Hicks*, 93 Ill. App. 667.

61. On an accounting by an executor he is not a competent witness in support of a charge against the estate for moneys paid to discharge a claim against the estate, as to conversations between himself and dece-

though the contrary has been held except as to his own individual claim.⁶²

G. AS TO NON-PROHIBITED MATTERS. — Even though incompetent the disability extends only to those matters prohibited by the statute; as to all other matters the representative is competent for himself⁶³ or for the estate.⁶⁴

17. Heirs and Distributees. — A. GENERALLY. — An heir or distributee is not disqualified by reason of being a party or interested,⁶⁵ unless the adverse party is one protected by the statute,⁶⁶ or the action is one falling within a statute disqualifying all parties or interested persons.⁶⁷ Where he is neither a party nor interested he is of course competent,⁶⁸ except where the statute is construed to include such persons.⁶⁹

In an action by or against the personal representative of a decedent which may result in increasing or diminishing the assets of the estate, an heir or distributee of the latter is an interested person within the meaning of the statute,⁷⁰ and is therefore incompetent against an adverse party protected by the statute.⁷¹ Under some statutes, however, it is held that an heir is only disqualified in such an action when he is also a party,⁷² or a necessary party⁷³ thereto.

dent, in which the latter acknowledged the validity of the claim paid. *In re Smith*, 153 N. Y. 124, 47 N. E. 33.

Where an administrator has paid an unpreferred claim against the estate, which afterwards proved to be insolvent, both he and the claimant, because of interest, are incompetent as witnesses to establish the claim. *Hullett v. Hood*, 109 Ala. 345, 19 So. 419.

One executor of a will is not a competent witness to prove an allowance made to his co-executor for services rendered deceased. *Noble v. Jackson*, 124 Ala. 311, 26 So. 955.

62. *Sanderson v. Sanderson's Admrs.*, 17 Fla. 820. Compare *In re Eacott*, 95 Me. 522, 50 Atl. 708.

63. On an application by an administrator for the substitution of a record alleged to be lost or destroyed, being an annual or partial settlement of his accounts, he is a competent witness for himself to prove the correctness of the record proposed to be substituted; such evidence is not proof of a transaction with the deceased within the meaning of the statute. *Lilly v. Larkin*, 66 Ala. 110.

64. *Hinchman v. Parlin & Orendorff Co.* 74 Fed. 698.

65. See *supra*, IV, 16.

66. See *supra*, IV, 16; *Sheldon v. Carr*, 139 Mich. 654, 103 N. W. 181 (incompetent against grantee of decedent in action to set aside the conveyance or declare a trust); *Garrott v. Rives*, 26 Ky. L. Rep. 10, 80 S. W. 519; *Penny v. Croul*, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

67. See *supra*, IV, 2, B.

68. *Korminsky v. Korminsky*, 2 Misc. 138, 21 N. Y. Supp. 611, and see *supra*, IV, 1.

69. See *supra*, IV, 13, and *infra*, VII, 1, A.

70. *Tucker v. Gentry*, 93 Mo. App. 655, 67 S. W. 723; *Warfield v. Hume*, 91 Mo. App. 541; *Randall v. Phillips*, 3 Mason 378, 20 Fed. Cas. No. 11,555; *Conner v. Root*, 11 Colo. 183, 17 Pac. 773; *Cushman v. Blakesly*, 3 Greene (Iowa) 542.

71. *Manion's Admr. v. Lambert's Admx.*, 10 Bush (Ky.) 295.

The heirs of the decedent, in an action against his administrator based upon the decedent's alleged failure to perform his duty as their guardian, cannot testify as to transactions with him. *Dunn v. Beaman*, 126 N. C. 764, 36 S. E. 174.

72. *McCoy v. Ayers*, 2 Wash. Ter. 307, 5 Pac. 843.

73. *Michigan Trust Co. v. Pro-*

Where, however, the adverse party is not one protected by the statute, an heir or distributee is competent in his own behalf notwithstanding his interest,⁷⁴ unless the statute disqualifies interested persons generally as to transactions with a decedent without regard to whether the latter's estate is represented in the action.⁷⁵ A statute disqualifying both parties to actions by or against executors or administrators serves to exclude heirs and distributees who though not actual parties of record are interested in such an action;⁷⁶ where they are parties they are of course incompetent.⁷⁷ So, also, an heir is incompetent in an action by or against him, under a statute disqualifying both parties to actions by or against heirs.⁷⁸ But a statute merely disqualifying the opposite party in such actions does not render the heir incompetent.⁷⁹

B. PROBATE OR CONTEST OF WILL.—Under some statutes an heir is held not incompetent on the probate or contest of a will;⁸⁰ the general rule, however, is to the contrary.⁸¹

C. CLAIMING ADVERSELY TO REPRESENTATIVE OR OTHER PROTECTED PARTY.—Where the heir is claiming or is interested adversely to the representative or other protected party, he is not competent in his own behalf.⁸²

D. EFFECT OF INSOLVENCY OF ESTATE.—Where the estate is insolvent and would continue so regardless of the outcome of the

basco, 29 Ind. App. 109, 63 N. E. 255. But see *McDonald v. Jacobs*, 77 Ala. 524.

74. *Gunnison v. Lane*, 45 Me. 165.

75. *Manahan v. Halloran*, 66 Minn. 483, 69 N. W. 619.

76. *McCrary v. Rush*, 60 Ala. 374.

77. *Kirksey v. Kirksey*, 41 Ala. 626; *Fort v. Davis*, 67 Ala. 481; *Davis v. Tarver*, 65 Ala. 98.

78. Under such a statute in an action against an heir on a warranty in a deed executed by the ancestor, the heir is not competent to testify that the real consideration for the deed was different from that recited therein. *Sachse v. Loeb* (Tex. Civ. App.), 101 S. W. 450.

79. *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4.

80. *Nash v. Reed*, 46 Me. 168; *In re McCoy's Will*, 64 Neb. 150, 89 N. W. 665; and see fully *supra*, III, 6, E, c (1).

81. *In re Dunham*, 121 N. Y. 575, 24 N. E. 932; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493. And see *supra*, III, 6, E, c (1.).

82. *Ivers v. Ivers*, 61 Iowa 721, 17 N.-W. 149.

Samson v. Samson, 67 Iowa 253, 25 N. W. 233, which was an action by the widow and administratrix to recover alleged assets claimed by the defendant heirs under an alleged contract with the decedent, defendants were held incompetent to prove the delivery of the alleged agreement.

Where an heir brought suit against the administrator and other heirs of his father's estate on an alleged claim against deceased, it was held that plaintiff was not a competent witness in his own behalf, under § 606 of the code, as to any transactions or conversations had with deceased, unless the defendants were present and testified in regard thereto. *Carpenter v. Carpenter*, 23 Ky. L. Rep. 2180, 66 S. W. 814.

In an Action Against an Administrator and a judgment creditor of the intestate to set aside as fraudulent the confession of such creditor's judgment, a distributee of the intestate is interested in the success of the action and is therefore incompetent against the administrator as to transactions between the witness and the decedent. *Roe v. Harrison*, 9 S.

action, the heir or distributee has no disqualifying interest.⁸³ It has been held, however, that this rule does not apply until the question of insolvency has been judicially determined.⁸⁴

E. ACTION BY OR AGAINST HEIR. — a. *Generally*. — An action by or against an heir is not an action by or against an executor or administrator within the meaning of a statute disqualifying both parties to the latter class of actions.⁸⁵

b. *Other Heir Not a Party*. — An heir who is not a party has no disqualifying interest in an action by or against another heir, since the record would not be evidence for or against him.⁸⁶

18. **Legatee or Devisee**. — A. **GENERALLY**. — A beneficiary under a will has a disqualifying interest in actions by or against the estate which may result in increasing or diminishing its assets,⁸⁷ and is therefore incompetent where the statute disqualifies all persons interested in such an action,⁸⁸ or where the opposite party is protected against the testimony of an interested witness.⁸⁹ Such a person, however, is competent against his own interest and may therefore testify for a party adverse to the representative of the estate in which the witness is interested.⁹⁰ Where the legatee or devisee has received all of the estate to which he is entitled, he no longer has a disqualifying interest in actions by or against the estate.⁹¹

B. PROBATE OR CONTEST OF WILL. — In some states it is held

C. 279. See *supra*, III, 6, D, b, (8.), (C.).

83. *Lathrop v. Hopkins*, 29 Hun (N. Y.) 608; *Gidney v. Logan*, 79 N. C. 214.

84. While the interest which a distributee has in a proceeding to increase the assets of the estate is destroyed by the fact that the estate will be insolvent notwithstanding such increase of assets, the insolvency must have been judicially determined in some other action so as to estop the witness from disputing it. "Insolvency could not be determined as an incident merely to the question of the interest of the witness in the event of the suit. Such a proceeding would be without precedent and incompatible with ordinary procedure," and is not consistent with the statute which excludes "any person who has a legal interest which may be affected by the event of the action." *Roe v. Harrison*, 9 S. C. 279.

85. *O'Neal v. Breecheen*, 5 Baxt. (Tenn.) 604, *holding* that the heir was therefore competent in an action against himself where the adverse

party was not an executor or administrator.

86. *Muir v. Miller*, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032.

In an action by one heir against his ancestor's grantee to set aside a conveyance, other heirs who are not parties to the action are not interested therein because the judgment would be evidence neither for nor against them, and they are therefore competent witnesses as to transactions with the decedent. *Hobart v. Hobart*, 62 N. Y. 80.

87. A **Residuary Legatee** is a party in interest to an action against the estate, the result of which may be to diminish the estate. *Westcott v. Westcott's Estate*, 69 Vt. 234, 39 Atl. 199.

88. *McDonald v. Harris*, 131 Ala. 359, 31 So. 548, *overruling* *Austin v. Bean*, 101 Ala. 133, 16 So. 41; *Harwood v. Harper*, 54 Ala. 659.

89. *Stodder v. Hoffman*, 158 Ill. 486, 41 N. E. 1082.

90. *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

91. *Brown v. Klock*, 52 Hun 613, 5 N. Y. Supp. 245.

that on the probate or contest of a will a legatee or devisee is not incompetent against the contesting heirs.⁹² It is generally held, however, that he has a disqualifying interest in such a proceeding,⁹³ especially where he is a party.⁹⁴ But his competency depends further upon whether the statute is deemed to apply to such a case, a matter elsewhere discussed.⁹⁵

C. EFFECT OF FORMER WILL. — Where there is a prior will the interest of a legatee or devisee under the will in contest depends to some extent upon the nature of his interest under a former will, that is, whether the share of the witness would be more or less under the prior than under the later will.⁹⁶

19. Advancements. — On the issue whether a person has received certain alleged advancements from the decedent, such person is not competent against the representative or other protected parties,⁹⁷ though the contrary has been held.⁹⁸ This rule does not apply to actions which are not within the scope of the statute.⁹⁹

20. Widow. — **A. GENERALLY.** — A widow is not a competent

⁹². *Schofield v. Walker*, 58 Mich. 96, 24 N. W. 624; *In re Disbrow's Estate*, 58 Mich. 96, 24 N. W. 624; *Milton v. Hunter*, 13 Bush (Ky.) 163.

⁹³. *In re Wiltsey's Will*, 122 Iowa 423, 98 N. W. 294; *French v. French*, 14 W. Va. 458; *In re Tobin*, 196 Ill. 484, 63 N. E. 1021; *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874. And see *supra*, III, 6, E, c (1.).

⁹⁴. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606.

Proving Nuncupative Will. — In a proceeding by the legatees and devisees in an alleged nuncupative will to establish such will, they are not competent against the adverse parties, the heirs of the decedent, to prove the alleged will, since their testimony would be wholly concerned with statements by and transactions with the decedent. *Lewis v. Aylott*, 45 Tex. 190.

⁹⁵. See III, 6, E, c, (1.).

⁹⁶. *In re Worth's Will*, 129 N. C. 223, 39 S. E. 956, holding a legatee competent for the contestant where there was nothing to show that her share under the former will was greater than under the will in contest.

⁹⁷. *Ballinger v. Connable*, 100 Iowa 121, 69 N. W. 438; *Crafton v. Inge*, 30 Ky. L. Rep. 313, 98 S. W. 325; *Wolfe v. Kable*, 107 Ind. 565,

8 N. E. 559; *Dille v. Webb*, 61 Ind. 85.

⁹⁸. On the hearing of an appeal from an order of the probate court made in a proceeding, under How. Stat. § 5978, which provides that all questions as to advancements to any of the heirs may be heard and determined by the probate court, and shall be specified in the decree assigning the estate, a question was made whether or not the heirs were competent witnesses. It was held that the proceeding was not one in which the estate was on one side and the appellant (one of the heirs) on the other, as it must be in order to require exclusion of the testimony under How. Stat. § 7545, as adversely interested to the representative of the testator's estate; that, if there were any parties in opposition, each legatee was opposite to every other legatee; that it could make no difference to the executor, as such, into whose hands the assets fell; that no reason existed why all the legatees might not be allowed or compelled, as the case might be, to testify concerning the advances, which were not treated as debts, but as gifts to apply on legacies. *In re McClintock's Appeal*, 58 Mich. 152, 24 N. W. 549.

⁹⁹. *O'Neal v. Breechen*, 5 Baxt. (Tenn.) 604.

witness in her own behalf as to prohibited matters, against her deceased husband's representatives or successors protected by the statute.¹ Thus in an action between herself and the heirs claiming as such, she cannot testify in her own behalf as to transactions with the decedent or other matters within the prohibition of the statute.² She has no interest, however, in an issue between the heirs as to alleged advancements to one of them.³ Nor is she incompetent in any other proceeding by or against her husband's representatives or successors to which she is neither a party nor interested.⁴ Where the adverse party is not protected by the statute she is of course fully competent;⁵ thus where the heir, though an adverse party is not made such as heir the widow is competent in her own behalf.⁶

In a proceeding involving the validity of the will⁷ or for the

1. *Shipley v. Mercantile Tr. & Dep. Co.*, 102 Md. 649, 62 Atl. 814; *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320; *Fairchild v. Fairchild* (N. J. L.), 44 Atl. 944. See *Master v. Zimmerman*, 7 Ill. App. 156.

2. *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. 870 (claiming as grantee of her husband); *Huit v. Huit*, 122 Iowa 338, 98 N. W. 123; *Schaurer v. Schaurer*, 20 Ky. L. Rep. 1153, 48 S. W. 1087.

Where a widow who had been the second wife of her deceased husband, brings suit against the children by his first marriage, claiming an interest in certain real estate on the ground that her deceased husband had invested her money, held by him as such, in the property, which her labor and economy had assisted in improving, she cannot testify of her own motion as to matters occurring prior to the death of the ancestor. *Noble v. Withers*, 36 Ind. 193.

Action To Set Aside Antenuptial Contract.—In an action by a widow against the heirs of her deceased husband to set aside an antenuptial contract, she is incompetent by reason of interest. *Murdock v. Murdock*, 121 Ill. App. 429.

3. *Galbraith v. McLain*, 84 Ill. 379; *Spradling v. Conway*, 51 Mo. 51.

In an action for partition by the heirs of a landowner, his widow though a party to the record, is competent to testify to the statements of her husband concerning advancements made to one of the heirs, if no objection is made that such statements are confidential, and for that

reason incompetent. Advancements made by her husband in no way affect her rights to one-third of his real estate, and she has no interest in the controversy in relation to such advancement. *Scott v. Harris*, 127 Ind. 520, 27 N. E. 150.

4. *Pratt v. Delavan*, 17 Iowa 307; *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; *Keyes v. Gore*, 42 Ohio St. 211; *Blohme v. Lynch*, 26 S. C. 300, 2 S. E. 136.

In an action by the plaintiffs to recover their interests as tenants in common with the defendants to certain land in controversy, the defendants claiming title thereto by deed from their common ancestor, the widow of such ancestor was held competent for the defendants to prove a certain transaction with the deceased since she was neither a party to the action nor interested in the event thereof. *Wetherington v. Williams*, 134 N. C. 276, 46 S. E. 728.

5. *Tracy v. Kelley*, 52 Ind. 535.

6. As to when an heir is suing or defending in a representative capacity, see *supra*, III, 6, D, c.

The demandant in a writ of dower is a competent witness in her own behalf, although the tenant holds the estate by inheritance from his father, the demandant's late husband. The son is not "made a party as an heir," but is a party because he is the tenant of the estate, and therefore the inhibition of the statute does not apply. *Wentworth v. Wentworth*, 71 Me. 72.

7. *In re Evans' Estate*, 114 Iowa

distribution of the estate⁸ she is incompetent where the adverse party is protected by the statute, unless such proceedings are held not to be within the scope of the statute,⁹ or her interests are conflicting and equally balanced.¹⁰

Where the decedent's grantee is protected by the statute the widow is incompetent in an action by her against such grantee to set aside the deed.¹¹ So, also, she is interested in an action by the heirs to set aside the decedent's conveyance in which she joined, where she would be thereby restored to her dower or corresponding interest in the property.¹²

B. FOR OR AGAINST REPRESENTATIVE.—The widow though interested in actions brought or defended by the administrator for the benefit of the estate,¹³ is competent in his behalf,¹⁴ unless the adverse party is protected by the statute,¹⁵ and even in the latter case if not a party she is not incompetent where parties only are excluded,¹⁶ or in any event her disability extends only to the prohibited matters.¹⁷ She is competent for a third person claiming adversely to the estate.¹⁸

In actions by or against her to which the administrator is an adverse party she is incompetent, to the extent provided by statute,¹⁹

240, 86 N. W. 283 (action by her to set aside will); *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 756; *Steele v. Ward*, 30 Hun (N. Y.) 555; *Wisener v. Maupin*, 2 Baxt. (Tenn.) 342; *In re Perkins' Estate*, 109 Iowa 216, 80 N. W. 335.

8. See *supra*, III, 6, E, d., and *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320.

In an action of ejectment by one claiming as the common law wife of a decedent, against his heirs and the tenants of his administrator, all of whom deny the marriage, the plaintiff is incompetent to testify to matters equally within the knowledge of the decedent. *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609.

9. See *supra*, III, 6, E, c, and *Birmingham S. R. Co. v. Cuzzart*, 133 Ala. 262, 31 So. 979.

10. *Talbot v. Talbot*, 23 N. Y. 17.

11. *Palmer v. Palmer*, 62 Iowa 204, 17 N. W. 463.

12. *Sanford v. Ellithorp*, 95 N. Y. 48.

13. *Rairdon v. Sampson*, 67 N. J. L. 346, 51 Atl. 696; *Elliott v. Banks*, 115 Ga. 926, 42 S. E. 218.

14. *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357; *Cincinnati, H. & I. R. Co. v. Cregor*, 150 Ind. 625, 50

N. E. 760; *Adams v. Jones*, 39 Ga. 479; *Walker v. Sanborn*, 46 Me. 470; *Litchfield v. Merritt*, 102 Mass. 520.

In a suit against an administrator upon a claim against the estate, based on a promissory note alleged to have been executed by the decedent, the widow of decedent, whose interest is not opposed to the estate, may testify for the administrator. *Lewis v. Buskirk*, 14 Ind. App. 439, 42 N. E. 1118. See *Denbo v. Wright*, 53 Ind. 226; *Floyd v. Miller*, 61 Ind. 224.

15. See *infra*, V, and *Elliott v. Banks*, 115 Ga. 926, 42 S. E. 218.

16. *Rairdon v. Sampson*, 67 N. J. L. 346, 51 Atl. 696.

17. *Elliott v. Banks*, 115 Ga. 926, 42 S. E. 218.

18. *Robnett v. Robnett*, 43 Ill. App. 191; *Robb's Appeal*, 98 Pa. St. 501.

19. *Adoue v. Spencer*, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817; *Palmer v. Hanna*, 6 Colo. 55; *Lynam v. Buckner*, 60 Ind. 402; *Clawson v. Riley*, 34 N. J. Eq. 348; *Randall's Admr. v. Randall*, 64 Vt. 419, 24 Atl. 1011; *Ullman v. Abbott*, 10 Wyo. 97, 67 Pac. 467 (proceeding to have homestead set aside for her use).

though she is not disqualified in a proceeding against the administrator for funds in his hands for distribution.²⁰

21. Guardian and Ward. — A. GENERALLY. — It has been held that a guardian in an action by him in his representative capacity is incompetent against the representative of a decedent.²¹

Under a statute disqualifying both parties to an action by or against a guardian, the latter is incompetent in such an action.²² The ward has been held incompetent against his guardian's estate or surety under a statute disqualifying the surviving party to the contract or thing in action.²³

B. GUARDIAN AD LITEM OR NEXT FRIEND. — A guardian *ad litem* or next friend is not a party to an action in which he appears merely in his representative capacity, within the meaning of the

20. *Sherwood v. Thomasson*, 124 Ind. 541, 24 N. E. 334.

21. *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771; *Ellis v. Stewart* (Tex. Civ. App.), 24 S. W. 585. See *Crawford v. Parker*, 96 Ga. 156, 23 S. E. 196; *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656.

In an action by an incompetent through her guardian against the administrators of the incompetent's deceased husband to establish a trust in property purchased by the decedent with the incompetent's money, the guardian is not a competent witness as to transactions with the decedent because he is an interested party, being liable for costs and entitled to commissions in the management of the property recovered. *Holloway v. Wilkerson* (Ala.), 43 So. 731.

Doty's Admr. v. Doty's Guardian, 26 Ky. L. Rep. 63, 80 S. W. 803, was an action by the guardian of an infant against an administrator to enforce an alleged contract made by the decedent with the guardian prior to the latter's appointment, agreeing to convey certain land to the ward. It appeared that the ward was the illegitimate son of the decedent and the guardian, and that the decedent's agreement had been made in consideration of the mother's promise to allow the child to live with the father until the latter's death. The guardian was held a competent witness to testify on behalf of herself and ward as to the alleged contract of the decedent, although objected to as incompetent under § 606 Civ. Code for the rea-

sons that she was liable for the costs of the action and also entitled to compensation for her services as guardian and therefore an interested party, and that she was the real actor in the suit. It was held that the guardian under the law was not personally liable for the costs of the action, and that the fact that she was entitled to compensation did not give her such an interest as would make her an interested party as that term is used with reference to witnesses, the interest being not direct and immediate, but too remote (*citing* 1 Greenl. Ev. § 390). It was further held that although a guardian was an indispensable party to the suit she was not thereby disqualified as a witness, since "it is interest in fact in the controversy that disqualifies a witness, and not the mere fact that he is or is not a party to the action." However, when a guardian sues in his own name on a contract made with him in that capacity he cannot testify for himself as to a transaction with one who is dead, "for there he is personally liable for the negligent loss of the ward's estate and for the costs, or for any misconduct as guardian." The contract in the case at bar though made by the guardian was made prior to her appointment as such. The court *distinguishes* *Mason v. McCormick*, 75 N. C. 263, as decided under a broader statute disqualifying parties generally.

22. *Garwood v. Cooper*, 12 Heisk. (Tenn.) 101.

23. *In re Miller's Estate*, 26 Pittsb. Leg. J. (N. S.) 344.

statute disqualifying a party.²⁴ A mere contingent liability for costs does not constitute an interest which will disqualify such a person,²⁵ but where such liability is dependent merely on the outcome of the action it has been held to be a disqualifying interest.²⁶ He is not incompetent to establish the claim of the person represented by him, under a statute disqualifying a person as a witness to establish his own claim.²⁷

22. Partner. — A. GENERALLY. — In actions by or against a partnership or in which it is interested, the partners are both parties²⁸ and interested persons.²⁹ They are incompetent by reason of interest in proceedings involving the validity of their claim against

24. *Trahern v. Colburn*, Exr., 63 Md. 99; *Neale v. Hermanns*, 65 Md. 474, 5 Atl. 424; *Illinois Cent. R. Co. v. Becker*, 119 Ill. App. 221; *Kilpatrick v. Strozier*, 67 Ga. 247; *Mason v. McCormick*, 75 N. C. 263. But see *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656.

A guardian *ad litem* is not a party to a suit, being simply a party *pro forma* and is not, in contemplation of the statute, a guardian for or against whom judgment may be rendered, and is, therefore, competent to testify as to transactions had with the deceased person through whom the other party claims. *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185.

In a proceeding to contest a will where the contestants appear by their next friend, the latter is not an incompetent witness in their behalf, under the statute providing that in actions against representatives of the decedent a party to the action shall not be competent to testify to transactions with the decedent. The next friend in such case is not a party to the case, within the meaning of the statute, which should not be construed to exclude any one who was competent at common law. *Johnson v. Johnson* (Md.), 65 Atl. 918.

A guardian *ad litem* is not a party to the suit within the meaning of the statute even though interested therein because of his liability for costs, the disability of interest being removed. *Phillips v. Russell's Admr.*, 24 Mo. 527.

25. § 3348 of the Revised Statutes provides that in actions prosecuted

or defended by persons expressly authorized by statute to act, costs shall be chargeable only to the persons represented, unless the court directs them to be paid by the representatives for mismanagement or bad faith in the action. *Held*, that the contingent liability for costs does not render a guardian *ad litem*, who is contesting the probate of a will in the interest of two minor children of the testator, incompetent to testify for the minors as to facts equally within the knowledge of the guardian and testator, under R. S. of Utah, 1898, Sec. 3413, subd. 3, which disqualifies a person "directly" interested in a suit for or against an executor, etc., of a deceased person from testifying to facts equally within the knowledge of the deceased and witness. *In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942.

26. *Mason v. McCormick*, 80 N. C. 244; s. c. 75 N. C. 263. See *Holloway v. Wilkerson* (Ala.), 43 So. 731; *Doty's Admr. v. Doty's Exr.*, 26 Ky. L. Rep. 63, 80 S. W. 803. But see *Illinois Cent. R. Co. v. Becker*, 119 Ill. App. 221.

27. *Cockrell v. Cockrell*, 83 Miss. 385, 36 So. 390.

28. *Murray v. R. P. Smith & Sons*, 42 Ill. App. 548; *Stallings v. Hinson*, 49 Ala. 92.

29. *Campbell Bkg. Co. v. Cole*, 89 Iowa 211, 56 N. W. 441.

In an action against an estate by a partnership to collect notes, in which the firm was payee, one of the members thereof is interested within the meaning of the statute. *Farmers' & Traders' Bank v. Creveling*, 84 Iowa 677, 51 N. W. 178.

the estate of a decedent.³⁰ A retired partner, however, has no interest in an obligation to the firm occurring after his retirement.³¹

B. AGAINST REPRESENTATIVE OF DECEASED CO-PARTNER. — a. *Generally.* — In an action by a surviving partner against the representative of his deceased co-partner, he is incompetent in his own behalf as to matters prohibited by the statute.³² But testimony although relating to transactions with the decedent if it is not in furtherance of the witness' interest, is competent.³³

In an action by a third person against the representative of a deceased partner on a firm obligation, the surviving co-partner is interested³⁴ and is not a competent witness for the plaintiff to establish the deceased co-partner's liability, being interested in shifting a portion of his own liability.³⁵

b. *To Prove Partnership.* — In an action against the estate of a decedent on an alleged partnership debt, the alleged survivor is disqualified by reason of adverse interest from proving the partnership,³⁶

30. A member of a firm which claims an indebtedness to it from the estate of a deceased person is not a competent witness to prove the indebtedness, on the application of the administrator to sell the lands of the estate for payment of debts. *Miller v. Mayer*, 124 Ala. 434, 26 So. 892.

31. *Flournoy v. Wooten*, 71 Ga. 168.

32. *Sparling v. Smeltzer*, 133 Mich. 454, 95 N. W. 571.

In an action by the surviving member of a partnership against the administrator of a deceased partner, for a settlement of the partnership accounts, under § 606 the former is incompetent to testify as to transactions with the deceased. *Garnett v. Wills*, 24 Ky. L. Rep. 617, 69 S. W. 695.

33. *Wilhite's Admr. v. Boulware*, 11 Ky. L. Rep. 59, 10 S. W. 629, which was an action by the deceased partner's representative for an accounting. The defendant's testimony as to the status of certain real property which was mortgaged was held competent because not in his own behalf, the contest as to such matter being between the mortgagee and the plaintiff.

34. *Hurlbut v. Meeker*, 104 Ill. 541.

35. *Leach v. Dickerson*, 14 Ind. App. 375, 42 N. E. 1031; *Wrape v. Hampson*, 78 Ind. 499; *Hunter v. Herrick*, 26 Hun (N. Y.) 272.

In an action by the holder of a promissory note against the administrator of a deceased partner, the surviving partner, who is liable on the firm note, is incompetent to testify in behalf of the payee to payment of interest made by him on the note, such payment having the effect of avoiding the statute of limitations as against the deceased maker. The witness is interested in the event, though not a party to the action, because it was to his interest to render his co-maker jointly liable with him. *Hixson v. Rodbourn*, 67 App. Div. 424, 73 N. Y. Supp. 779.

In an action against a surviving partner on a promissory note alleged to have been executed by a partnership, the surviving partner is not a competent witness to testify in his own behalf as to the purpose for which the said note was executed in the partnership name. *Warren Deposit Bank v. Younglove*, 112 Ky. 767, 66 S. W. 749.

36. *Leach v. Dickerson*, 14 Ind. App. 375, 42 N. E. 1031; *Hogebloom, Exr. v. Gibbs, Sterrett & Co.*, 88 Pa. St. 235 (*distinguishing and disproving* *Brewster's Admx. v. Sterrett*, 32 Pa. St. 115); *Charlotte Oil & Fertilizer Co. v. Rippy*, 123 N. C. 656, 31 S. E. 879; *Lyon v. Pender*, 118 N. C. 147, 24 S. E. 744.

Giesecke Boot & Shoe Mfg. Co. v. Seevers, 85 Iowa 685, 52 N. W. 555, holding such witness incompetent

even though he is a co-party with the decedent's representative.³⁷ So in an action by one claiming to be a partner of a decedent against the latter's representative, plaintiff is incompetent to prove the partnership.³⁸ The latter fact may, however, be proved by the surviving partner in an action in which he is neither a party nor interested.³⁹

23. Principal and Surety.—A. PRINCIPAL.—The principal obligor is not competent for his surety or guarantor as against protected parties, where he is interested in or would be bound by the judgment.⁴⁰ Where, however, he has not been made a party to an action on the debt and would not be bound by the judgment, he is not incompetent.⁴¹ And where his liability has already been fixed by a prior judgment⁴² or default⁴³ he is no longer interested

against the administrator of the decedent to prove this fact. Being liable to contribute to the co-partners who may pay partnership debts the witness is interested in the result of the suit, because if the decedent's estate shall be held liable, "it will add one more to the number that must bear the burden" of the debt. It was contended that the question of interest must be determined by the common law rule. The court, however, disapproved a dictum to that effect in *Goddard v. Leffingwell*, 40 Iowa 249, and held that within the rule laid down in *Wormley v. Hamburg*, 40 Iowa 22, the interest of the witness was present, certain and vested, saying: "While it is true that, not being a party to the action, he is not bound by the result, it is equally true that the estate will be, and, if the result is to hold the estate liable, the witness will reap all the benefit that he would if he were a party to the action. A judgment in favor of the plaintiff against the estate will be legal evidence for Mr. Slocum, if the estate should seek to charge him with the entire indebtedness to the plaintiff, and will be legal evidence in his favor, as going to show the liability of the estate to contribute to the payment of the debt sued for." The court after *distinguishing* *Grant v. Shurter*, 1 Wend. (N. Y.) 148, says: "It cannot be said, as in *Fuller v. Lendrum*, 58 Iowa 356, that this witness neither gains nor loses anything by the result of this suit; for, if the result is against the estate, he not only gains by the liability of the estate to pay the debt, but by its liability to share

in the contribution. His interest is shown by his right to have intervened and joined the plaintiff in charging" the decedent.

In an action brought against the executors of one who was claimed to have been a member of a firm, against the surviving members of which a judgment has been rendered and returned unsatisfied, it was held error to permit one of the surviving members of such firm to testify upon the trial as to personal transactions had with the deceased tending to show that the deceased was a member of the firm. *Hunter v. Herrick*, 26 Hun (N. Y.) 272.

37. *Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884.

38. *Eppinger, Russell & Co. v. Canepa*, 20 Fla. 262. See *Schwartz v. Stock*, 26 Nev. 128, 65 Pac. 351.

39. *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685.

40. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820.

41. Before the principal can be bound by the judgment he must have been placed in such a situation that he is called upon to control or defend the action, as by formal notice from the surety to defend or something tantamount to such notice. The bare fact that he is called as a witness by the surety, nothing else appearing, does not bind him by the result of the litigation. *Wallace v. Straus*, 113 N. Y. 238, 21 N. E. 66.

42. *Starret v. Burkhalter*, 86 Ind. 439.

43. In *Bell v. Wilson*, 17 Ohio St. 640, the administrator of the payee of a promissory note brought suit against the makers, one of the latter

and is therefore competent, though the contrary has been held.⁴⁴ One who is apparently a principal cannot testify against a protected party as to prohibited matters for the purpose of showing that he is only a surety.⁴⁵

On an issue as to the relations between the several sureties, the principal obligor whose liability will not be affected one way or the other is competent to prove the nature of the agreement, although one surety is dead.⁴⁶

B. SURETY. — The surety is interested in the event of an action against his principal, the result of which may impose a liability on the former, and he is therefore incompetent on behalf of the latter as to the prohibited matters,⁴⁷ especially where he is also a party.⁴⁸

being principal and the other surety. The principal made no defense, but the surety set up an alleged agreement between the principal and the makers for an extension of time for payment. It was held that the principal maker was a competent witness for the surety to prove such an agreement.

44. In *Hill v. Hotchkin*, 23 Hun (N. Y.) 414, an action by the administrator of a deceased payee of a promissory note against the makers, one of the latter claimed to have signed the same as a surety only and the other defaulted. The testimony of the latter in behalf of his co-defendant was held incompetent in reference to personal transactions and communications had by the witness and the deceased. The court follows, as exactly in point *Church v. Howard*, 79 N. Y. 415, (which holds that the witness was interested in avoiding a judgment against a surety, on which the latter could sue him) saying, however, that if the question were an open one it would incline to a contrary opinion.

45. *Thornburg v. Allman*, 8 Ind. App. 531, 35 N. E. 1110. But see *Chamblee v. Pirkle*, 101 Ga. 790, 29 S. E. 20.

On a proceeding against a husband and wife by the executrix of a deceased mortgagee to foreclose a mortgage executed by the defendants to secure their joint and several notes, payable to deceased, the wife is not a competent witness to testify in her own behalf that the note and mortgage were given for the husband's debt, and that she signed these

instruments as surety for him. *Jones v. Hough*, 98 Ga. 492, 25 S. E. 566.

46. *Adams v. Brown*, 17 Ky. L. Rep. 634, 32 S. W. 282.

47. *Keel v. Larkin*, 72 Ala. 493; *Munz v. Colvin*, 35 App. Div. 188, 54 N. Y. Supp. 781; *Hinkson v. Wigglesworth*, 20 Ky. L. Rep. 1166, 48 S. W. 1079.

The surety upon the bond of a non-resident executor is interested in the event of the accounting of his principal, within the meaning of the code, hence he is incompetent to testify, as a witness on behalf of the executor, to a personal transaction or communication between himself and the deceased. *Miller v. Montgomery*, 78 N. Y. 282.

Party to Indemnity Bond. — In an action of trespass by an administrator against a sheriff to recover damages for an alleged wrongful sale of goods belonging to the estate of the decedent, a person who has signed the bond to indemnify the sheriff against loss by reason of the sale has an interest adverse to the decedent and is incompetent to testify as to matters occurring prior to the decedent's death. *Kyte v. Foran*, 167 Pa. St. 252, 31 Atl. 575.

48. *Crawford v. Parker*, 96 Ga. 156, 23 S. E. 196.

Surety Incompetent for Co-defendant Principal. — In an action by an administrator against the principal and surety on a note, the surety is not competent for his co-defendant principal, even conceding that he has no interest in the issue being tried, to-wit, an alleged alteration of the

But where he has no legal interest in the result of an action by his principal against the estate of the deceased obligee he is not incompetent.⁴⁹

A surviving surety is not competent against the representative of his deceased co-surety to prove that the latter agreed to indemnify him.⁵⁰ One who has agreed to indemnify a party to the action is a party in interest.⁵¹

24. Trustee and Beneficiary.—A mere naked trustee, in an action for the benefit of his *cestui que* trust, is not regarded as interested within the meaning of the statute.⁵² The beneficiary, however, has a disqualifying interest in such an action, though not a party thereto;⁵³ consequently a trustee who is also a beneficiary is interested.⁵⁴ A trustee under a will is not an interested witness in actions by or against the estate to which he is not a party.⁵⁵

Where a statute requires the court to examine a trustee before allowing his account, the latter is a competent witness in his own behalf against the representatives of his deceased *cestui que* trust who have interposed exceptions to the account.⁵⁶

note by the deceased, since the statute disqualifies all parties to the action as witnesses against the representative. *Lowman v. Aubery*, 72 Ill. 619.

49. Where a husband has borrowed money on a bond with a surety and has loaned the money thus borrowed to his wife, the surety is a competent witness against the wife's estate after her death, in an action to establish the husband's right to the fund. The witness has no direct interest in the outcome, but at most he would in a certain contingency become a creditor of the husband, which would not make him incompetent even at common law. *In re Spotts' Estate*, 156 Pa. St. 281, 27 Atl. 132.

50. *Wright v. Wilson*, 17 Mich. 192.

51. *Carpenter v. Romer & Tremper Steamboat Co.*, 48 App. Div. 363, 63 N. Y. Supp. 274.

52. *Ryan v. O'Connor*, 41 Ohio St. 368; *Jenkinson v. Brooks*, 119 Mich. 108, 77 N. W. 640. But see apparently *contra*, *Morgan v. Johnson*, 87 Ga. 382, 13 S. E. 710.

The payee of a check is a competent witness to prove that the check was drawn in the maker's lifetime to enable the payee to collect the money and pay it over to another person to whom the maker intended to pre-

sent the money as a gift, the witness having no interest in the matter. *In re Taylor's Estate*, 154 Pa. St. 183, 25 Atl. 1061.

53. *Hopkins' Admr. v. Faerber*, Trustee, 86 Ky. 223, 5 S. W. 749; *Gabbett v. Sparks*, 60 Ga. 582.

Action by Trustee in Bankruptcy. Bankrupt Incompetent.—In an action by a trustee in bankruptcy against the estate of a decedent, a member of the bankrupt partnership though not a party is interested in the result and is therefore incompetent as to transactions with the decedent. *Johnston v. Coney*, 120 Ga. 767, 48 S. E. 373.

54. *Brothers v. Mitchell*, 157 Pa. St. 484, 27 Atl. 760.

55. *Cromwell v. Horton*, 94 Ala. 647, 10 So. 358.

Trustee Under Will.—In *In re Palmer*, 52 Hun 612, 5 N. Y. Supp. 213, it was held that a person who had been appointed trustee under a will did not have such an interest therein as would disqualify him from testifying as to personal transactions with the testator.

56. "It is objected that Smith Hodges was not a competent witness upon any matter in this accounting. By the provisions of Revised Laws, section 2105, and section 2490, it is made the duty of the probate court to examine every executor and ad-

25. Creditors. — A. GENERALLY. — A creditor of the decedent is of course incompetent, to the extent provided by the statute, in an action to establish his claim against the estate.⁵⁷ He is not, however, incompetent on the ground of interest, to testify for another creditor or claimant,⁵⁸ even though the two claims are alike or based upon the same evidence.⁵⁹

Ordinarily the creditor would be competent to testify when called by the representative or protected party.⁶⁰ This, however, is not the rule where it is to the latter's interest to have the claim established as against other persons protected by the statute.⁶¹ Thus he is not competent for the representative in an action⁶² or proceeding⁶³ prosecuted by the latter for his benefit, as where its purpose

ministrator and guardian, upon oath, as to the correctness of his account, before the same is allowed by the court, except when no objection is made to its allowance, and its correctness is satisfactorily established by competent testimony. Revised Laws, section 2298, imposes the same duty as to the examination of a trustee, as to the correctness of his account, before its allowance by the court. In cases of this kind, the county court is an appellate probate court: Rev. Laws, § 2268. Under these statutory provisions Smith Hodges was a competent witness upon all questions and matters touching his management of the trust fund and the disposal of the same, or the income thereof, by him." *In re Hodges' Estate*, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820.

^{57.} *Lennartz v. Estate of Popp*, 118 Ill. App. 31; *Telford v. Howell*, Exr., 119 Ill. App. 83; *Sammis v. L'Engle*, 19 Fla. 800; *Moore v. Moore*, 30 Ky. L. Rep. 383, 98 S. W. 1027; *Owsley v. Boles' Admr.*, 30 Ky. L. Rep. 1016, 99 S. W. 1157; *Seligman v. Estate of Ten Eyck*, 60 Mich. 267, 27 N. W. 514; *Larch v. Goodacre*, 126 Ind. 224, 26 N. E. 49. See *infra*, IX, 1, and IX, 2.

Creditor's Suit. — Where a creditor's suit is brought to settle up a decedent's estate, a creditor who files a claim against the estate with the commissioner to whom the case is referred, which claim involves purely personal transactions between the creditor and the deceased, is not a competent witness as to such claim. *Bank of Union v. Nickell*, 57 W. Va. 57, 49 S. E. 1003.

^{58.} *Street v. Street*, 113 Ala. 333, 21 So. 138.

^{59.} See *supra*, IV, 3, B.

In the settlement of the deceased's estate, two daughters of decedent filed separate claims for services rendered him during his lifetime, each claim being separate and distinct from the other. It was held that either claimant was competent to testify for the other, that she heard decedent say to her that if they stayed and worked for him, he would give them whatever was left after his death. *In re Sworthout's Estate*, 38 Misc. 56, 76 N. Y. Supp. 961.

^{60.} See *infra*, X, 7.

^{61.} On an application in probate court by the administratrix and widow to declare the estate of decedent insolvent, where the heirs deny the insolvency, and are joined in such denial by a creditor, but a special issue is made by the heirs as to the justness of the creditor's claim, such creditor cannot establish his claim by testimony as to transactions with decedent. And where it appears to be to the interest of the administratrix to have the claim established, the creditor's testimony is not made competent by his being called by her since she is an opposite party in interest. *Dolan v. Dolan*, 89 Ala. 256, 7 So. 425.

^{62.} *Henegan v. United States*, 17 Ct. Cl. (U. S.) 155.

^{63.} On an application by the administrator to sell real estate to pay the debts of the estate, the creditor is not competent to prove the decedent's indebtedness to him. *Miller v. Mayer*, 124 Ala. 434, 26 So. 892.

is to increase the assets of the estate so that the claim may be paid.⁶⁴ So where the representative has paid an alleged claim against the estate without the sanction of the court, the claimant is not competent to establish the validity of the claim,⁶⁵ though the contrary has been held.⁶⁶

The fact that the statute provides that creditors seeking to enforce their claims may be examined does not give them the right to testify,⁶⁷ nor does the fact that the court in its discretion may allow them to testify.⁶⁸

B. PROBATE OF WILL. — A creditor is not an interested witness on a proceeding to probate the will.⁶⁹ A creditor proposing the will for probate would be incompetent as a party where nominal or disinterested parties are disqualified,⁷⁰ except in those jurisdictions where such a proceeding is regarded as one *in rem* to which there are no parties.

26. Parties to Bills and Notes. — The maker of the note in an action thereon is not competent in his own behalf against a person protected by the statute.⁷¹ His testimony, however, which tends

64. After the settlement of the accounts of an administrator in chief and a declaration of insolvency a creditor of the estate, being interested in the trust fund represented by the administrator *de bonis non*, though not a party to the record, is not a competent witness for the latter to prove a transaction with the deceased, which would tend to increase the liability of the administrator in chief. *Dunlap v. Mobley*, 71 Ala. 102.

65. *Clift v. Shockley*, 77 Ind. 297; *White v. Thompson*, 123 Ala. 610, 26 So. 648; *Appeal of Fross*, 105 Pa. St. 258; *Hullett v. Hood*, 109 Ala. 345, 19 So. 419; *In re Burton's Estate*, 15 Pa. Co. Ct. 367, 3 Pa. Dist. 755.

The administrator of a married woman paid a bill presented by a physician against the estate, and her husband excepted to its allowance in the settlement of the administrator's account. *Held*, that the physician was incompetent to testify to a promise by the decedent to pay the bill. *Baker v. Galpin*, 39 N. J. Eq. 491.

66. *In re Eacott*, 95 Me. 522, 50 Atl. 708; *Gordon v. McEachin*, 57 Miss. 834.

In a contest over the settlement of an administrator's account, it was alleged that the deceased had given his note to his brother, who was the

administrator and claimant in this case, and that thereafter the payee had transferred the note to one B. for a valuable consideration. After the death of deceased the administrator paid the amount due on the note to the transferee, upon which payment the claim of the administrator rested. It was held that such transferee was not a party to the proceeding nor interested in the settlement of the accounts, and was therefore a competent witness in reference to the transaction had with the decedent resulting in the giving of such note, under § 829 of the Code. *McNeany v. Curtin*, 38 N. Y. Supp. 1093.

67. *White v. Brown*, 67 Me. 196; *Gould v. Carlton*, 55 Me. 511.

68. *Moore v. Taylor*, 44 N. H. 370.

69. *In re Young's Will*, 123 N. C. 358, 31 S. E. 626.

70. *In re Young's Will*, 123 N. C. 358, 31 S. E. 626, holding such witness competent to prove the declarations of the decedent; and treating *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687, as overruling *Pepper v. Broughton*, 80 N. C. 251.

71. *Frey v. Horton*, 85 N. Y. Supp. 402; *Reynolds v. Linard*, 95 Ind. 48; *Jockisch v. Hardtke*, 50 Ill. App. 202; *Fitzgerald v. Cox*, 39 Ind. 84 (incompetent against the heir to whom the administratrix had assigned the note); *Bliler v. Boswell*, 9 Wyo.

to establish the liability of the endorser⁷² or surety⁷³ is not in his own behalf or interest and is therefore competent. Where he is neither a party to nor interested in the result of the action he is a competent witness.⁷⁴ In an action on the note he is not interested in an issue between the plaintiff and an intervenor claiming title to the note.⁷⁵ Where the adverse party is not one of the class of persons protected by the statute the maker is, of course, competent.⁷⁶

Where the indorser is a party to or interested in an action on the note by a person protected by the statute, he is incompetent against the latter.⁷⁷ He is not, however, interested in an action against the maker merely by reason of being indorser where there is nothing to show that his liability as such has been fixed by the proper steps.⁷⁸ The payee is not competent against a protected

57, 59 Pac. 798, 61 Pac. 867; *Burns v. Ross*, 17 Ky. L. Rep. 181, 30 S. W. 641; *Farnum v. Virgin*, 52 Me. 576. See *Proctor v. Proctor's Admr.*, 118 Ky. 474, 81 S. W. 272; *Bonte's Admr. v. Hinman*, 6 Ohio Dec. 1173.

In an action on a note against the administrator of decedent, who was co-maker of the note, the maker of the note being a necessary party to the suit (by statute) cannot testify that he signed testator's name by the authority of the latter. *Bowen v. O'Hair*, 29 Ind. App. 466, 64 N. E. 672. See also *Wilcox v. Corwin*, 117 N. Y. 500, 23 N. E. 165 (*reversing* 50 Hun 425, 3 N. Y. Supp. 317); *Alcorn's Exr. v. Cook*, 101 Pa. St. 209.

72. *Fuller v. Lendrum*, 58 Iowa 353, 12 N. W. 340; *German American Sav. Bank v. Hanna*, 124 Iowa 374, 100 N. W. 57. See *New York Nat. Exch. Bank v. Jones*, 9 Daly (N. Y.) 248.

In an action upon a promissory note indorsed by defendant's testator for the accommodation of the maker, who delivered the note to the plaintiff for money loaned, the maker was permitted to testify as to certain admissions of the deceased, tending to show that he had been properly charged as indorser of the note, which testimony was objected to by defendant on the ground that the plaintiff derived his title and interest in the note from the witness, and that witness was interested in the event of the action. It was held that the objection was properly overruled, that while the maker although

not a party to the action, was interested in the event thereof, his interest was to protect his indorser and so prevent any ultimate claim against himself, but he was examined, not in his "own behalf or interest," but to establish the liability of the indorser, and such was the effect of his testimony. *Converse v. Cook*, 31 Hun (N. Y.) 417.

73. *Sconce v. Henderson*, 102 Ill. 376.

74. *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109. See *McMullen v. Ritchie*, 64 Fed. 253.

In an action by an indorsee against the personal representatives of the deceased payee and indorser of a promissory note, the maker is a competent witness for the plaintiff to prove that the note was made for the accommodation of the payee. He is not a party to the suit nor is he directly interested in the result of the suit. *Morris v. Birmingham Nat. Bank*, 93 Ala. 511, 9 So. 606. See also *Freeman v. Bigham*, 65 Ga. 580.

75. *Lynam v. Buckner*, 60 Ind. 402.

76. *White v. Jones*, 105 Ga. 26, 31 S. E. 119.

77. *Frey v. Horton*, 85 N. Y. Supp. 402.

78. *Shober v. Jack*, 3 Mont. 351.

In an action by an administrator against the maker of a note or the drawer of a check, the indorser of the paper, not a party, is a competent witness for the defendant where it does not appear that he has been charged as an indorser; his indorsement simply does not make him even

party for the purpose of relieving himself of liability as endorser,⁷⁹ but where he is a mere trustee and not beneficially interested in the note or check made payable to him, he is not incompetent as to the transaction with the deceased maker.⁸⁰

27. Husband and Wife. — A. GENERALLY. — Whether a witness is disqualified merely because he is the spouse of one who is an incompetent witness under the statutes herein discussed, aside from any question of interest, depends upon the general legislation affecting the status of husband and wife for or against each other,⁸¹ and whether the disability of such witnesses on the ground of public policy is held to be removed by the general enabling acts.⁸² In some jurisdictions it is held that the disability on such ground has not been affected, and that therefore husband and wife are incompetent for each other against the representative of a decedent.⁸³ Other courts have held the contrary.⁸⁴ There are statutes in some

presumptively liable, and, until presentation, protest and notice is shown, he does not stand in the attitude of one interested in the event. *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894.

79. *Bevan v. Fitzsimmons*, 40 Ill. App. 108.

80. *In re Taylor's Estate*, 154 Pa. St. 183, 25 Atl. 1061, 18 L. R. A. 855.

81. See article "HUSBAND AND WIFE," Vol. VI.

82. See article "HUSBAND AND WIFE," Vol. VI.

83. *Hess v. Gourley*, 89 Pa. St. 195 (*disapproving* *Craig v. Brendel*, 69 Pa. St. 153); *Bierly's Estate*, 81 Pa. St. 419 (*holding* that *Taylor v. Kelly*, 80 Pa. St. 95, *overrules* *Delinger's Appeal*, 71 Pa. St. 425 on this point); *Sutherland v. Ross*, 140 Pa. St. 379, 21 Atl. 354; *Bitner v. Boone*, 128 Pa. St. 567, 18 Atl. 404; *Westcott v. Westcott's Estate*, 69 Vt. 234, 39 Atl. 199; *Swift v. Martin*, 19 Mo. App. 488. See *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12; *Davis v. Davis' Estate*, 48 Vt. 502. But see *In re Hoffer's Estate*, 156 Pa. St. 473, 27 Atl. 11; *Lcvan v. Bickel*, 5 Pa. Co. Ct. 610.

In Illinois the husband and wife are not competent for each other where the adverse party is the representative of the decedent. *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189 (*overruling* *Marshall v. Peck*, 91 Ill. 187, and contrary statements in *Crane v. Crane*, 81 Ill. 165, and *distinguishing* *Pigg v. Carroll*, 89 Ill.

205; *Mueller v. Rebhan*, 94 Ill. 142); *Heintz v. Dennis*, 216 Ill. 487, 75 N. E. 192; *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19; *Smith v. Smith*, 168 Ill. 488, 48 N. E. 96; *Mann v. Forein*, 166 Ill. 446, 46 N. E. 1119; *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792; *Way v. Harriman*, 126 Ill. 132, 18 N. E. 206; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Stodder v. Hoffman*, 158 Ill. 486, 41 N. E. 1082; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589; *Giffert v. McGuern*, 51 Ill. App. 387.

In an action by a daughter against her mother's estate to recover for services rendered the decedent by plaintiff and her husband, the latter is not a competent witness as to conversations between himself and the decedent in which the alleged contract was made, the testimony being as to facts equally within the knowledge of the deceased and therefore incompetent under § 10,212 Comp. Laws 1897, as amended by Act 1903, p. 36, No. 30. *Finn v. Sowders' Estate*, 139 Mich. 623, 103 N. W. 177; *citing* *Stackable v. Stackable's Estate*, 65 Mich. 515, 32 N. W. 808. But see *Cotherman v. Cotherman's Estate*, 58 Mich. 465, 25 N. W. 467.

The wife of one seeking specifically to enforce a contract between himself and the decedent for the conveyance of land is incompetent. *Ayres v. Short*, 142 Mich. 501, 105 N. W. 1115.

84. *Alabama.* — *Marcy v. Howard*, 91 Ala. 133, 8 So. 566. See *Hender-*

states regulating the competency of husband and wife in such cases.⁸⁵

B. STATUTE DISQUALIFYING SPOUSE. — In some states the statute expressly provides that the spouse of an incompetent witness shall also be incompetent.⁸⁶ Where the incompetency is as to transactions with the decedent, the spouse is incompetent only as to transactions between himself and the decedent.⁸⁷

Divorced Spouse. — Such a statute has no application to a divorced husband or wife.⁸⁸

son *v.* Brunson, 141 Ala. 674, 37 So. 549.

Colorado. — Butler *v.* Phillips, 38 Colo. 378, 88 Pac. 480.

Iowa. — See *Shafer v. Dean*, Admr., 29 Iowa 144; *Wendeling v. Besser*, 31 Iowa 248.

Maryland. — Neale *v.* Hermanns, 65 Md. 474, 5 Atl. 424.

Michigan. — Cotherman *v.* Cotherman's Estate, 58 Mich. 465, 25 N. W. 467; *Graham v. Alexander*, 123 Mich. 168, 81 N. W. 1084.

Minnesota. — Madson *v.* Madson, 69 Minn. 37, 71 N. W. 824.

Mississippi. — Barry *v.* Sturdivant, 53 Miss. 490; *Saffold v. Horne*, 72 Miss. 470, 18 So. 433; *Ellis v. Alford*, 64 Miss. 8, 1 So. 155.

Nebraska. — See *Parker v. Wells*, 68 Neb. 647, 94 N. W. 717.

New Hampshire. — *Clements v. Marston*, 52 N. H. 31.

New Jersey. — *Foley v. Loughran*, 60 N. J. L. 464, 38 Atl. 960.

New York. — *Fogal v. Page*, 59 Hun 625, 13 N. Y. Supp. 656.

North Carolina. — *Bradsher v. Brooks*, 71 N. C. 322.

Ohio. — *Wolf v. Powner*, 30 Ohio St. 472.

South Carolina. — *Brickle v. Leach*, 55 S. C. 510, 33 S. E. 720.

Texas. — *Eddie v. Tinnin*, 7 Tex. Civ. App. 371, 26 S. W. 732.

85. See following sections.

Where the statute merely disqualifies parties to the action and in another section it is provided that the husband or wife of a party or interested person shall not for that reason be incompetent, the spouse of a party is not incompetent as to transactions with a decedent. *Miller v. Miller* (Ariz.), 64 Pac. 415.

A statute providing that a husband or wife shall be competent to give evidence the same as any other wit-

ness does not remove any existing disability on the ground of being a party to or interested in the action. *Kilgore's Admr. v. Hanley*, 27 W. Va. 451.

86. *Indiana.* — *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

Iowa. — *Eastwood v. Crane*, 125 Iowa 707, 101 N. W. 481.

Kentucky. — *Bright's Exrs. v. Swinebroad*, 106 Ky. 737, 51 S. W. 578.

Maine. — *Jones v. Simpson*, 59 Me. 180; *Berry v. Stevens*, 69 Me. 290; *Hunter v. Lowell*, 64 Me. 572.

New York. — *Waver v. Waver*, 15 Hun 277; *Whitehead v. Smith*, 81 N. Y. 151; *Hoffman v. Hoffman*, 63 Hun 635, 18 N. Y. Supp. 387.

South Dakota. — *Guillaume v. Flannery*, 108 N. W. 255.

Virginia. — *McDevitt v. Frantz*, 85 Va. 740, 8 S. E. 642.

West Virginia. — *Kilgore's Admr. v. Hanley*, 27 W. Va. 451.

87. *Auchampaugh v. Schmidt*, 77 Iowa 13, 41 N. W. 472. See *Brickle v. Leach*, 55 S. C. 510, 33 S. E. 720.

A husband who joins with his wife in the execution of an agreement between her and the decedent is a party to the transaction and cannot testify thereto on her behalf. *Samson, Admx. v. Samson*, 67 Iowa 253, 25 N. W. 233.

In an action upon a promissory note against an administrator, alleged to have been given for work and labor of plaintiff's wife, the testimony of the latter respecting the amount of labor performed by her for decedent was held incompetent. *Ashworth v. Grubbs*, 47 Iowa 353.

88. *Hitt v. Sterling-Gould Mfg. Co.*, 111 Iowa 458, 82 N. W. 919.

C. INTEREST. — a. *Generally*. — While the mere fact that one spouse is a party to or interested in an action does not make the other an interested witness,⁸⁹ nevertheless if the action is of such a nature that the result thereof would invest such other spouse with a legal interest because of the marital relation, he is incompetent to the same extent as any other interested witness.⁹⁰

b. *Resulting Property Interests*. — (1.) *Generally*. — Where the action will directly affect the title to property in which the spouse of a party, by reason of the marriage relation, has or would acquire a direct legal interest, such spouse has a disqualifying interest,⁹¹ otherwise he has not.⁹² Where as a result of the action property

89. *Butler v. Phillips*, 38 Colo. 378, 88 Pac. 480; *Saffold v. Horne*, 72 Miss. 470, 18 So. 433; *Fogal v. Page*, 59 Hun 625, 13 N. Y. Supp. 656; *Olcott v. Kohlsaat*, 55 Hun 607, 8 N. Y. Supp. 116, 117.

In a proceeding by a succeeding administrator to compel a former administrator of an estate to turn over to the plaintiff certain money which the defendant claimed as a gift from the intestate, the interest of the defendant's wife in the result is not a "direct legal interest" within the meaning of the statute. *Foster v. Murphy* (Neb.), 107 N. W. 843, following *Gillette v. Morrison*, 9 Neb. 395, 2 N. W. 853.

A husband is a competent witness in behalf of his wife in an action brought by her in equity to establish the ownership of property claimed by her and held in trust by the administrator of his mother's estate, he having no direct interest adverse to the administrator. *Bently v. Jun* (Neb.), 107 N. W. 865.

The wife of the plaintiff in an action against an administrator to secure credit for an alleged payment on a note held by the decedent is not an incompetent witness. "The plaintiff's wife having no more interest in the 'subject of the action' than she would have in any ordinary action at law to recover upon a debt due her husband, and, as the statute expressly provides that her testimony shall not be excluded merely because she is the wife of a party, the rejection of her testimony in this instance was clearly erroneous. Were this an action to foreclose the mortgage unnecessarily mentioned in the complaint, or if its determination

would in any manner affect the secured debt, entirely different questions would be presented which need not now be considered." *Guillaume v. Flannery* (S. D.), 108 N. W. 255.

90. *Parker v. Wells*, 68 Neb. 647, 94 N. W. 717.

91. See following sections.

Where, under the provisions of a statute a wife cannot convey her real property, except by the consent of her husband and, except as to certain instruments, her conveyance or contract is invalid unless the husband joins therein; the interest and right which he acquires or had in real estate belonging to the wife is immediate, direct, and pecuniary. Therefore, he is not a competent witness, in an action in which his wife is a party, as to conversations with, or admissions by a deceased person. *Lowe v. Lowe*, 83 Minn. 206, 86 N. W. 11.

Where the wife's community interest would be affected in an action by or against her husband, she is incompetent in his behalf as to transactions with the decedent. *Whitney v. Priest*, 26 Wash. 48, 66 Pac. 108.

92. *Lashaw v. Croissant*, 88 Hun 206, 34 N. Y. Supp. 667 (where the husband had agreed that the money received by the wife for services rendered decedent should be her own separate property); *Sands v. Sparling*, 82 Hun 401, 31 N. Y. Supp. 251 (the same); *Slack v. Norton*, 111 Mich. 213, 69 N. W. 497 (same); *Fogal v. Page*, 59 Hun 625, 13 N. Y. Supp. 656. But see *Porter v. Dunn*, 61 Hun 310, 16 N. Y. Supp. 77.

In an action to cancel a deed from the plaintiff to one since deceased, the plaintiff's husband is not incom-

may accrue to the wife, of which, under the law, her husband would be entitled to the control or disposition, he is an interested witness.⁹³

(2.) Inchoate Dower Interest.—Where the result of an action in which the husband is a party or interested may establish or defeat his title to real estate in which the wife would be entitled to a dower interest, such inchoate dower interest or the possibility of its vesting makes the wife an interested witness,⁹⁴ though the contrary has been held.⁹⁵

(3.) Curtesy Initiate.—The husband is not an interested witness in an action to which his wife is a party, merely because he will as a result of such action acquire or lose the possibility of becoming a tenant by the curtesy.⁹⁶

petent to testify on behalf of plaintiff as to transactions with the decedent, since he is neither a party nor pecuniarily interested in the result of the suit. Under the statutes the husband has no interest in the wife's lands and she may by will so dispose of the same as to prevent any estate in the lands coming to him on her death. "Such expectation as he may have, dependent upon the death of the wife, is analogous to that of an heir expectant, which, as was held in *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836, does not give rise to any incompetency in a witness." *Henderson v. Brunson*, 141 Ala. 674, 37 So. 549.

93. In an action by a wife to recover alleged separate property, in which action her husband joined, the latter was held incompetent on behalf of his wife as to transactions with the decedent on the ground that the witness was more than a mere nominal party since the law gave him a beneficial interest in the money recovered, viz., the right to its use and management during the life of his wife. *Tompkins v. McGinn* (Tex. Civ. App.), 85 S. W. 452. See also *Stackable v. Stackable's Estate*, 65 Mich. 515, 32 N. W. 808.

94. *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220; *Laird v. Laird*, 115 Mich. 352, 73 N. W. 382; *Johnson v. Cochrane*, 91 Hun 165, 36 N. Y. Supp. 283. See also *Hoffman v. Hoffman*, 63 Hun 635, 18 N. Y. Supp. 387 (where the wife was held incompetent to prove a parol contract by the deceased to convey land to her husband).

Where a will conveying real estate

is contested by the testator's heirs, the wife of one of the contesting heirs is not a competent witness to prove a declaration of the decedent, since she is an interested party because the inchoate dower right would attach immediately upon vesting of title to the real estate in her husband. *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709; *Steele v. Ward*, 30 Hun (N. Y.) 555. *Contra.*—*Scherer v. Kaufman*, 1 Dem. (N. Y.) 39.

The wife of the complainant in a bill against the heirs of a deceased person to restore a destroyed deed, and for the specific performance of a land contract, is an incompetent witness as to conversations had with the deceased grantor. *Chaddock v. Chaddock*, 134 Mich. 48, 95 N. W. 972. But see *Dunn v. Dunn's Estate*, 127 Mich. 385, 86 N. W. 801.

95. *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999. See *Madson v. Madson*, 69 Minn. 37, 71 N. W. 824 (where the wife was held competent for her husband to prove an oral contract by the latter with a decedent for the purchase of land).

96. *Spindler v. Gibson*, 75 App. Div. 444, 78 N. Y. Supp. 320; *Cooper v. Monroe*, 77 Hun 1, 28 N. Y. Supp. 222; *In re Clark*, 40 Hun (N. Y.) 233; *Bowan v. Sweeney*, 17 N. Y. Supp. 752.

Contra.—*Devinney v. Corry*, 52 Hun 612, 5 N. Y. Supp. 289.

Where a tenancy by the curtesy is merely initiate, there is no vested right, but the husband is in the same category as an heir expectant. His contingent interest may be defeated at any time without regard to his wishes or consent. Albany County

D. PREDECESSOR IN INTEREST. — Whether and when one spouse is the predecessor in interest of the other is elsewhere treated.⁹⁷

28. Contract for Benefit of Another. — A. PARTY TO CONTRACT.

a. *Action by Beneficiary.* — In an action by a third person for whose benefit a contract was made, against the representative of one of the deceased parties to the contract, the competency of the other party to the contract for the plaintiff depends upon the form of the statute. The witness is held not to be interested and therefore not incompetent on that ground.⁹⁸ He is, however, the surviving party to the contract and incompetent where that ground of disqualification exists.⁹⁹ So, also, he is the person from whom plaintiff derives

Sav. Bank *v.* McCarty, 149 N. Y. 71, 43 N. E. 427. See *Henderson v. Brunson*, 141 Ala. 674, 37 So. 549.

Curtsey Distinguished From Dower. — The inchoate dower interest is sufficient to disqualify the wife because when once it is attached it cannot be defeated by the action of the husband; whereas the right by curtesy can be defeated by the deed of the wife without the consent of the husband, and it is not therefore a direct legal interest within the meaning of the statute. *Hiskett v. Bozarth* (Neb.), 105 N. W. 990.

⁹⁷. See *supra*, IV, 13.

⁹⁸. In *Jackson v. Gallagher*, 128 Ga. 321, 57 S. E. 750, it appeared that the witness worked for her brother who agreed to deposit a portion of her wages in a certain bank in his own name as trustee for the witness' child. In an action by the child against the brother's administrator, the mother was held a competent witness as to the alleged arrangement with her brother, since she was not a party nor pecuniarily interested in the result. In the transaction with her brother, the decedent, she was not acting as agent for the plaintiff, but merely making the latter a gift. The fact that her child would profit by her testimony did not make her incompetent. To same effect, *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927; *Rosseau v. Rouss*, 91 App. Div. 230, 86 N. Y. Supp. 497. But see *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916, *infra*.

In *Stowers v. Hollis*, 83 Ky. 544, it was held that the mother of a bastard is a competent witness for the child to prove a contract by the father with her for the support of

the child, although the father is dead when she testifies; the mother being, however, neither guardian of the child nor a party to the action.

⁹⁹. In an action against the heirs and administrator of an intestate to enforce an alleged contract to will to the plaintiff, one-half of the decedent's estate, made by the decedent to the plaintiff's mother in consideration of the plaintiff being given by her mother to the decedent to be raised as a child of the latter, the plaintiff's mother is a party to the contract and not competent to testify with reference thereto on behalf of the plaintiff under Rev. St. 1899, § 4652, disqualifying a party to the contract or cause of action as against the representatives of the decedent. It was contended that the mother was merely the plaintiff's agent in making the contract, and therefore competent. The court held, however, that the contract although made for the benefit of the plaintiff, was between the mother and the decedent. The case of *Godine v. Kidd*, 64 Hun 585, 19 N. Y. Supp. 335, relied upon by plaintiff, though similar in facts, is distinguished as being decided under a different statute which provided that a person under or through whom a party derives his title is not a competent witness for that party against one deriving his title from a decedent. "The court held in that case that the child did not derive title through her mother, albeit the contract was made for the benefit of the child. In the case at bar the plaintiff's mother, being a party to the alleged contract in issue and on trial, the other party being dead was not a competent wit-

his title and interest within the meaning of the statute disqualifying such persons.¹

b. *Action by Party*. — In an action by one party to such a contract against the representative of the other to enforce it for the benefit of the third person, the plaintiff is incompetent as a party under a statute disqualifying parties.² But where he has, subsequent to the contract, been appointed guardian of the third person and sues in that capacity to enforce it, he is not an interested witness unless liable for costs.³

B. PERSON FOR WHOSE BENEFIT CONTRACT IS MADE. — In an action to enforce a contract with decedent and claimed to have been broken by the latter, a third person for whose benefit the contract was partly made is not an interested person within the meaning of the statute.⁴

29. Contest Between Creditors. — A. GENERALLY. — In a contest

ness." *Asbury v. Hicklin*, 181 Mo. 658, 81 S. W. 390, *citing* other cases to the effect that the statute should be construed to carry out its spirit rather than its strict letter.

1. Under the New York Code of Civ. Proc., § 829, a person from whom a party derives his interest is disqualified from testifying in an action to enforce such interest against the decedent's estate; hence in an action by a child to enforce an alleged settlement upon him by his father, of a certain sum, the testimony of the plaintiff's mother as to the alleged settlement agreement was held incompetent where it appeared that the witness' promise to support plaintiff was the only consideration for the father's agreement. "As the plaintiff did not make the contract himself, he must have derived his interest therein from some one. He did not derive it from his father because his father could not make a promise to himself, nor contract with himself for the plaintiff's benefit. The father made no promise to the plaintiff, but he promised the mother to pay the plaintiff the sum named; that, however, was not enough, for such a promise is not binding without a consideration. The plaintiff furnished no consideration for the promise, and would have had no interest in the contract unless a consideration had been furnished by some one. His mother furnished the sole consideration, and the promise was made by the father to the

mother to pay the sum. He thus derived his interest from her." *Rousseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916, *reversing* 91 App. Div. 230, 86 N. Y. Supp. 497, and *distinguishing* *Connelly v. O'Connor*, 117 N. Y. 91, 22 N. E. 753, and *Bouton v. Welch*, 170 N. Y. 554, 63 N. E. 539. But three judges dissent on the opinion of the appellate court below, 86 N. Y. Supp. 497. But see *contra*, *Godine v. Kidd*, 64 Hun 585, 19 N. Y. Supp. 335; *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927.

2. *Mason v. McCormick*, 75 N. C. 263.

3. *Doty's Admr. v. Doty's Guardian*, 26 Ky. L. Rep. 63, 80 S. W. 803.

4. Where plaintiff contended that, at the time she deeded land to a deceased daughter-in-law, it was agreed that the daughter-in-law should make a will giving her husband a life estate in all her property, with remainder to plaintiff if she survived him, or else to plaintiff's daughter, and that plaintiff should make a will in favor of the daughter-in-law's husband and the daughter, in a suit against the daughter-in-law's administrator, to enforce the contract, brought in the lifetime of the mother-in-law, testimony of the daughter was not competent under code, § 4604, declaring no party or one interested in the event shall be examined as a witness in regard to communications between the witness and the representatives or heirs at law of one deceased, since the daugh-

between creditors for property of the common debtor, the latter has no interest in the controversy and is therefore competent even though the creditor is suing or defending as the representative of a decedent.⁵

B. CONTEST BETWEEN EXECUTION CREDITORS. — In a contest between execution creditors the judgment debtor has no interest and is therefore a competent witness for one creditor against the personal representative of another.⁶ And in such a contest to which the administrator of the judgment debtor has been made a party, the latter is not an adverse party within the meaning of the statute disqualifying a party where the adverse party is an administrator or executor; and the contesting creditors are therefore competent in their own behalf.⁷

V. PERSONS PROTECTED.

1. Generally. — As before stated⁸ the purpose of the statutes is the protection of the representatives or successors of deceased or incompetent persons; but in some states the adverse party is also protected inasmuch as both parties to the action are disqualified.⁹ In other jurisdictions the statute does not expressly designate the class of persons to be protected, but merely points out the persons disqualified and the circumstances under which the disqualification operates.¹⁰ And in some states the protection is extended to the estate of a deceased person.¹¹

The persons protected and the extent of the protection depend upon the terms of the statute¹² and the construction which is given it.¹³ In some jurisdictions it is confined strictly to persons of the classes enumerated.¹⁴ In others a more liberal construction is given,

ter, though benefited by the contract. *Bird v. Jacobus*, 113 Iowa 194, 84 N. W. 1062.

5. *Hitt v. Sterling-Goold Mfg. Co.*, 111 Iowa 458, 82 N. W. 919.

6. **Judgment Debtor Not Interested in Contest Between Execution Creditors.** — In a contest between execution creditors over the proceeds of a sheriff's sale where one of the creditors dies and his administrator is substituted, the judgment debtor is a competent witness in behalf of the other judgment creditor since he has no interest in the suit. *McCartney v. Kipp*, 171 Pa. St. 644, 33 Atl. 233, holding that at common law the judgment debtor was not interested in a contest between judgment creditors in such a proceeding (*Smith v. Wagenseller*, 21 Pa. St. 491), and that the exceptions to the enabling

statutes did not disqualify any one who was competent theretofore.

7. *Gordon v. Kennedy*, 36 Iowa 167.

8. See *supra*, I, 2, C.

9. See *supra*, I, 2, B, statutes of United States, Alabama, Arizona, Arkansas, Delaware, Indiana, Minnesota, North Dakota, South Dakota, Tennessee, Texas, and also *Gerding v. Wells*, 103 Md. 624, 64 Atl. 298, 433; *Jones v. Purnell*, 5 Pen. (Del.) 444, 62 Atl. 149.

10. See *supra*, statutes of Missouri, Vermont, Virginia, and *infra*, IX, 2, and also, *supra*, statutes of Kentucky and Minnesota.

11. See *supra*, statutes of Alabama and Mississippi.

12. See *supra*, I, 2, B.

13. See *supra*, II, 2.

14. The court will not extend the

and the protection is extended to those persons who come within the spirit as well as the letter of the law.¹⁵

2. Representative or Successor of Person^a Civilly Dead. — A. GENERALLY. — It has been held that the statute protecting executors and administrators includes the executor of the estate of a person in prison sentenced to death.¹⁶

B. DEFUNCT CORPORATION. — The disqualifying statutes refer only to the death of natural persons; hence persons representing a corporation cannot claim the protection of the statute merely because it has been dissolved.¹⁷

3. Representative of Decedent. — A. GENERALLY. — In some statutes it is provided that the designated classes of witnesses shall be incompetent generally or as to certain matters, against the "representatives," or "legal representatives," of deceased persons.¹⁸ Some courts are inclined to give a broad interpretation to these terms, including all persons who have succeeded to the rights of the decedent,¹⁹ while others construe them narrowly, confining

protection of the statute to any person unless it appears that he belongs to one of the classes protected by the statute. *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680.

The United States statute disqualifies a witness only against executors, administrators or guardians; hence an assignee in bankruptcy of decedent is not protected. *Hobbs v. McLean*, 117 U. S. 567.

15. See *infra*, V, 3, A.

16. *Knight v. Brown*, 47 Me. 468.

17. *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429.

18. See *supra*, statutes of Arizona, District of Columbia, Georgia, Michigan, Nebraska, Nevada, New Jersey, Texas, Washington.

Representative. — Who Is. — "If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, then he may be said, in that litigation, to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased, that is, where the right of the deceased himself, at the time of his death, is not

in any way involved, and the question is, not what was the right of the deceased at the time of his death, but, merely, to whom has the right descended; in such a contest, neither party can be said to represent the deceased." *Sorensen v. Sorensen*, 68 Neb. 483, 100 N. W. 930, 68 Neb. 509, 103 N. W. 455, *quoting* from *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665.

In an action by an assignee of stock after the death of his assignor, the original holder thereof, to compel the corporation to make the transfer on its books, the corporation is not the representative of the decedent and is therefore not entitled to the protection of the statute. *Firemen's Ins. Co. v. Peck*, 126 Ill. 493, 18 N. E. 752.

19. Under a statute providing that interested witnesses shall not be competent "when the adverse party is an executor, administrator, or legal representative of a deceased person," the word "representative" as used in the statute "was intended by the law giver to designate the person or party who succeeds to the rights of the deceased, whether by purchase, descent or operation of law." *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771, *quoting* from *Wamsley v. Crook*, 3 Neb. 344. To same effect, *Davis v. Davis*, 26 Cal. 23, 37. But in a con-

them to their technical meaning of executor or administrator.²⁰

B. "LEGAL" REPRESENTATIVE. — A statute which protects the executor, administrator or "legal" representative of the decedent includes the same class of persons as is covered by a statute protecting the representative.²¹

C. HEIR. — An heir is a "representative" as that term is used in the statute,²² though it has been held that he is not to be regarded as the representative of the decedent in actions to which he is a party, because claiming ownership of property coming to him by descent.²³

D. A LEGATEE OR DEVISEE is not a legal representative of the decedent within the meaning of the statute, in those jurisdictions where the statute is strictly construed,²⁴ though he is in states applying the more liberal rule.²⁵

tested proceeding to probate a will, the executor and beneficiaries therein named cannot be deemed the representatives of the decedent, since their status has not yet been established. *In re McCoy's Will*, 64 Neb. 150, 89 N. W. 665.

20. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337.

"By the term 'personal representative' the statute embraces only an administrator, executor or other person entitled to represent the decedent in the ownership and management of his general estate." *Gunn v. Pettygrewe*, 93 Ga. 327, 20 S. E. 328; *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434.

Widow. — Whether a widow is the representative of her husband, see *infra*, V, 3, F, and V, 12, C.

21. See *Housel v. Cremer*, 13 Neb. 298, 14 N. W. 398, holding that the assignee of the decedent though neither an executor nor administrator was his "legal representative" within the meaning of such a statute. But see *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812, distinguishing "personal" from "legal" representative.

22. *Brown v. Forbes* (Neb.), 96 N. W. 52; *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848; *Rushing's Admr. v. Bray*, 38 N. J. Eq. 398. But see *infra*, V, A, a. *Contra.* — *Boynton v. Reese*, 112 Ga. 354, 37 S. E. 437; *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826.

23. See *Cowdrey v. Cowdrey* (N. J. Eq.), 64 Atl. 98; *McKinley v. Coe*,

66 N. J. Eq. 70, 57 Atl. 1030; and *supra*, III, 6, D, e.

24. *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648; *Emerson v. Scott* (Tex. Civ. App.), 87 S. W. 369; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337.

In *Caffey's Exrs. v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738, which was an action against executors for property held by them in trust for the devisees, the petition alleging the title to be in such devisees and that the executors were holding possession for them, it was held that the statute would not apply to the action unless it further developed that the suit was prosecuted against the executors as the legal representatives of the estate, since the statute does not embrace devisees or legatees.

A statute which extends its protection to endorsees, assignees, transferees and personal representatives of the decedent does not protect legatees claiming the estate under the will. *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434.

25. See *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771. Now, however, in a contested proceeding to probate the will, since his status as legatee or devisee is not yet established. *In re McCoy's Will*, 64 Neb. 150, 89 N. W. 665. And see *McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030; *Joss v. Mohn*, 55 N. J. L. 407, 26 Atl. 987; *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255, and *supra*, III, 6, D, e, (1.).

E. GRANTEE AND ASSIGNEE. — As to whether the term "representative" includes an assignee the courts are not agreed; some holding that it does,²⁶ and others that it does not,²⁷ and the same is true in the case of a grantee.²⁸

F. SURVIVOR OF COMMUNITY. — a. *Generally.* — In those jurisdictions where community property prevails, statutes sometimes provide for the administration of the community estate by the surviving spouse. Such survivor in actions involving the community estate is regarded as the legal representative of the deceased spouse,²⁹ if he has qualified as survivor of the community in the manner provided by law.³⁰

b. *Defending Merely Community Interest.* — Where the surviving spouse is defending merely his community interest, he is not acting as the representative of the estate within the meaning of the statute.³¹

G. SURVIVING PARTNER. — Where the disqualifying statute is strictly construed, a surviving partner would not be the "representative" of his deceased co-partner,³² though he would be where this term is given a liberal construction,³³ especially when, in an

A legatee to whom the executrix has assigned a note payable to decedent is protected against the maker's testimony in an action on the note. *McAyeal v. Gullett*, 105 Ill. App. 155.

26. *Housel v. Cremer*, 13 Neb. 298, 14 N. W. 398.

27. *Grafton Stone Co. v. St. Louis, C. & St. P. R. Co.*, 199 Ill. 458, 65 N. E. 424.

28. **Grantee Is "Representative."** *Davis v. Davis*, 26 Cal. 23, 37.

Grantee Not a Representative. *Lockwood v. Lockwood*, 56 Conn. 106, 14 Atl. 293; *Wootters v. Hale*, 83 Tex. 563, 19 S. W. 134. See *Hendricks v. Kelly*, 64 Ala. 388.

Donee Not a Representative. *Shea v. Doyle*, 65 Ill. App. 471.

29. *Clarke v. Adam*, 30 Tex. Civ. App. 66, 69 S. W. 1016; *Harrell v. Houston*, 66 Tex. 278, 17 S. W. 731; *Gurley v. Clarkson* (Tex. Civ. App.), 30 S. W. 360.

30. *Wilmerth v. Tompkins*, 22 Tex. Civ. App. 87, 53 S. W. 833; *Harris v. Warlick* (Tex. Civ. App.), 42 S. W. 356.

31. *Evans v. Scott* (Tex. Civ. App.), 97 S. W. 116.

32. See *supra*, V, 3, A, and *Roberts v. Yarboro*, 41 Tex. 449; *Whitley v. Hudson*, 114 Ga. 668, 40 S. E. 838. But see *Stuart Bros. v. Alt-*

man, 8 Tex. Civ. App. 657, 28 S. W. 461.

In an action against a surviving partner and the representative of the deceased partner on a firm obligation which is joint and several in its nature, the opposite party while incompetent against the representative as to transactions with the decedent is competent as to such matters against the survivor. *Clarke v. Adam*, 30 Tex. Civ. App. 66, 69 S. W. 1016.

A surviving partner who gives bond under R. S. c. 69, § 2, and is afterwards sued upon a note of the firm, is not the legal representative of the deceased within the meaning of the statute. *Holmes v. Brooks*, 68 Me. 416.

33. See *Parker v. Edwards*, 85 Ala. 246, 4 So. 612; *Gage v. Phillips*, 21 Nev. 150, 26 Pac. 60; *Crane v. Gloster*, 13 Nev. 279. Under § 329, Nebraska Code Civ. Proc., a party is not disqualified from testifying as to a transaction with a person since deceased, except as against the representative of such person; and though a party seeking to enforce a claim against the surviving members of a partnership cannot testify as to a transaction with the deceased partner, and though the same rule might be applied even where a new partner had been substituted for the de-

action against two partners, one dies and the survivor continues the action, by virtue of the statute, on behalf of himself and the decedent.³⁴

H. SURETY. — A surviving surety is not the representative of his deceased co-surety,³⁵ though it has been held that a surety of the deceased principal debtor is entitled to the protection of the statute.³⁶

I. BAILEE. — One who is in possession of property at the death of the owner as the latter's bailee is entitled to defend such possession pending the appointment of a personal representative, and in such case is entitled to the protection of the statute as the decedent's representative.³⁷

J. TRUSTEE. — It has been held that a trustee is, within the meaning of the statute, the representative of a beneficiary who dies during the administration of the trust.³⁸

4. **Executor or Administrator.** — A. GENERALLY. — The protection of the statutes everywhere extends to executors and administrators,³⁹ in many states by the express terms of the statute.⁴⁰

ceased, and the firm so organized had assumed all of the liability of the former partnership, nevertheless, where it is conceded by both parties to the action that the defendants are liable only on a contract made by the new firm or the survivors between plaintiff and the new firm or the survivors, made after the death of the decedent with whom the transaction occurred, the plaintiff's testimony is not incompetent since the defendants do not represent the decedent within the meaning of the statute. *North & Co. v. Angelo* (Neb.), 110 N. W. 570.

34. *Mead v. Weaver*, 42 Neb. 149, 60 N. W. 385.

35. *People v. Borders*, 31 Ill. App. 426.

36. See *infra*, V, 6.

37. *Burke v. Dunn*, 117 Mich. 430, 75 N. W. 931. Compare *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289; *Mullins v. Chickering*, 110 N. Y. 513, 18 N. E. 377, and *infra*, V, 5, A.

38. In *MCutchen v. Loud*, 71 Mich. 433, 39 N. W. 569, it was held that where in a suit against the trustees of a co-partnership upon a contract made by their business agent, who was also a member of the firm, the judgment, if one is recovered, must be paid out of the trust estate, the death of such agent renders the testimony of the plaintiff incompetent as to the terms of the contract, un-

der How. Stat. § 7545, the trustees being the representatives of such deceased beneficiary.

39. *United States*. — *Miller v. Steele*, 153 Fed. 714.

Alabama. — *Knight v. Coleman*, 117 Ala. 266, 22 So. 974.

Georgia. — *Medlock v. Miller*, 94 Ga. 652, 19 S. E. 978.

Illinois. — *Groff v. Mutual Life Ins. Co.*, 92 Ill. App. 207; *Murray v. R. P. Smith & Sons*, 42 Ill. App. 548.

Indiana. — *McConnell v. Huntington*, 108 Ind. 405, 8 N. E. 620; *Reed v. Reed*, 30 Ind. 313; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316.

Iowa. — *McElroy v. Allfree*, 131 Iowa 518, 108 N. W. 119.

Maine. — *McLean v. Weeks*, 65 Me. 411, 424; *Farnum v. Virgin*, 52 Me. 576.

New Jersey. — *Walker v. Hill's Exrs.*, 21 N. J. Eq. 191.

New York. — *Heyne v. Doerfler*, 124 N. Y. 505, 26 N. E. 1044.

Wyoming. — *Bliler v. Boswell*, 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867; *Ullman v. Abbott*, 10 Wyo. 97, 67 Pac. 467. But see *In re McCoy's Will*, 64 Neb. 150, 89 N. W. 665.

40. Statutes in the following states expressly extend the protection to executors and administrators: United States, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Maryland,

Protection given in terms to executors and administrators does not extend to an heir,⁴¹ a devisee or legatee,⁴² a grantee,⁴³ an assignee,⁴⁴ surviving partner,⁴⁵ or widow⁴⁶ of the decedent.

A Public Administrator is an "administrator" within the meaning of a statute disqualifying the adverse party in an action by or against an executor or administrator.⁴⁷

B. REPRESENTATIVE CAPACITY.—The representative is not entitled to the protection of the statute where he is claiming or defending merely in his individual capacity.⁴⁸

5. Decedent's Successor in Interest, Title or Liability.—**A. GENERALLY.**—In many states persons deriving title or interest from a

New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wyoming.

41. *Bird v. Jones*, 37 Ark. 195; *Lawrence v. La Cade*, 46 Ark. 378.

A statute which disqualifies a party in any action where the adverse party is the executor of a deceased person does not extend to an action where the adverse party is the heir of a decedent, though the reason underlying the statute applies with equal force to such a case. "Courts do not apply a statute to all cases embraced within the reason of it, but only to those within the language of it." *Campbell v. Mayes*, 38 Iowa 9. This statute, however, seems to be extended by the Iowa courts to actions against an administrator. See *Campbell v. Mayes*, 38 Iowa 9; *Quick v. Brooks*, 29 Iowa 484; *Romans v. Hay's Admr.*, 12 Iowa 270. But see *Miller v. Steele*, 153 Fed. 714.

42. *Goodwin v. Fox*, 129 U. S. 601; *Miller v. Steele*, 153 Fed. 714; *Harman v. Harman*, 70 Fed. 894, *reversing decision in s. c.* 51 Fed. 113.

43. *Harris v. Seinsheimer*, 67 Tex. 356, 3 S. W. 307.

44. **Assignee in Bankruptcy.**—In an action by two partners against the assignee in bankruptcy of their deceased co-partner, they are not incompetent witnesses as to transactions with such deceased co-partner. "The witnesses admitted by the circuit court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator, or guardian. But the counsel

for the defendant insists that the policy of the act applies to suits by or against assignees as well as to suits by or against executors, administrators, or guardians, and that we ought to construe the act so as to include such suits. We cannot concur in this view. The purpose of the act was to remove generally the old incapacity to testify imposed on parties or persons interested in the suit. This was done by a sweeping provision subject to certain well defined exceptions; but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe." *Hobbs v. McLean*, 117 U. S. 567.

45. *Hines v. Consolidated Coal & L. Co.*, 29 Ind. App. 563, 64 N. E. 886; *Dodds v. Rogers*, 68 Ind. 110; *Bradley v. Patton*, 51 Ala. 108; *Bragg v. Clark*, 50 Ala. 363, but for the rule under a later statute, see *infra*, V, 15, B. See *Crane v. Glosster*, 13 Nev. 279.

The defendant in an action by a surviving partner on an account may testify as to payments on the account by him to the deceased partner. *Wood v. Stewart*, 9 Ind. App. 321, 36 N. E. 658.

46. See *infra*, V, 12, C.

47. *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955.

48. See III, 6, D, e. In a proceeding by an administrator to establish a personal claim against the estate, the heirs are competent wit-

deceased or incompetent person are protected in actions involving such interest or title.⁴⁹ It is not necessary that the decedent's title or interest should have passed to such person, but it is sufficient that he claim through or under the decedent.⁵⁰ Nor does the fact that decedent had the transfer made directly to such person by a

nesses against him. *Douglass v. Fullerton*, 7 Ill. App. 102.

49. *Georgia*.—*Hendricks v. Allen*, 128 Ga. 181, 57 S. E. 224.

Kansas.—*Roach v. Roach*, 69 Kan. 522, 77 Pac. 108; *O'Neill v. Martin*, 26 Kan. 494.

New York.—*German-American Bank v. Slade*, 15 Misc. 287, 36 N. Y. Supp. 983; *Sheldon v. Sheldon*, 84 Hun 422, 32 N. Y. Supp. 419; *Rice v. Daley*, 66 Hun 628, 20 N. Y. Supp. 941. See *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Curnan v. Delaware & O. R. Co.*, 63 Hun 628, 17 N. Y. Supp. 714.

North Carolina.—*Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. C. 150, 5 S. E. 907; *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201.

Washington.—*Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579.

Statutes.—See *supra*, statutes of District of Columbia (assignee); Florida (assignee); Georgia (endorsee, assignee, and transferee); Iowa (assignee); Kansas (assignee); Michigan (assignee); New Hampshire (endorsee or assignee of negotiable instrument); New York (person deriving title or interest from, through or under); North Carolina (person deriving title or interest from, through or under); Ohio (assignee, grantee); Oklahoma (assignee); South Carolina (assignee); Tennessee (assignee or grantee direct or remote); Washington (deriving right or title through or from deceased); West Virginia (assignee); Wisconsin (deriving title or sustaining liability to the cause of action from, through or under deceased or incompetent person).

One who furnished the consideration for a transfer to decedent and who has been adjudged the equitable owner, is decedent's successor in title. *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812.

The Purchaser or Endorsee of a

Note is entitled to the protection of the statute when the payee is dead. *Wagner v. Grimm*, 169 N. Y. 421, 62 N. E. 569.

Donee.—In an action to recover certain securities from the defendant, title to which she claimed by a gift, *causa mortis*, from the testator, plaintiffs, as executors of the deceased, and also a residuary legatee of the testator, were held to be incompetent witnesses as to conversations had between them and the deceased, to disprove the gift, under § 309 of the code. *Cornell v. Cornell*, 12 Hun (N. Y.) 312.

50. As Against Decedent's Bailee.

In a replevin suit against a bailee of the decedent, the plaintiff is not a competent witness as to transactions with the decedent; the bailee being the adverse claimant of record. *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289. Compare V, 3, I, *supra*.

Plaintiff delivered to defendants a piano to be stored for her. The executors of her deceased husband claimed it as belonging to their testator's estate, and on demand defendants delivered it to them. In an action for conversion, it appeared that the testator purchased the piano and paid for it with his own money. Plaintiff was permitted to testify that the piano was given to her by her husband. This was held error on the ground that defendants by delivery to the executors took the risk of their title, but could defend and justify under it; that they, therefore, came within the description of the statute as persons deriving title "from, through or under a deceased person . . . by assignment or otherwise," and as against them, therefore, plaintiff was prohibited by said section from testifying in her own behalf to any personal transaction between herself and her husband. *Mullins v. Chickering*, 110 N. Y. 513, 18 N. E. 377.

third party without an intervening conveyance to himself defeat the application of the statute.⁵¹

B. INTEREST CREATED BY CONTRACT WITH DECEDENT. — A party cannot claim the protection of the statute where the matter in question is a chose in action or security therefor created by the very contract or transaction in relation to which the evidence is offered.⁵²

C. INTEREST DERIVED FROM THIRD PERSON. — Where the interest or title is derived from a third person, the fact that it does not vest until the termination of the interest of the decedent in the same subject-matter, does not bring it within the statute.⁵³

D. BENEFICIARY UNDER FORMER WILL. — A beneficiary under a former will is on the contest of the probate of the later will a person deriving his interest from the decedent within the meaning of the statute protecting persons who derive their interest or title from, through or under the decedent by assignment or otherwise.⁵⁴

E. SUCCESSOR OF FORMER REPRESENTATIVE SINCE DECEASED. — A statute which protects, among others, a person deriving his title or

51. Where the defendant's husband purchased certain property on a contract and paid for the same with money borrowed on his note from the plaintiff and thereafter in place of having title under his contract conveyed to him by the vendors, had the conveyance made to defendant, the court held that the wife took the property "from, through or under" her husband, and that the plaintiff could not testify as to an agreement with the husband, since deceased, to pay the loan from the sale of the land and to make a division of the profits. *Freygang v. Train*, 42 Misc. 49, 85 N. Y. Supp. 538.

52. The Payee of a Note is not a successor in interest or title of the maker, because the payee and not the maker is the original owner of the note. *Wilcox v. Corwin*, 117 N. Y. 500, 23 N. E. 165; *Comstock v. Hier*, 73 N. Y. 269.

A Mortgagee is not a successor in interest or title of a mortgagor. He does not derive his title to the mortgage from the mortgagor, but is the original owner. *Holcomb v. Campbell*, 117 N. Y. 46, 22 N. E. 1107.

53. Remainder-Man Does Not Derive Interest From Life Tenant. Land was devised to the testator's wife "for her sole use and benefit so long as she shall live, with power to dispose of the same if it shall be necessary for her support and com-

fort;" and the will further provided that "whatever remains after her death shall go to the heirs," etc. In ejectment brought by the heirs of the testator after the widow's death against her grantee, the defendant was competent to testify as to the contract between himself and the deceased wife, since plaintiffs did not derive their title from her, under § 4069 of the Revised Statutes. *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615.

54. *In re Smith*, 95 N. Y. 516, holding that on the contest of the probate of a will, a legatee under a former will was a person deriving his interest from the deceased. The court says: "We think the contestant was a person deriving an interest under the deceased, within the meaning of this section. It is true the contestant's interest was not fixed or certain. If the will propounded for probate is valid, she has no interest, and if it should be set aside, it does not follow that the will under which she claims will be established. But the probate of a will is a special proceeding (Code, § 3334). The contestant, by appearing to contest the probate, became a party thereto (§ 2617). The will propounded was an obstruction to any claim she may have under the prior wills. Her interest, though contingent and uncertain, whatever it was, was derived under the deceased.

interest from, through or under a deceased person, by assignment or otherwise, includes and protects the successor in office of a former executor or administrator since deceased.⁵⁶

F. GRANTEE, VENDEE, OR ASSIGNEE. — a. *Generally.* — The grantee,⁵⁶ vendee⁵⁷ or assignee⁵⁸ of a deceased or incumbent person is protected by statute in many states, either expressly or by general language including them. Under such statutes the grantee is protected in an action to set aside a conveyance,⁵⁹ or to enforce an al-

Her position, though not precisely analogous, is similar to that of heirs or next of kin contesting the will of their ancestor, and it can scarcely be doubted that they would be within the protection of the section."

55. *Carpenter v. Romer & Tremper Steamboat Co.*, 48 App. Div. 363, 63 N. Y. Supp. 274, holding that an executor who upon the death of the first executor succeeded in an office by virtue of the will was entitled to the protection of the statute against testimony as to transactions and communications between the witness and the deceased executor; that while his office as executor was not perhaps derived from, through or under the deceased executor, but from the will, yet the cause of action in the case at bar arose out of and from the act of the deceased executor and was derived from his action so that the title of the plaintiff to and his interest in the subject-matter of the action may properly be said to have been derived from, through or under the deceased executor. "By the use of the words, 'against a person deriving his title or interest from, through or under a deceased person, . . . by assignment or otherwise,' it was intended to protect all persons succeeding to the right, title, or interest, or standing in the place or stead, of the deceased person, against testimony as to communications made by him to the adverse party. The words 'or otherwise' were intended to embrace and cover every and all means and manner of succession or devolution, in addition to that by assignment. The plaintiff in this action is the successor in office to a deceased executor, and has succeeded to the right, title and interest of everything that he acquired as executor and trustee during his lifetime." *Compare* *Guery v. Kinsler*, 3 S. C. 423.

56. See *supra*, V, 5, and *Hendrick v. Daniel*, 119 Ga. 358, 46 S. E. 438; *Helton v. Asher*, 103 Ky. 730, 46 S. W. 22; *Maun v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854; *Killian v. Bank*, 103 Ga. 245, 29 S. E. 971. But see *Heard v. Phillips*, 101 Ga. 691, 31 S. E. 216.

57. *Hodges v. Denny*, 86 Ala. 226, 5 So. 492. But see *Hendricks v. Kelly*, 64 Ala. 388.

58. *Robinson v. James*, 29 W. Va. 224, 11 S. E. 920; *Lewis v. Fort*, 75 N. C. 251; *Harris v. Bank of Jacksonville*, 22 Fla. 501; *Bailey v. Holden*, 113 Mich. 402, 71 N. W. 841; *Letts v. Letts*, 91 Mich. 596, 52 N. W. 54; *Sheldon v. Carr*, 139 Mich. 654, 103 N. W. 181; *O'Neil v. Greenwood*, 106 Mich. 572, 64 N. W. 511. See *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434.

The Assignee of a Deceased Mortgagee is entitled to the protection of the statute in an action to foreclose the mortgage. *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun (N. Y.) 142; *Poston v. Jones*, 122 N. C. 536, 29 S. E. 951. So is the assignee of the deceased assignee of the mortgagee. *Smith v. Cross*, 90 N. Y. 549.

59. *Campbell v. Brown*, 183 Pa. St. 112, 38 Atl. 516; *Sheldon v. Carr*, 139 Mich. 654, 103 N. W. 181.

A statute which prohibits the "opposite party," in a suit prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, from testifying at all to matters which, if true, must have been equally within the knowledge of the deceased, applies to a suit by a daughter to set aside a deed executed by her father in his lifetime, based upon the agreement to give her the property in consideration of a life support. *Lloyd v. Hallenback*, 98 Mich. 203, 57 N. W. 110.

It was held, in an action by a

leged prior agreement of the decedent to devise the property.⁶⁰

Where the statute in express terms includes within its protection the assignee of the decedent, the term is given its ordinary legal meaning and includes any person to whom the decedent has transferred his title or interest.⁶¹ It is confined, however, to persons to whom the decedent has made a voluntary conveyance or assignment, and does not include one who succeeds to the decedent's rights merely by operation of law.⁶² It includes his grantee,⁶³ but not his surviving partner.⁶⁴ But a statute protecting the decedent's grantee does not extend to his assignee.⁶⁵ A statute disqualifying any person as a witness in his own behalf as to transactions with a decedent has been held to protect such decedent's grantee⁶⁶ or assignee,⁶⁷ although the decedent's estate is not interested in the action.

widow, who had joined with her husband in a deed of his real estate, brought against the grantee to amend the deed on the ground of fraud, so far as it affected her right of dower, that defendant derived his title "through, from and under," the husband within the meaning of § 829 of the Code of Civil Procedure; and that plaintiff was not a competent witness as to personal transactions with the decedent. *Witthaus v. Schack*, 105 N. Y. 332, 11 N. E. 649.

60. *Shroyer v. Smith*, 204 Pa. St. 310, 54 Atl. 24.

61. The Word "Assigns" as used in the statute should be given its legal sense and signifies any person to whom any property or right is transferred by the deceased person in his lifetime. *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143. Hence it includes any person claiming title immediately through the deceased. *Rix v. Smith*, 145 Mich. 203, 108 N. W. 691. But see *Buffum v. Porter*, 70 Mich. 623, 38 N. W. 600.

62. Thus where a receiver in obedience to an order of court turns over the residuary assets of the receivership to a trustee for the interested parties, such trustee is not the assignee of the receiver, within the meaning of the statute, after the latter's death. An assignee does not mean one who succeeds to the decedent's interest or title merely by operation of law. *Pulsifer v. Arbuthnot*, 59 Kan. 380, 53 Pac. 70.

Neither the sheriff nor an attaching creditor are the assignees of an attachment debtor, within the meaning of the statute. *Burlington Nat. Bank v. Beard*, 55 Kan. 773, 42 Pac.

320, where the court says: "We think that the common acceptance of the word 'assignee' is limited to an assignee in fact, and does not comprehend an assignee by mere operation of law. If it had been intended by the legislature to include the latter sense, it would have scarcely been necessary to use the words 'executor, administrator, heir at law, next of kin,' or 'surviving partner,' for the word 'assignee' would be broad enough to embrace them all, and therefore the word 'assignee' was used in its more limited sense of an assignee in fact. It would be regarded as a strained construction of the word to extend it to a sheriff, or the creditors whom he represents, by reason of the levy of an attachment."

63. *Sheldon v. Carr*, 139 Mich. 654, 103 N. W. 181; *Mattoon v. Young*, 45 N. Y. 696; *Conklin v. Yates*, 16 Okla. 266, 83 Pac. 910.

64. *Tremper v. Conklin*, 44 N. Y. 58.

65. The provision of the statute which excludes a party from testifying in a civil action where the adverse party claims as a grantee of a deceased person, does not apply to the assignee of a chose in action. *Elliott v. Shaw*, 32 Ohio St. 431.

66. *Elliott v. Campbell*, 117 Ky. 719, 78 S. W. 1122; *Girdner v. Girdner*, 17 Ky. L. Rep. 657, 32 S. W. 266.

67. Thus in an action on a note by the assignee of the deceased payee the defendant maker was held incompetent. The court said: "If Irvin had died owner of the note, and this was an action by his personal representative to recover judg-

b. *Remote Grantee or Assignee.*—Where the statute protects persons deriving their title or interest from, through or under the decedent, it includes not only the latter's immediate, but his remote grantees,⁶⁸ though the contrary has been held.⁶⁹ The same is true under a statute protecting the heirs.⁷⁰ So where the statute protects the "assignee" of a decedent, it applies not only to his immediate assignee, but to remote assignees as well,⁷¹ though the contrary has

ment thereon, or even if appellant had, by reason of the assignment to him, recourse on decedent's estate, the testimony in question would, we think, be certainly incompetent. But it seems to be conceded that if appellant ever had such recourse, it has been lost; and so the estate of the deceased assignor will not be affected by determination of this action one way or another. Nevertheless, we think there can be, according to the plain language used, no question of cases like this being comprehended by the exceptions to, and modifications of, section 605, that are contained in subsection 2, section 606, for it is there provided, in explicit terms, that no person shall testify for himself concerning any verbal statement of, transaction with, or act done or omitted to be done by, one who is dead when the testimony is offered to be given, except under circumstances and conditions recited, none of which exist in this case. Yet, that is precisely what appellee did do on trial of this action in the lower court, for the statements of, and transactions with, the deceased Irvin, concerning which he was permitted to testify, had a direct and, without doubt, decisive bearing in his favor upon the only issue involved. Before thus disregarding or restricting the natural and obvious meaning of the words of a statute, the court should be convinced an imperative reason for doing so exists. We do not now perceive any reason for excluding such testimony in an action by the personal representative of one who is dead, that does not exist in full force in a case like this. The issue here presented is one of fact, involving an inquiry for the simple truth, not at all changed or affected by death, but to be sought for according to rules of evidence intended to operate justly, equally, and mutually between the parties, no matter

who they may be. It does not, therefore, make any difference whether the personal representative of a deceased payee or the assignee of a note be party plaintiff in an action to recover on it; to permit the defendant to testify for himself concerning what was said or done by the decedent, thereby affecting the issue involved, without the presence or power of anyone to speak for the dead man, would give an unjust and unfair advantage in one case just as much as, no more than, the other, which the legislature did not intend for him to have, but carefully and particularly framed subsection 2, section 606, to prevent." *Hurry v. Kline*, 93 Ky. 358, 20 S. W. 277.

68. Within the meaning of the statute disqualifying a witness against a person who derives his title or interest through or under a deceased person, the owner of land derives his title thereto not only from his immediate grantor, but also through him from the remote grantor. *Pope v. Allen*, 90 N. Y. 298. So also the assignee of a mortgage derives title thereto not only from his immediate assignor, but also through him from all former assignors, though not from the original mortgagor. *Holcomb v. Campbell*, 117 N. Y. 46, 22 N. E. 1107.

69. *Prouty v. Eaton*, 41 Barb. (N. Y.) 409.

70. *Remote Grantee of Heir.* *Olin v. Henderson*, 120 Mich. 149, 79 N. W. 178.

71. Thus on the foreclosure of a mortgage by the assignee of the assignee of the deceased mortgagee's assignee, the mortgagor is not competent as to transactions with the decedent. *Tunno v. Robert*, 16 Fla. 738.

The word "assigns" as used in the statute covers remote as well as immediate assignees. *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143;

likewise been held under such a statute.⁷² The statute sometimes provides that the interest or title must have been acquired immediately from the deceased.⁷³

c. *Assignee of Beneficiary*. — One to whom the beneficiary in a policy of insurance on the decedent's life has assigned, his interest is not the assignee of the decedent within the meaning of the statute.⁷⁴

G. INTEREST DERIVED BY OPERATION OF LAW. — Whether one deriving his interest or title by operation of law is protected, depends somewhat upon the form of the statute and the interpretation given it. Some statutes in general terms protect persons deriving their title or interest from the decedent in any manner. Such a statute would include all cases where title of one since deceased has passed to another, whether by operation of law or otherwise.⁷⁵ Thus a purchaser at a mortgage foreclosure sale derives his title from the mortgagee under such a statute.⁷⁶ But the grantee in a tax deed does not derive title from the delinquent owner, since he takes adversely to such owner's interest.⁷⁷

A statute protecting heirs and legal representatives does not include a purchaser at execution sale of the property of one since deceased.⁷⁸ As to whether a statute in terms applying to an assignee extends to a purchaser at a judicial sale the cases are not agreed.⁷⁹

Miller v. Shumway, 135 Mich. 654, 98 N. W. 385.

72. See White v. Jones, 105 Ga. 26, 31 S. E. 119; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680, holding that one claiming as the fourth grantee in succession from the executor of the decedent was not within the protection of the statute. The court says: "Under the decisions of this court in the cases of Jones v. Plunkett, 9 S. C. 392, and Cantey v. Whitaker, 17 Id. 527, it could not be held that the defendant here was entitled to be classed as an 'assignee,' within this provision of the code. In the case last cited, Mr. Justice McGowan said: 'But whilst, as it seems to us, the plaintiff as *alienee* is within the mischief intended to be remedied by the exception, she is not within the express terms. She is the third or fourth alienee of the land from the deceased person, but she is neither "executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor," according to the terms of the exception, which enumerated those intended to be excepted; and this court, whose only duty it is to *declare* the law, cannot amend it so that its terms will

embrace a case, which we may suppose to be within the principle upon which the law was founded, but not within its express terms.'"

73. Reville v. Dubach, 60 Kan. 572, 57 Pac. 522.

74. Berry v. Equitable Life Assur. Soc., 59 N. Y. 587 (since the beneficiary himself is not an assignee within the meaning of the statute).

75. Carpenter v. Romer & Tremper Steamboat Co., 48 App. Div. 363, 63 N. Y. Supp. 274.

76. Nau v. Brunette, 79 Wis. 664, 48 N. W. 649, holding the mortgagor incompetent against such persons after the mortgagee's death.

77. Begole v. Hazzard, 81 Wis. 274, 51 N. W. 325.

78. A Purchaser at Execution Sale under a judgment against the decedent is not an executor, administrator or guardian, nor is he an heir or legal representative of the decedent within the meaning of the statute confining the disqualification to actions by or against such parties. Harris v. Seinsheimer, 67 Tex. 356, 3 S. W. 307.

79. Meaning of "Assignee." One who derives title through an executor's sale of the decedent's real

A purchaser at an administrator's sale does not represent the estate.⁸⁰

H. IN PENNSYLVANIA the present statute expressly protects parties to whom the decedent's right has passed, whether by the latter's own act or the act of the law,⁸¹ thus embodying the construction which the courts gave to a former act disqualifying the witness where the assignor of the thing in action was dead.⁸² Under this statute the decedent's assignee is protected,⁸³ so is his grantee,⁸⁴

estate is not the "assignee" of the decedent, within the meaning of § 4770 Gen. Stat. 1901, disqualifying a party as a witness in his own behalf as to transactions with the decedent when the adverse party is the assignee of such decedent. "An assignee within the meaning of this section is one who holds by the voluntary act of his assignor; not one who holds by operation of law or the judgment of a court, or through an executor's or judicial sale, and in spite of such assignor." *Powers v. Scharling*, 71 Kan. 716, 81 Pac. 479. See also *Burlington Nat. Bank v. Beard*, 55 Kan. 773, 42 Pac. 320; *Pulsifer v. Arbuthnot*, 59 Kan. 380, 53 Pac. 70.

In Pennsylvania a former statute (the act of 1869) provided that the enabling statute should not apply to actions by or against executors, administrators or guardians, "nor where the assignor of the thing or contract in action may be dead, etc." The assignor within the meaning of this act is one whose rights have passed, either by his own act or by that of the law, to another who represents his interest in the subject of the controversy. *Karns v. Tanner*, 66 Pa. St. 297, holding that within the meaning of the statute, a purchaser at a sale by the decedent's representative was the assignee of the decedent. The court says: "The true spirit of the proviso then seems to be that when a party to a thing or contract in action is dead, and his rights have passed, either by his own act or by that of the law, to another who represents his interest in the subject of the controversy, the surviving party to that subject shall not testify to matters occurring in the lifetime of the adverse party, whose lips are now closed." To the same effect see *Hess v. Gourley*, 89 Pa.

St. 195. The statute has been held to protect the decedent's donee (*Patterson v. Dushane*, 115 Pa. St. 334, 8 Atl. 440, following *Diehl v. Emig*, 65 Pa. St. 320. But see *Hostetter v. Schalk*, 85 Pa. St. 220), his devisee (*Ewing v. Ewing*, 96 Pa. St. 381), and surviving partner (*Standbridge v. Catanach*, 83 Pa. St. 368; *Hanna v. McVay*, 77 Pa. St. 27).

80. *Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190.

81. See Pennsylvania statute, *supra*, and *Jack v. Moyer*, 187 Pa. St. 87, 40 Atl. 1013; *Patterson v. Dushane*, 115 Pa. St. 334, 8 Atl. 440.

In an action between a mortgagee and parties claiming the land in question by an alleged prior conveyance from the mortgagor, since deceased, the mortgagee represents the deceased mortgagor, and the adverse parties are not competent as to transactions with the decedent because their interests are adverse to those of the deceased mortgagor. *Griggs v. Vermilya*, 151 Pa. St. 429, 25 Atl. 61.

82. See notes to preceding section.

83. *Acklin v. McCalmont Co.*, 201 Pa. St. 257, 50 Atl. 955.

In an action of ejectment by a grantor against his deceased grantee's assignee, such grantor is not a competent witness in his own behalf. *New York & Ontario Land Co. v. Weidner*, 169 Pa. St. 359, 32 Atl. 557.

84. In an action of ejectment where the location of a boundary line is in issue, the defendant is not a competent witness to prove a boundary line agreement between himself and the plaintiff's grantor, since deceased. *Reiter v. McJunkin*, 194 Pa. St. 301, 45 Atl. 46. See also *Crothers v. Crothers*, 149 Pa. St. 201, 24 Atl. 190; *King v. Humphreys*, 138 Pa. St. 310, 22 Atl. 19.

his administrator,⁸⁵ creditors,⁸⁶ legatees,⁸⁷ surviving partner,⁸⁸ a purchaser at execution sale under a judgment against decedent.⁸⁹

I. WHERE BOTH PARTIES CLAIM THROUGH DECEDENT. — Although both parties claim under the same grantor since deceased, neither is a competent witness against the other as to transactions between himself and the decedent.⁹⁰ It has been held, however, that the disqualification extends only as to the particular transaction in issue.⁹¹

J. TRANSACTIONS SUBSEQUENT TO ASSIGNMENT BY DECEDENT OF

85. *Flanagan v. Nash*, 185 Pa. St. 41, 39 Atl. 818.

86. *Irwin's Estate*, 160 Pa. St. 82, 28 Atl. 505 (creditors seeking to surcharge the representative with property omitted from the inventory and claimed by the representative through an alleged contract with the decedent).

87. *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562, which was an action by legatees to charge the executor with debts due the estate.

88. See *Hanna v. McVay*, 77 Pa. St. 27; *Standbridge v. Catanach*, 83 Pa. St. 368; *Jack v. Moyer*, 187 Pa. St. 87, 40 Atl. 1013; *Huntley v. Goodyear*, 182 Pa. St. 613, 38 Atl. 507.

89. **Purchaser at Execution Sale.** A lessor being dead, in a controversy between an assignee of the lessee and one who had succeeded to the lessor's title by purchase at an execution sale, the lessee and his assignee are not competent witnesses to prove a waiver by the lessor of a forfeiture. *Duffield v. Hue*, 136 Pa. St. 602, 20 Atl. 526. But see *Van Horne v. Clark*, 126 Pa. St. 411, 17 Atl. 642.

90. *Roach v. Roach*, 69 Kan. 522, 77 Pac. 108; *Rix v. Smith*, 145 Mich. 203, 108 N. W. 691. But see *Hendricks v. Kelly*, 64 Ala. 388; *Heard v. Phillips*, 101 Ga. 691, 31 S. E. 216.

In an action of trespass for cutting timber, the defendant is not a competent witness to testify as to an alleged parol sale of the land to himself by a person since deceased, under whom plaintiff claims title. *Robbins v. Farwell*, 193 Pa. St. 37, 44 Atl. 260, citing *Brothers v. Mitchell*, 157 Pa. St. 484, 27 Atl. 760.

91. *McFerren v. Mont Alto Iron Co.*, 76 Pa. St. 180. This was an action of trespass. Plaintiff claimed the property in question by virtue of a prior conveyance by the defendant's

grantor, since deceased. Defendant pleaded that the *locus in quo* was a private way reserved by his grantor in the latter's conveyance to the plaintiff. It was held that the plaintiff was a competent witness in his own behalf to prove the circumstances of another conveyance of another lot by the deceased grantor to the plaintiff; that the witness was not rendered incompetent by the qualification to the general enabling act that the act shall not apply "where the assignor of the thing or contract in action is dead." The court said: "If in legal contemplation Hughes (the deceased grantor) is to be regarded as the assignor of the alleged right of way . . . the plaintiff was not a party to the transaction, nor was he called to testify to anything concerning it. Surely the proviso was not intended to exclude parties from being witnesses, where the assignor of the thing or contract in action is dead, if they were not parties to the transaction, and are not called to testify to anything that took place between themselves and the deceased assignor. If it was, then no party claiming title through or under a deceased grantor, however remote the conveyance, can be a witness where the land, or some estate in it, is the subject of the action. The proviso must have a reasonable interpretation, and it must not be so construed as to defeat the very purpose of the act. It was intended to exclude parties to the transaction from being witnesses in regard to it, where the opposite party is dead and his rights have become vested in others by his own act or by operation of law. But it never could have been intended to exclude persons who were not parties to the transaction, and who are not called to testify anything respecting it."

INTEREST IN QUESTION. — The statute protecting the assignee of or other person claiming an interest under the decedent applies only to transactions or communications occurring prior to or contemporaneously with the assignment or transfer of the interest, and not to matters occurring subsequent thereto.⁹²

K. PARTY SUSTAINING LIABILITY THROUGH OR UNDER DECEASED. In some states the statute protects a party who sustains his liability to the cause of action through or under the deceased.⁹³

6. **Surety of Decedent.** — It has been held that although a surety on an obligation of the decedent be not protected by the letter of the law, inasmuch as he can recover from the decedent's administrator the amount of any judgment against him as surety, he should be entitled to the same protection as the administrator in order to afford the latter the full protection of the statute.⁹⁴ But under a

92. *Cary v. White*, 59 N. Y. 336.

93. In an action on an alleged oral contract of life insurance, the plaintiff, the widow of deceased, was allowed to testify against the objection and exception of the defendant, to a conversation had between her husband and the agent of defendant, it being argued that the testimony was inadmissible under § 4069, Stats. 1898, which excludes testimony of a party as to transactions personally had with a deceased person when the opposite party "sustains his liability" from, through, or under such deceased person. *Held*, that while the insurance company was dealing with Chamberlain, the deceased, in the transaction, it was the opposite party in the deal, and it sustained its liability, if any, through its contract "with" the deceased, but in no reasonable meaning of words through or under him, and, therefore, the evidence was admissible. *Chamberlain v. The Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128.

94. *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. 27, was an action to foreclose a trust deed executed by husband and wife on the wife's property to secure the husband's debt. The action was against the wife and the trustee in the deed, the legal representatives of the deceased husband not being parties to the action. Testimony of the plaintiff that the debt had not been paid was held incompetent under § 950 of the code, although it was contended that the defendants did not derive any title or interest from, through or under

the decedent. The defendant wife being surety for her deceased husband she would be entitled to reimbursement from her husband's estate for any judgment against her, and any testimony against her, would, "in a material respect and in the same degree, though indirectly, affect her husband's estate." It was further held that since the trustee in the deed could have acquired no right, title or interest to the wife's land unless the deceased husband joined in the deed, the trustee, therefore, within the spirit and meaning, if not within the letter, of § 590 of the code derived his interest from, through or under" the decedent. The court follows and quotes extensively from *Bryan v. Morris*, 69 N. C. 444, where the plaintiff in an action against a surety on the bond of a deceased constable was held incompetent to testify to transactions between himself and a deceased constable, on the ground that such testimony if not within the letter was within the spirit of the inhibition of the statute. The court says: "The rule to be deduced from these authorities is that the surety, who comes not within the letter, but within the intendment, of the law, stands in the same position, and is entitled to the same protection . . . as the representative of his deceased principal." The court further *distinguishes* *Shields v. Smith*, 79 N. C. 517; *Hawkins v. Carpenter*, 85 N. C. 482; *Gidney v. Moore*, 86 N. C. 484; *Morgan v. Bunting*, 86 N. C. 66; *Bunn v. Todd*, 107 N. C. 266, 11 S.

statute disqualifying interested persons as to transactions with a decedent whose estate is interested in the result, it is held that a surety of the decedent is not entitled to protection, a judgment against him being merely evidence against decedent's representatives.⁹⁵

7. Representative or Successor of Deceased Representative or Other Protected Party.—A representative of another representative, since deceased, is entitled to protection the same as his decedent.⁹⁶ So a representative or successor of a deceased beneficiary under another decedent's will is entitled to the protection of the statute in a proceeding to contest the will,⁹⁷ though the contrary has been held.⁹⁸

8. Purchaser From Protected Party.—It has been held that a purchaser from a protected party is not entitled to the protection of the statute, since the disqualification should not be extended any further than the express terms of the statute require.⁹⁹ On the

E. 1043, and *disapproves* Ledbetter v. Graham, 122 N. C. 753, 29 S. E. 1035 as having been disposed of by a *per curiam* order on the authority of cases which were not in point, a decision moreover by *per curiam* order not being a binding precedent, nor having the effect of overruling a previous decision based on a well considered opinion. *Compare* People v. Borders, 31 Ill. App. 426. But see Cooper v. Jackson, 22 Ky. L. Rep. 295, 57 S. W. 254; and *Contra*, Lee v. Wisner, 38 Mich. 821.

^{95.} Cousins v. Jackson, 52 Ala. 262.

^{96.} McDonald v. Jacobs, 77 Ala. 24, *holding* a representative of a deceased administrator protected, on a settlement of the decedent's accounts, against the testimony of an adverse interested witness. *Compare* Carpenter v. Romer & Tremper Steamboat Co., 4 App. Div. 363, 63 N. Y. Supp. 274.

^{97.} **A g a i n s t R e p r e s e n t a t i v e o f D e c e a s e d B e n e f i c i a r y .**—A contestant in a will contest is not a competent witness in his own behalf to prove transactions with a beneficiary under the will, since deceased, as against the latter's representative who is a party to the contest and interested in the result thereof, under code § 590, providing that an interested person shall not be competent as to transactions with a decedent against a person deriving title under such decedent. *In re* Peterson, 136

N. C. 13, 48 S. E. 561. *Compare* Merrill v. Atkins, 59 Ill. 19; *In re* Atwood's Estate, 14 Utah 1, 45 Pac. 1036.

^{98.} *In re* Miller's Estate, 31 Utah 415 88 Pac. 338; *citing In re* Baum's Will, 4 N. Y. Supp. 342; Fleming v. Mills, 182 Ill. 464, 55 N. E. 373.

Upon a contest over the probate of a will, the petitioner who was the residuary legatee thereunder, died, and the probate thereof was continued by her legal representatives. Upon the trial the contestant testified as to a conversation between the decedent's widow, who was the original petitioner, since deceased, and himself. It was held that such testimony did not come within the prohibition of § 829 of the code as the words "deceased person" as used in that section referred to personal communications with a deceased person, the disposition of whose property is under consideration, and not to transactions and communications with another deceased person, the extent of whose interest in the estate involved is under dispute. *In re* Baum's Will, 4 N. Y. Supp. 342.

^{99.} Chamberlain v. Boon, 74 Tex. 659, 12 S. W. 727, *holding* that in an action by one claiming under the decedent against a vendee of the decedent's heirs the plaintiff was competent as to transactions between himself and the deceased. See also Wootters v. Hale, 83 Tex. 563, 19

other hand it has been held that such persons are entitled to protection because they are equally within the purview of the statute;¹ thus where the statute protects the surviving partner, his assignee is equally entitled to protection.²

9. Judgment Creditor of Protected Party. — A statute disqualifying the witness against an heir, amongst other successors of the decedent, does not protect a judgment creditor of such heir.³

10. Successor to Deceased Trustee. — A statute which protects not only the personal representatives, heirs, legatees and devisees of decedent, but also his assignee or survivor, does not apply to the successor in office of the deceased trustee;⁴ nor does a statute protecting personal representatives apply to the successor of a deceased receiver.⁵

11. Bank Containing Deposit Assigned by Decedent. — A bank in which decedent was a depositor is not his personal representative, assignee or survivor under the statute, and is therefore not protected thereby in an action by one to whom the decedent had assigned his deposit.⁶

S. W. 134. To same effect, *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934.

Grantee of Executor or Administrator. — *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008. But see *Foster v. Hart*, 29 Ill. App. 260.

1. Assignee of Administrator. *Reynolds v. Linard*, 95 Ind. 48.

In an action on a note against the maker where it appears that the note was endorsed to plaintiff by the payee's administrator, the defendant is not a competent witness to prove payment to the deceased payee under code 1896, § 1794, since the plaintiff's claim to the note is in succession to the deceased's ownership and the transfer did not revive defendant's competency. "The transfer of the note did not operate to take the defendant out of the exception to the statute rendering parties competent witnesses. 'Mutuality in its operation is the policy and purpose of the statute. Its provisions exclude the living from testifying to any transactions between himself and the dead, in all cases where the effect of the evidence is to diminish the rights of the deceased, or those claiming under him, and where the presumption exists that the dead, if living, could explain, qualify or contradict.' *Carpenter v. Stiggins*, 146 Ala. 681, 40 So. 216.

Remote Grantee of Heir. — *Olin v.*

Henderson, 120 Mich. 149, 79 N. W. 178.

2. *Hook v. Bixby*, 13 Kan. 164.

3. *Drake v. Painter*, 77 Iowa 731, 42 N. W. 526. This was a suit by parties in possession of and claiming to own real estate under an oral contract with the deceased owner to enjoin the sale of the land by a judgment creditor of an heir of the decedent in satisfaction of his debt. Plaintiffs were held competent as to the alleged oral contract, since the defendant creditor was not one of the persons protected by the statute.

4. *Guery v. Kinsler*, 3 S. C. 423, holding that a trustee appointed by the court in place of the former deceased trustee was not protected by such a statute. Compare *Carpenter v. Romer & Tremper Steamboat Co.*, 48 App. Div. 363, 63 N. Y. Supp. 274.

5. *Lehigh Coal & Nav. Co. v. Central R. Co.*, 41 N. J. Eq. 167, 3 Atl. 134.

6. *Severn v. National Bank of Troy*, 18 Hun (N. Y.) 228, holding that the assignee, in an action to recover the deposit, was competent in her own behalf to prove personal transactions with the decedent as the bank was not the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of the decedent within the meaning of the statute.

12. Heirs, Distributees or Next of Kin. — A. HEIR. — a. *Generally.* — The heirs of a decedent are quite generally protected by statute.⁷ An heir derives his title from the decedent within the meaning of a statute protecting persons deriving title from a deceased person.⁸ But an heir who has assigned his interest in the estate is not entitled to the protection of the statute.⁹

A statute applying in terms only to actions by or against the executors and administrators has been construed to apply also to actions by or against heirs,¹⁰ though the contrary has also been

7. *Illinois.* — *Hawley v. Hawley*, 187 Ill. 351, 58 N. E. 332; *Stodder v. Hoffman*, 158 Ill. 486, 41 N. E. 1082; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768; *Brace v. Black*, 125 Ill. 33, 17 N. E. 66; *Pyle v. Oustatt*, 92 Ill. 209.

Indiana. — *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. 315; *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389.

Iowa. — *Leathers v. Ross*, 74 Iowa 630, 38 N. W. 516.

Kansas. — *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71.

Kentucky. — *Black v. Cox*, 26 Ky. L. Rep. 599, 82 S. W. 278.

Maine. — *Higgins v. Butler*, 78 Me. 520, 7 Atl. 272; *Hinckley v. Hinckley*, 79 Me. 320, 9 Atl. 897.

New Jersey. — *Fairchild v. Fairchild* (N. J. Eq.), 44 Atl. 944.

Pennsylvania. — *Campbell v. Brown*, 183 Pa. St. 112, 38 Atl. 516.

Texas. — *Jones v. Day* (Tex. Civ. App.), 88 S. W. 424; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606.

Utah. — *Hennefer v. Hays*, 14 Utah 324, 47 Pac. 90.

Statutes. — See *supra*, statutes of Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, Wyoming.

Plaintiff in an action to enforce an alleged dedication of streets by his grantor, since deceased, is not a competent witness in his own behalf, since the adverse party was defending as decedent's heir. *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19.

In an action by an assignee of the administratrix of an estate on a promissory note executed to the decedent and assigned under the stat-

ute to the plaintiff as an heir, the maker of the note is not a competent witness to prove payment of the note to the decedent. *Fitzgerald v. Cox*, 39 Ind. 84.

In a suit by an heir to enforce an implied trust in real estate, growing out of the taking of the title by the defendant in his own name, the purchase money having been paid by the plaintiff's ancestor, the defendant is not a competent witness for herself as to matters occurring prior to the death of such ancestor. *Malady v. McEnary*, 30 Ind. 273.

In an Action To Set Aside a Tax Deed given under tax sale against a decedent, his heirs, defendants, are protected by the statute. *Grimes v. Ellyson*, 130 Iowa 286, 105 N. W. 418.

Heirs Suing or Defending by Guardian are entitled to the protection of the statute. *McC Campbell v. Henderson*, 50 Tex. 601; *Bridge v. Carter*, 33 Tex. Civ. App. 591, 77 S. W. 245.

8. *Quinn v. Quinn*, 130 Wis. 548, 110 N. W. 488.

9. *Howard v. Patrick*, 38 Mich. 795.

10. *Lewis v. Aylott*, 45 Tex. 190, so holding on the theory that the statute was intended to protect not the executor or administrator, but those beneficially interested. See also *Parks v. Caudle*, 58 Tex. 216, discussing the effect of an amendment to the statute extending its provisions to heirs and legal representatives. But see *Caffey's Exrs. v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157, holding that such subsequent amendment does not embrace devisees and legatees.

Under the federal statute extend-

held.¹¹ And a statute applying to actions in which the estate is interested is held to include actions by or against heirs as such.¹² The term "heir" does not include a grantee of the decedent,¹³ nor a legatee or devisee,¹⁴ though it has been held to include the widow.¹⁵

The Arizona and Texas statutes extending the protection of the statute to heirs, by their express terms apply only to actions in which the cause of action arises out of a transaction with the decedent.¹⁶

Antenuptial Contract. — Neither party to an alleged antenuptial contract is competent against the heirs of the other party as to the existence or non-existence of such contract,¹⁷ or the circumstances attending its making.¹⁸

b. *Heir of Heir.* — The protection of the statute extends not only to the immediate heirs, but the heirs of such heirs *ad infinitum*.¹⁹

ing the protection in terms to executors, administrators and guardians, an interested party is not competent against representatives of a decedent, against the minor heirs, nor against adult heirs not present at the transaction or conversation testified to. *Miller v. Steele*, 153 Fed. 714.

11. *Hughlett v. Conner*, 12 Heisk. (Tenn.) 83; *O'Neal v. Breecheen*, 5 Baxt. (Tenn.) 604; *Bird v. Jones*, 37 Ark. 195; *Lawrence v. La Cade*, 46 Ark. 378.

12. *Goodlett v. Kelly*, 74 Ala. 213.

13. *Harris v. Seinsheimer*, 67 Tex. 356, 3 S. W. 307; *Seaton v. Lee*, 221 Ill. 282, 77 N. E. 446; *Wooters v. Hale*, 83 Tex. 563, 19 S. W. 134; *Crone v. Crone*, 170 Ill. 494, 49 N. E. 217; *Hodgson v. Jeffries*, 52 Ind. 334 (even though he be an heir).

14. The Texas statute renders the witness incompetent only as against the heirs and legal representatives of the decedent; hence as against the devisees and legatees, the plaintiff, in an action to set aside a deed by him to the decedent on the ground that it was a mortgage, is a competent witness as to the nature of the transaction. *Emerson v. Scott* (Tex. Civ. App.), 87 S. W. 369; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337; *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648.

15. **Who Is an Heir.** — The word "heirs" used in the statute includes all persons who take any portion of the estate under the statute of

descent, or who would have thus taken, did they not take by virtue of a will. A widow taking by will is an heir, and in an action by her on a note assigned to her by the executor as sole legatee, the defendant is not a competent witness in her own behalf. *Peacock v. Albin*, 39 Ind. 25; *Larch v. Goodacre*, 126 Ind. 224, 26 N. E. 49.

16. *Barrett v. Eastham Bros.*, 28 Tex. Civ. App. 189, 67 S. W. 198. But see *s. c.* (opinion on subsequent appeal) (Tex. Civ. App.), 86 S. W. 1057, where the court doubts the soundness of its previous decision "though it seems to be supported by the decision in the case of *Harris v. Seinsheimer*, 67 Tex. 356, 3 S. W. 307."

17. In an action by a deceased wife's heir against the decedent's husband to enforce an antenuptial contract, the defendant was not a competent witness to prove that the contract though executed was to take effect only upon certain conditions which had not been fulfilled. *Dunlop v. Lamb*, 182 Ill. 319, 55 N. E. 354. So in an action by him to enforce such a contract. *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930.

18. In an action by the widow against the heirs of her deceased husband to set aside an antenuptial contract and for assignment of dower for a homestead, she is incompetent as to the facts and circumstances accompanying the making of the contract. *Yarde v. Yarde*, 187 Ill. 636, 58 N. E. 600.

19. *Merrill v. Atkins*, 59 Ill. 19.

c. *Tenant by Curtesy Not an Heir*. — A party claiming as tenant by curtesy is not an heir within the meaning of the statute disqualifying a party where the adverse party is claiming or defending as heir.²⁰

d. *Must Sue or Defend in Hereditary Capacity*. — Where the action is not based on any alleged hereditary rights, the heir is not entitled to the protection of the statute.²¹

B. NEXT OF KIN. — The decedent's next of kin are protected under some statutes.²² His widow is his next of kin within the meaning of such a statute.²³

C. WIDOW. — A statute protecting the personal representatives, heirs, devisees and legatees, extends its protection²⁴ to the widow of decedent; so does one disqualifying the parties to an action in which the estate is interested,²⁵ provided she is suing or defending as representative of the estate.²⁶

20. *Hubbell v. Hubbell*, 22 Ohio St. 208.

21. *Harrow v. Brown*, 76 Iowa, 179, 40 N. W. 708 (*holding* that in an action by an heir against the executor, the plaintiff was not entitled to the protection of the statute because he was suing merely as a creditor). See *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373, and fully, *supra*, III, 6, D, e.

22. See *supra*, statutes of Florida, Iowa, Kansas, North Dakota, South Carolina, South Dakota, West Virginia.

The term "next of kin" is not confined to the nearest blood relations of the decedent, but includes any distributee. *Seabright v. Seabright*, 28 W. Va. 412, 465.

23. *French v. French*, 84 Iowa 655, 51 N. W. 145; *Campbell Bkg. Co. v. Cole*, 89 Iowa 211, 56 N. W. 441; *Seabright v. Seabright*, 28 W. Va. 412, 465. See also *Willcox v. Jackson*, 51 Iowa 208, 1 N. W. 513.

24. *Harmon v. Dart*, 37 Mich. 53. See *Crawford v. Moore*, 28 Fed. 824. But see *Lake v. Nolan*, 81 Mich. 112, 45 N. W. 376 (containing dictum to the effect that a widow suing to set aside a deed by her husband and for a partition of her dower rights in the land is not protected, since the estate is not interested in the controversy), and *Golder v. Golder*, 95 Me. 259, 49 Atl. 1050.

25. In *Dicus v. Childress*, 128 Ala. 617, 29 So. 617, a widow and minor children of decedent, to whom there has been duly and regularly set apart as a portion of their exemptions, a note owned by the decedent at the time of his death, filed a bill to enforce its collection by having a vendor's lien declared. The defendant maker was held incompetent to testify as to transactions had with, or statements made by, the decedent.

26. In a suit by a widow against the surety on a note held by her deceased husband, when the widow does not sue as the personal representative of his estate, but as his widow, testimony of the maker of the note that the husband granted him an extension of time for payment is admissible since there is no such conflict of interest between the witness and decedent that the estate can be said to be interested in the result of suit within the meaning of the statute. The interest of the estate would not be affected although the plaintiff may not recover. *Howle v. Edwards*, 97 Ala. 649, 11 So. 748.

A Widow Suing, Before Administration on the estate of her deceased husband, for the collection of assets of the estate, which she claims as exempt to her under the statute, in legal effect sues as the representative of the estate. *Howle v. Edwards*, 113 Ala. 187, 20 So. 956.

A widow has been held to be an heir²⁷ or next of kin²⁸ of her deceased husband, under a statute protecting such classes of persons. But she is not the "representative" of her deceased husband, as that term is used in the statute,²⁹ except where she is entitled to his whole estate without administration;³⁰ nor is she his executor or administrator³¹ within the meaning of the statute protecting such persons, unless, of course, she has been so appointed.

13. Legatees or Devisees.—Statutes³² in many states provide that the testimony of certain witnesses shall not be competent against legatees³³ or devisees.³⁴ A grantee of the decedent is not a devisee within the meaning of the statute.³⁵ Whether a legatee or devisee is the representative,³⁶ executor or administrator,³⁷ or heir³⁸ of the decedent within the meaning of a statute protecting such persons is elsewhere discussed.

14. Creditors.—The statutes generally are construed not to protect the decedent's creditors,³⁹ though it has been held to the contrary

27. See *supra*, V, 12, A, a, and *Cuthrell v. Cuthrell*, 101 Ind. 375; *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735.

28. See *supra*, V, 12, B.

29. One contesting with the widow the title to property set apart or sought to be set apart for her year's support is not incompetent, since she is not in such case the decedent's personal representative. *Gunn v. Pettygrew*, 93 Ga. 327, 20 S. E. 328; *Harris v. Whitney*, 112 Ga. 633, 37 S. E. 883. But see *Killian v. Banks*, 103 Ga. 245, 29 S. E. 971.

The widow to whom dower in certain lands has been assigned by the commissioners in their return is not protected by the statute against one who enters a traverse to the return claiming the land as his own and denying the decedent's title. Such an action is not one instituted or defended by the personal representative of the decedent within the meaning of the statute. *Flowers v. Flowers*, 92 Ga. 688, 18 S. E. 1006.

30. *Johnson v. Champion*, 88 Ga. 527, 15 S. E. 15, distinguished in *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434.

31. *Bird v. Jones*, 37 Ark. 195; *Lawrence v. La Cade*, 46 Ark. 378; *Golder v. Golder*, 95 Me. 259, 49 Atl. 1050; *Crawford v. Moore*, 28 Fed. 824; and see *supra*, V, 4, A.

32. See *supra*, statutes of Colo-

rado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Michigan, Ohio, South Carolina, Utah, West Virginia, Wyoming.

33. Where pending a will contest the contestant dies and the contest is continued by his legatees, a beneficiary under the will is an incompetent witness under §4604 as to a conversation between himself and the deceased contestant, the statute prohibiting interested persons from testifying to such transactions as against the legatee. *In re Wiltsey's Will*, 122 Iowa 423, 98 N. W. 294.

The Legatee of Payee of a Note, in an action thereon, is protected against the testimony of the defendant maker. *Chapman v. Chapman*, 132 Iowa 5, 109 N. W. 300.

34. *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Blake v. Blake*, 120 N. C. 177, 26 S. E. 816; *Nordman v. Meyer*, 118 Iowa 508, 92 N. W. 693.

35. *Seaton v. Lee*, 221 Ill. 282, 77 N. E. 446.

36. See *supra*, V, 3, D.

37. See *supra*, V, 4, A.

38. See *supra*, V, 12, A, a.

39. *Hutzler Bros. v. Phillips*, 26 S. C. 136, 1 S. E. 502; *Houston v. Maddux*, 73 Ill. 203; *Jackson v. Lewis*, 32 S. C. 593, 10 S. E. 1074; *Matter of Le Baron*, 67 How. Pr. (N. Y.) 346.

A Creditor suing to set aside a deed by the deceased is not protected

where the creditors are in effect acting as the legal representatives of the estate.⁴⁰

15. Persons Jointly Interested or Liable With Decedent. — A. **GENERALLY.** — Statutes in some states protect surviving joint contractors with the decedent or persons jointly interested or liable with him.⁴¹ Such persons, however, are not protected under statutes applying to the personal representatives and distributees of a decedent.⁴²

B. SURVIVING PARTNER. — Where a surviving partner is claiming a partnership right, or defending a partnership liability, he is protected by some statutes against testimony as to firm transactions in which he did not personally participate, or of which he has no

by a statute disqualifying parties and interested persons against an executor, administrator, heir, next of kin, assignee, devisee, legatee, or survivor of a deceased person. *Farmers' Bank v. Gould*, 42 W. Va. 132, 24 S. E. 547.

40. In a suit against an administrator by creditors of the estate to subject certain land, alleged to have been fraudulently conveyed to him by his intestate, to the payment of the debts of intestate, the defendant was permitted, under the objections and exceptions of the plaintiff, to be examined as a witness in his own behalf as to transactions between himself and his intestate in reference to the land, and precedent to the execution of the deed, terminating in the conveyance to himself. It was held that in all substantial respects as regards the alienee claiming the estate, the creditors occupy towards him the same relation as the personal representative would occupy in a proceeding by himself as administrator to obtain an order of sale of property, fraudulently conveyed, and within the terms and scope of the statute. "The administrator, when he sues, sues for the creditors, whose representative and trustee he becomes, and when he cannot, (as in the present case) the creditors become actors and sue for themselves; and testimony incompetent to the former, would seem to be not less so in the latter action. The same rule ought to govern both, and . . . a fair and reasonable interpretation of the act, looking to its obvious purpose and the evils against which it

is directed, includes the testimony of the defendant admitted on the trial, and it ought to have been excluded." *Grier v. Cagle*, 87 N. C. 377. See also *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232.

41. See *supra*, statutes of Colorado, Georgia, Illinois, Kansas, Ohio, Oklahoma, Virginia, Wyoming. And see *Nicolls v. Esterly*, 16 Kan. 32; *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313.

Surviving Party to Penal Bond. The statute rendering the adverse party incompetent against a surviving joint contractor applies to penal bonds, as well as to any other class of contract. *Henry v. Tiffany*, 5 Ill. App. 548.

42. **Surviving Joint Tort Feasor.** Where, pending a suit against two physicians, partners, for damages for an injury alleged to have been caused by the negligent and unskilful manner in which they reset and treated the plaintiff's dislocated shoulder, one of the defendants dies, it was not error to permit the plaintiff to describe the acts and repeat declarations made to him by the deceased physician, while resetting his shoulder and treating it afterwards. Upon the death of one of the physicians the plaintiff's cause of action against the decedent was extinguished. The only cause of action remaining was that which existed against the other; and, while the transaction with the decedent is incidentally involved, his estate is not concluded by the judgment, even though the surviving partner may

personal knowledge.⁴³ Whether a surviving partner is the decedent's representative,⁴⁴ executor or administrator,⁴⁵ or assignee,⁴⁶ is elsewhere discussed.

The surviving partner does not represent the deceased partner's estate even though the matter in issue is a partnership right or liability, where the statute disqualifies a person as a witness in support of his claim or defense against the estate of the decedent,⁴⁷ though the contrary rule has been laid down under a statute applying to actions in which the decedent's estate is interested.⁴⁸

C. EXTENT OF PROTECTION.—As to what extent the opposite party or witness is disqualified against such survivor depends much upon the general form and provisions of the statute in this regard, the disability in this case usually being the same as in the case of other protected parties,⁴⁹ though it is more limited in one jurisdiction.⁵⁰ Generally, however, the disability does not extend to matters as to which the surviving joint contractor can testify,⁵¹ and some

enforce contribution. *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156.

43. See *supra*, I, 2, B, statutes of Colorado, Georgia, Illinois, Kansas, Michigan, Ohio, Oklahoma, West Virginia, Wyoming. And see the following cases:

Georgia.—*Morgan v. Johnson*, 87 Ga. 382, 13 S. E. 710; *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266.

Illinois.—*Foster v. Hart*, 29 Ill. App. 260.

Kentucky.—*Lawhorn v. Carter*, 11 Bush 7; *Collins v. Fenley*, 21 Ky. L. Rep. 958, 53 S. W. 667.

Michigan.—*Jackson City Nat. Bank v. Wilcox*, 136 Mich. 567, 100 N. W. 24.

Nevada.—*Gage v. Phillips*, 21 Nev. 150, 26 Pac. 60.

New York.—*Manning v. Schmitt*, 4 App. Div. 131, 38 N. Y. Supp. 640. See also *infra*, IX, 2, G.

44. See *supra*, V, 3, G.

45. See *supra*, V, 4, A.

46. See *supra*, V, 5, F, a.

47. *Combs v. Black*, 62 Miss. 831; *McCutchen v. Rice*, 56 Miss. 455. And see *infra*, IX, 1.

48. *Hussey v. Peebles*, 53 Ala. 432; *Parker v. Edwards*, 85 Ala. 246, 4 So. 612. But see *Bragg v. Clark*, 50 Ala. 363.

49. See *supra*, I, 2, C, statutes.

By statute in Michigan the opposite party in an action by or against a surviving partner is incompetent as to matters equally within the

knowledge of the deceased partner. *Jackson City Nat. Bank v. Wilcox*, 136 Mich. 567, 100 N. W. 24.

50. **Disability Limited to Admissions and Conversations.**—Parties and interested persons are incompetent against a surviving joint contractor only as to admissions or conversations between the witness and such deceased joint contractor; hence in a proceeding by the ward against the surety on his guardian's bond the ward is competent against the surviving surety as to any other matters. *People v. Borders*, 31 Ill. App. 426.

Testimony by a witness against a surviving contractor as to an arrangement between himself and the deceased co-contractor, without specifying its nature, is incompetent because, if written, the instrument itself is the best evidence, and if oral his testimony is indirect evidence as to a conversation with decedent, which is incompetent under the statute. *Henry v. Tiffany*, 5 Ill. App. 548.

51. *Payne v. Miller*, 89 Ga. 73, 14 S. E. 926; *Harrison v. Neely*, 41 Ohio St. 334.

In an action against two surviving obligors on a note executed by them and other persons since deceased, the plaintiff obligee is a competent witness as to matters which occurred between himself and either of the two survivors, but not as to any

statutes so provide.⁵² A statute so providing in actions by or against a surviving partner has been construed to apply to actions by or against surviving joint contractors generally.⁵³

16. Survivor. — Some statutes protect the "survivor" of the decedent.⁵⁴ It has been held that the term "survivor" as used in the statute applies to any person who by reason of his surviving the deceased, becomes, as such survivor, interested in the subject of the controversy,⁵⁵ and therefore protects the surviving partner,⁵⁶ though not the receiver of a partnership, one party to which is dead,⁵⁷ nor the principal of an agent since deceased.⁵⁸

Joint and Several Obligors. — A surviving obligor on a joint and several obligation is not the survivor of the deceased co-obligor within the meaning of the statute.⁵⁹

transaction between himself and the deceased obligor; hence for the purpose of explaining alterations apparent on the face of the instrument he cannot testify that it was delivered to him in its present condition by one of three obligors, but which one he could not remember, since the delivery might have been by the decedent. *Dean v. Warnock*, 98 Pa. St. 565.

52. See *supra*, Statutes, I, 2, B.

53. A statute removing the disqualification of the adverse party, in actions by or against surviving partners, as to transactions with the survivor, is liberally construed to cover actions by or against the survivor of joint contracting parties, since they are partners in the popular sense of the term. Hence it includes the surviving members of a fraternal organization jointly engaged in erecting a lodge building. *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818.

54. See *supra*, statutes of Iowa, New York, North Carolina, South Carolina.

55. The word "survivor" as used in the statute includes any person, who, by reason of his surviving the deceased, would become as such survivor interested in the subject of controversy; as for instance, a widow claiming as distributee a share of her husband's estate, the question in controversy being whether her husband in his lifetime had given away a portion of his personal property to one who was his executor. *Seabright v. Seabright*, 28 W. Va. 412, 467.

56. *Salysers v. Monroe*, 104 Iowa 74, 73 N. W. 606. And see *Manning v. Schmitt*, 4 App. Div. 131, 38 N. Y. Supp. 640.

57. In an action by a receiver of a banking partnership against the administrator of one of the deceased partners and a third person who claimed to be the equitable owner of the property in question, where the receiver sought to have the decedent's title to certain land declared to be a trust for the partnership, and such third person claimed that the decedent held title in trust for him, such third person was held an incompetent witness as to the alleged trust agreement between himself and the deceased as against the administrator or against the receiver. But as to the issues between the receiver and such third party the question of the admissibility of the latter's testimony "is more difficult. It may be that his testimony would be admissible, but in order to obtain any relief as against him he must establish his title as against Wood (the administrator). That the testimony would be admissible in a controversy between the receiver and Stewart (the witness) alone seems to be held in *Ruddick v. Otis*, 33 Iowa 402." *McElroy v. Allfree*, 131 Iowa 112, 108 N. W. 116.

58. *Reynolds v. Iowa & Nebraska Ins. Co.*, 80 Iowa 563, 46 N. W. 659.

59. *Sprague v. Swift*, 28 Hun (N. Y.) 49, holding that in an action on a joint note against a surviving maker the payee may testify as to personal transactions had with a de-

17. Beneficiaries in Insurance Policy.—The beneficiary named in a policy of insurance is not the representative⁶⁰ or assignee⁶¹ of the insured, and is therefore not entitled to the protection of the statute, though the contrary has been held under a statute protecting the personal representatives, heirs, legatees, devisees and assigns of the decedent.⁶²

18. Principal of Agent Deceased or Insane.—A. GENERALLY. Statutes of varying phraseology in several states extend their protection to the principal of an agent since deceased, in actions involving transactions between such decedent, as agent, and the adverse party;⁶³ and in one state a party is disqualified as to transactions with the agent, since deceased, of the adverse party's predecessor in interest.⁶⁴ This rule, of course, does not protect one party

ceased maker of the note, the defendant not being a "survivor" of the decedent within the meaning of the statute. The obligation being several as well as joint, defendant could have been sued separately before as well as after his co-maker's death. *Compare* *Clarke v. Adam*, 30 Tex. Civ. App. 66, 69 S. W. 1016.

60. In an action by the beneficiaries under a policy of life insurance against a bank for the possession of the policy, conversations and transactions by the president and cashier of the bank with the assured, since deceased, are not incompetent testimony against the plaintiffs under §400 of the code, as plaintiffs are not prosecuting this action in any of the representative capacities referred to in said section. *Macauley v. Central National Bank*, 27 S. C. 215, 3 S. E. 193.

61. *Shuman v. Supreme L. K. of H.*, 110 Iowa 480, 81 N. W. 717.

In *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587, it was alleged that the plaintiff was induced, by undue influence of her husband, the deceased, and acting under duress and coercion, to sign a blank assignment of a certain policy of insurance and which assignment was thereafter filled in with the name of the defendant Brune. The plaintiff was called as a witness in her own behalf as to the transaction between herself and husband at the time of executing the assignment. This was objected to on the ground that she was not a competent witness thereto under §399 of the code. It was held that the defendant Brune was not the

assignee of the deceased, and the plaintiff was therefore competent.

62. *Wallace v. Fraternal Mystic Circle*, 127 Mich. 387, 86 N. W. 853 (since the decedent could up to the time of his death change his beneficiary, the latter takes by virtue of a right bestowed upon him by decedent).

63. See *supra*, statutes of Alabama, Colorado, Georgia, Illinois, Maryland, Michigan, Virginia and Wisconsin. And see *Sucke v. Hutchinson*, 97 Wis. 373, 72 N. W. 880; *Birmingham Min. R. Co. v. Tennessee C., I. & R. Co.*, 127 Ala. 137, 28 So. 679; and *infra*, V, 19.

In an action against a buyer to recover the price of goods sold by plaintiff's salesman, since deceased, defendant is not a competent witness as to fraudulent representations made by the salesman in effecting the sale. *Kessler & Co. v. Zacharias*, 145 Mich. 698, 108 N. W. 1012.

In *Meyer v. Hafemeister*, 119 Wis. 539, 97 N. W. 165, the defendant was held incompetent to testify in his own behalf in reference to a transaction had with plaintiff's attorney, since deceased.

64. See *supra*, I, 2, B, Wisconsin statute.

Cause of Action Occurring Subsequent to Agent's Death.—The rule disqualifying a witness from testifying as to transactions or communications between himself and an agent of the person from, through or under whom the adverse party derives his interest or title when such agent is dead has no application where the cause of action and the facts con-

to a transaction with the other party's agent who afterwards dies.⁶⁵

As to whether in the absence of an express provision covering the subject the principal of a deceased agent is protected, the cases are not in harmony,⁶⁶ the conflict, however, being partly due to the difference in the form of the statutes.⁶⁷

stituting the same occur subsequent to the death of such agent. *Moore v. May*, 117 Wis. 192, 94 N. W. 45.

65. *Moore v. May*, 117 Wis. 192, 94 N. W. 45.

66. **Not Protected.**—*United States*.—*Missouri*, K. & T. R. Co. v. Byrne, 100 Fed. 359, 40 C. C. A. 402.

Georgia.—*Maxwell v. Imperial Fertilizer Co.*, 103 Ga. 108, 29 S. E. 597.

Iowa.—*Reynolds v. Iowa & Nebraska Ins. Co.*, 80 Iowa 563, 46 N. W. 659; *Bellows v. Litchfield*, 83 Iowa 36, 48 N. W. 1062.

Kansas.—*Missouri Pac. R. Co. v. Phelps*, 10 Kan. App. 1, 61 Pac. 672.

Michigan.—*Bullock v. Tompkins' Estate*, 125 Mich. 17, 83 N. W. 1029.

Nebraska.—*Kansas Mfg. Co. v. Wagoner*, 25 Neb. 439, 41 N. W. 287; *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106.

New York.—*Flaherty v. Herring-Hall-Marvin Safe Co.*, 22 Misc. 329, 49 N. Y. Supp. 174; *Hildebrant v. Crawford*, 65 N. Y. 107.

North Carolina.—*Howerton v. Lattimer*, 68 N. C. 370; *Sprague v. Bond*, 113 N. C. 551, 18 S. E. 701; *Gwaltney v. Provident Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659.

Ohio.—*Cochran v. Almack*, 39 Ohio St. 314; *First Nat. Bank v. Cornell*, 41 Ohio St. 401.

Tennessee.—*See Burton v. Farmers' Bldg. & L. Assn.*, 104 Tenn. 414, 58 S. W. 230.

West Virginia.—*Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

Transaction With Deceased Agent of Decedent.—In an action to recover for coal furnished the defendant by plaintiff's testator it was shown that the testator during the time in question gave no personal attention to his business, but that his business of selling coal was carried on by one Patterson from whom defendant had purchased the coal

and who had since died. It was held that the defendant was competent under § 829 of the code to testify in his own behalf that the price agreed upon between the witness and Patterson for the coal was less than stated in the entries made in the books by the latter. *Dakin v. Walton*, 85 Hun 561, 33 N. Y. Supp. 203.

67. Under § 606, Civ. Code Prac., providing that no person shall testify in his own behalf as to any transaction had with a person since deceased, one party cannot testify against the other as to a transaction between himself and the adverse party's agent, where such agent is dead when the testimony is offered. *Loomis v. Mullins*, 31 Ky. L. Rep. 231, 101 S. W. 913; *Mutual Life Ins. Co. v. O'Neil*, 116 Ky. 742, 76 S. W. 839; *Holcolmb-Lobb Co. v. Kaufman*, 29 Ky. L. Rep. 1006, 96 S. W. 813; *Breckenridge v. McRoberts*, 20 Ky. L. Rep. 699, 47 S. W. 454; *Harpending's Exrs. v. Daniel*, 80 Ky. 449; *Knight v. Wilson*, 22 Ky. L. Rep. 545, 58 S. W. 439. See *Farmers' Union Elev. Co. v. Syndicate Ins. Co.*, 40 Minn. 152, 41 N. W. 547.

In some of those jurisdictions in which the statute disqualifies the surviving party to the contract or cause of action in issue and on trial, it is held that the statute applies when the contract or transaction was with the adverse party's agent, since deceased. (See fully *infra*, IX, 2, C, c. (4).) Thus one who contracts with the authorized agent of a corporation is not a competent witness as to such contract, or the admissions or declarations of the agent after the latter's death. *Central Bank of Kansas City v. Thayer*, 184 Mo. 61, 82 S. W. 142; *Green Real Estate Co. v. St. Louis Mut. House Bldg. Co.*, 196 Mo. 358, 93 S. W. 1111 (*distinguishing Clark v. Thias*, 173 Mo. 628, 73 S. W. 616). "The statute does not provide in terms that a party to the contract made with an

Agent Insane. — The same rule would apply where the agent has become insane as where he has died, in those jurisdictions making insanity a ground of disqualification.⁶⁸

B. DEATH OF CORPORATE OFFICER OR AGENT. — The same rule applies to transactions with a deceased or insane agent or officer of a corporation as to transactions with agents generally.⁶⁹ In some states, by statute, the witness is expressly disqualified in such cases.⁷⁰

19. One to Whom Decedent Was Acting in Fiduciary Relation. In Alabama, the statute disqualifies interested persons from testifying against the person to whom the decedent was acting in a fiduciary capacity.⁷¹

agent shall be disqualified by the latter's death, but its purpose and the mischief to be obviated are held to require the enforcement of the disqualification in such a contingency." *Crosno v. Bowser Mill Co.*, 106 Mo. App. 236, 80 S. W. 275, following *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429.

68. In an action brought to recover on two lost notes, the defendants are, under § 606 Civ. Code Prac., incompetent to establish the fact that they had paid the notes sued upon to plaintiff's agent, who, at the time of the trial, was of unsound mind and confined in an asylum. *Maxey v. Bethel*, 23 Ky. L. Rep. 1085, 64 S. W. 746.

69. See preceding section, and *Flaherty v. Herring-Hall-Marvin Safe Co.*, 22 Misc. 329, 49 N. Y. Supp. 174; *Missouri Pac. R. Co. v. Phelps*, 10 Kan. App. 1, 61 Pac. 672; *Farmers' Union Elev. Co. v. Syndicate Ins. Co.*, 40 Minn. 152, 41 N. W. 547 (holding adverse witness incompetent as to transaction with the deceased agent of the corporation); *Murray v. East End Imp. Co.*, 22 Ky. L. Rep. 1477, 60 S. W. 648 (same); *William Tarr Co. v. Kimbrough*, 17 Ky. L. Rep. 1284, 34 S. W. 528.

70. *Rayburn v. Lumber Co.*, 57 Mich. 273, 23 N. W. 811 (incompetent as to admissions of deceased officer); *Baumann v. Salt & Lumb. Co.*, 94 Mich. 363, 53 N. W. 1113 (conversations with deceased officer); *Florida Cent. & P. R. Co. v. Usina*, 111 Ga. 697, 36 S. E. 928; *Register v. Aultman & Taylor Co.*, 106 Ga. 331, 32 S. E. 116; *Merchants'*

Nat. Bank v. Demere, 92 Ga. 735, 19 S. E. 38. See *infra*, V, 19.

The Michigan statute (see *supra*) protects the corporation against testimony by the adverse party as to matters equally within the knowledge of a deceased officer of the corporation, and not within the knowledge of any surviving officer. *Lyttle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. 571; *Hoskins v. Rochester, S. & L. Assn.*, 133 Mich. 505, 95 N. W. 566.

And the Georgia statute contains the same limitations. *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459.

In an action against a railroad company for damages alleged to have been caused by the negligence of a locomotive engineer, since deceased, it was held that the engineer was an agent of the corporation within the meaning of the statute. *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459.

In an action on a policy of insurance, it was held error to receive the testimony of plaintiff as to the contents of a letter claimed to have been sent by him to a deceased secretary of the defendant company, where the latter's surviving associates testified that they had never seen such a letter, and that, while it would have been filed if received, a search of the office files failed to reveal it. *Shelden v. Michigan M. M. F. I. Co.*, 124 Mich. 303, 82 N. W. 1068.

71. See *supra*, statutes, I, 2, B. **Transaction With Deceased Agent.** Under such a statute one party to the action is not competent to testify

20. Persons Themselves Incompetent and Their Representatives or Successors. — A. *GENERALLY.* — In some jurisdictions the protection of the statute is confined to the representatives or successors of deceased persons. Inasmuch, however, as the reason for the rule is equally applicable in the case of living persons who are incapable of properly testifying, the statutes of many states contain provisions, differing considerably in phraseology and import, partially or wholly covering this class of cases, either protecting the incompetent directly or his legal representative or successor.⁷²

B. *GUARDIAN.* — In some states the statute protects "guardians" in general terms from certain testimony as to transactions with the ward.⁷³ In others, the protection is confined to guardians of infants or particular classes of infants.⁷⁴ In many states the statute applies to the guardian, trustee, committee or conservator of insane or incompetent persons.⁷⁵

C. *PERSONS INCAPABLE OF TESTIFYING.* — In some jurisdictions the statute protects parties incapable, for various reasons, of testifying on their own behalf.⁷⁶ In Virginia where the statute disqualifies one party to the contract or cause of action when the other party is incapable of testifying by reason of death, insanity, infancy, or "other legal cause," it has been held that a party prevented from testifying by reason of the statute itself is also entitled to its protection.⁷⁷

D. *INSANE PERSONS.* — a. *Generally.* — The statutes sometimes extend the protection directly to insane persons.⁷⁸ Under such a

in his own behalf as to transactions with the other party's agent, since deceased. *Daniel v. Bradford*, 132 Ala. 262, 31 So. 455; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736, 6 So. 703; *Warten v. Strane*, 82 Ala. 311, 8 So. 231; *Stanley v. Sheffield, L. I. & C. Co.*, 83 Ala. 260, 4 So. 34 (transaction with corporation agent); *Tabler v. Sheffield, Land I. & C. Co.*, 87 Ala. 305, 6 So. 196 (same); *Burgess v. American Mtg. Co.*, 115 Ala. 468, 22 So. 282.

The complainant seeking to establish an equitable interest or trust in lands, under an oral agreement between himself and an agent or officer of the defendant corporation, cannot testify as to any transaction between him and said agent or officer, since deceased. *Downing v. Woodstock Iron Co.*, 93 Ala. 262, 9 So. 177.

^{72.} See *supra*, I, 2, B, statutes, and *infra*, the following sections.

^{73.} See *supra*, I, 2, B, statutes of

United States, Arizona, Arkansas, Delaware, Tennessee, Texas.

^{74.} See *supra*, I, 2, B, statutes of Ohio (child of deceased); Washington (under fourteen years); Wyoming (child of deceased).

Guardian of Heir, Legatee or Devisee. — See *supra*, statutes of Colorado, Illinois, Utah, and *In re Atwood's Estate*, 14 Utah 1, 45 Pac. 1036.

^{75.} See *supra*, I, 2, B, statutes of Colorado, District of Columbia, Florida, Illinois, New York, North Carolina, Ohio, Washington, West Virginia, Wyoming.

^{76.} See *supra*, I, 2, B, statutes of District of Columbia, Maryland (by reason of mental disability); New Jersey (prohibited by any legal disability); Tennessee (by reason of idiocy, lunacy or insanity).

^{77.} *Mason v. Wood*, 27 Gratt. (Va.) 783. See also *Ginter v. Breeden*, 90 Va. 565, 19 S. E. 656.

^{78.} See *supra*, I, 2, B, statutes of

statute it seems that the lunatic as well as his guardian must himself be made a party before the adverse party can be disqualified.⁷⁹

b. *Who Are Insane Persons.* — Since inability of the incompetent to testify is the basis of the disqualification, his mind must be in such condition that it is impossible for him to testify;⁸⁰ although he is technically an insane person, if he is able to give rational testimony as to the matter in question, the statute does not apply.⁸¹

Georgia (insane at time of trial); Missouri (shown to the court to be insane); Vermont.

79. Where one sued in his individual capacity for a wrongful conversion of personal property justifies on the ground that the property was rightfully held by him as the property of a lunatic, for whom, subsequent to the conversion, he had been appointed guardian, the plaintiff is a competent witness on her own behalf, even as to communications and transactions between herself and such lunatic before he became insane; and this is true, even though upon the trial an order is passed, without objection, making the defendant, in his representative capacity, also a party defendant. Such order not being effectual to make the lunatic himself a party to the case. *Elliot v. Keith*, 102 Ga. 117, 29 S. E. 155.

80. The mere fact that a person's mind and memory are clouded, and that he is extremely feeble in body on account of old age and is able to converse only with great difficulty, being afflicted with paralysis, does not show such a condition of mind as to amount to insanity. *Percival-Porter Co. v. Oaks*, 130 Iowa 212, 106 N. W. 626.

Insanity — What Is. — In *McCor-mick v. Hickey*, 24 Mo. App. 362, Thompson, J., in discussing a provision disqualifying one party to the contract or cause of action where the other "is shown to the court to be insane," says: "We are clear that the defendant was not shown to be insane, within the meaning of this statute, by the evidence that was adduced for that purpose in this case. This evidence consisted of the testimony of his family physician, to the effect that the defendant had a growth on the base of the cranium, which had been there for several years, and was growing worse all the

time; that it had now caused paralysis of one side; that any excitement would aggravate the disease; that to offer him as a witness in court might cause his immediate death; that under any excitement his memory or statements could not be depended upon; but that at home, surrounded by his family, he could converse intelligently enough. . . . The fact that the defendant may have a lesion of the brain which would render it imprudent for him to appear and undergo, in the character of a witness, the tension and excitement of a cross-examination, does not, we take it, disqualify the other party as a witness. If the rule were so, any party defendant who is too ill from any cause to appear in court and testify as a witness in his own behalf would be insane in the sense of the statute, and it would come to this, that the serious illness of a party would disqualify the opposite party as a witness. It does not appear from the testimony of the defendant's family physician that his condition was such as to render it impossible, if necessary to his defense of the action, to take his deposition at his residence; and if his statements were not to be relied on under excitement, that would be a matter affecting his credibility and a subject of observation to the jury. A man whose memory is not so far impaired by a disease of the brain as to prevent him from conversing intelligently when surrounded by his family, can, we take it, furnish to his counsel such information as is necessary to his defense on an ordinary suit on a bill of exchange, and give a deposition on any point material to his defense, if they shall deem it necessary. We, therefore, hold that the court committed no error in allowing the plaintiff to testify."

81. *Kendall v. May*, 10 Allen (Mass.) 59.

Adjudication of Insanity Unnecessary. — It is not necessary that there should have been a decree establishing the insanity of the incompetent and appointing a guardian for him.⁸²

E. INFANTS. — Statutes sometimes disqualify a witness in his own behalf as to transactions with or acts by infants under a certain age.⁸³

21. Co-Parties With Protected Party. — Where the protected party has one or more co-parties, the adverse party, though incompetent against the person protected, is nevertheless competent against his co-parties, at least where their rights and liabilities can be separately determined.⁸⁴ But where only one judgment or de-

^{82.} *Bailey v. Harvey*, 60 N. H. 152.

^{83.} § 606, subsec. 2 of Ky. Civ. Code Prac. (see *supra*); and *Mullins v. Mullins*, 27 Ky. L. Rep. 1048, 87 S. W. 764, which was an action by a father to set aside a conveyance to his children, some of whom were under fourteen years of age at the time of the conveyance. It was held that the plaintiff was not competent in his own behalf as to the nature of the transaction. See also *Holtheide v. Smith*, 24 Ky. L. Rep. 2535, 74 S. W. 689. This statute is not confined in its application to actions in which the infant is a party or interested. See *supra*, III, 1, A and III, 6, A.

^{84.} *Wilmurth v. Tompkins*, 22 Tex. Civ. App. 87, 53 S. W. 833; *Clarke v. Adam*, 30 Tex. Civ. App. 66, 69 S. W. 1016; *Emerson v. Scott* (Tex. Civ. App.), 87 S. W. 369; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198. See *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

"Where there are two or more persons, plaintiffs or defendants, claiming several interests under the same title or alleged state of facts, and the adverse party is a competent witness as against one or more of them, and incompetent, . . . as against the others, and the case is one in which separate judgments may be rendered, the testimony of such party should be received in evidence, but used and considered only as against those as to whom the witness was competent; and the court should render such judgment or judgments in the action as would have been warranted by the evidence, in case there had been separate actions — the evidence being considered in one of

such actions, and not in the other." *Hubbell v. Hubbell*, 22 Ohio St. 208.

Kirby's Dig. § 3093, provides that in actions by or against administrators in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to transactions with or statements by the intestate, unless called to testify thereto by the opposite party. Under this statute in an action based on a transaction to which there are several parties, where one of the parties defendant dies and his administrator is substituted, the plaintiffs are nevertheless competent witnesses as to the transaction in question for the purpose of determining their rights as against the other party defendant, although not as against the administrator. "There is some difference in the authorities as to the effect of such provisions as section 3093, Kirby's Dig. (which is section 2 of the schedule of the Constitution), where there are several parties to the contract out of which the transaction grew. In Missouri and Massachusetts it has been held under somewhat similar provisions that the death of one party will not prevent testimony from the other parties being adduced against the administrator of the deceased. *Fulkerson v. Thornton*, 68 Mo. 468; *Nugent v. Curran*, 77 Mo. 323; *Goss v. Austin*, 11 Allen (Mass.) 525; *Hayward v. French*, 12 Gray (Mass.) 453. On the other hand, New York seems to hold otherwise. *Wilcox v. Corwin*, 117 N. Y. 500, 23 N. E. 165. These authorities are not of usual weight, because there are differences in the provisions and in the practice of joining parties, and the questions

termination of the issues is possible and must operate equally against the protected as well as the unprotected parties, the witness is totally disqualified.⁸⁵

22. Dismissal or Abatement of Action as to Protected Party. Where the action has been dismissed⁸⁶ or has abated⁸⁷ as to the protected party, the disqualifying statute no longer applies.

23. When Suing or Defending in Other Capacity.— Although a party comes within the class of persons protected by the statute he is not entitled to its protection if he is suing or defending in some other capacity.⁸⁸

24. Party Suing in Both Representative and Individual Capacity. Where a party is suing or being sued both as the representative of a decedent and also in his individual capacity, he is entitled to the protection of the statute,⁸⁹ but a witness incompetent against him as representative may be competent against him individually.⁹⁰

have arisen differently. Under section 6011, Kirby's Dig., providing that the court may determine a controversy between parties before it when it can be done without prejudicing the rights of others, or by saving the rights of others, it is apparent that there can be no good reason for excluding testimony regarding transactions between parties whose rights may be adjudicated without affecting the estate of the deceased, who may have been a party to the contract out of which the transaction arose." *Bush v. Prescott & N. W. R. Co. (Ark.)*, 103 S. W. 176.

In an action upon a promissory note alleged to have been executed by a co-partnership, brought by the payee against the surviving partner and the administrator of the deceased partner, wherein the administrator answers by a verified denial, and the surviving partner by a verified denial, the plaintiff is a competent witness on the latter issue. *Dodds v. Rogers*, 68 Ind. 110.

85. *Mullins v. Mullins*, 27 Ky. L. Rep. 1048, 87 S. W. 764. This was an action to set aside a conveyance to the defendants jointly, some of whom were entitled to the protection of the statute. The plaintiff was held incompetent to show the nature of the transaction, the grantor being dead.

86. *Campbell v. Mayes*, 38 Iowa 9, so holding in an action where the

administrator as to whom the action has been dismissed was not a *necessary* party. The court says: "The depositions, when taken, were competent as against all the present defendants, and hence they are competent now. In this respect they are different from a deposition of an interested witness, under the common law rule when interest would disqualify; for then the subsequent removal of interest by release or otherwise would not make the deposition competent—it being incompetent when taken, it would remain so. At the common law the incompetence inhered in the witness, and he must first be made competent and then testify; under our statute the witness is competent, and the incompetence of the deposition attaches by reason of the party, and when the party is dismissed, the incompetence is removed."

87. *Hall v. State ex rel. Robinson*, 39 Ind. 301.

88. See *supra*, III, 6, E, and *Crone v. Crone*, 170 Ill. 494, 49 N. E. 217.

Although a party is an heir or devisee of a decedent, if he is defending as the latter's grantee he is not entitled to the protection extended by the statute to heirs and devisees. *Seaton v. Lee*, 221 Ill. 282, 77 N. E. 446.

89. *Dixon v. Edwards*, 48 Ga. 142.

90. See *Field v. Field* (Tex. Civ. App.), 87 S. W. 726.

VI. NATURE AND SUBJECT-MATTER OF TESTIMONY.

1. **Generally.** — Most of the statutes confine the disability of the witness to testimony as to certain classes of facts, which in this article for the sake of brevity are termed "prohibited matters." The effect of such statutes is not to exclude any evidence of such matters but merely the testimony of the incompetent witness thereto;⁹¹ nor is such witness incompetent as to matters other than those specified.⁹² Some statutes, in form, totally disqualify the witness as against certain classes of persons with certain exceptions set out in the statute.⁹³ The witness is incompetent unless his testimony falls within one of the exceptions.⁹⁴

2. **Transactions and Communications With or Statements by Decedent.** — A. **GENERALLY.** — Statutes in many states confine the disability to transactions with, or statements by, the deceased or incompetent person,⁹⁵ or to transactions and communications with

91. *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435; *Hines v. Consolidated Coal & L. Co.*, 29 Ind. App. 563, 64 N. E. 886; *Park v. Ensign*, 10 Kan. App. 173, 63 Pac. 280; *Ballard v. Ballard*, 75 N. C. 190.

92. See *infra*, VI, 2, B.

93. See statutes of Illinois, Ohio and Wyoming.

94. *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324; *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19.

95. See *supra*, I, 2, B, statutes of United States, Alabama, Arizona, Arkansas, Delaware, Maryland, North Dakota, South Dakota, Tennessee, Texas, Utah, Washington. And see the following cases:

United States. — *Glover v. Patten*, 165 U. S. 394.

Alabama. — *Ryan v. Shaneyfelt*, 146 Ala. 683, 40 So. 223.

Arkansas. — *Rainwater v. Harris*, 51 Ark. 401, 11 S. W. 583.

Delaware. — *Jones v. Purnell*, 5 Pen. 444, 62 Atl. 149.

Maryland. — *Keyser v. Warfield*, 103 Md. 161, 63 Atl. 217; *Gerting v. Wells*, 102 Md. 624, 64 Atl. 298, 433; *Shipley v. Mercantile Tr. & Dep. Co.*, 102 Md. 649, 62 Atl. 814.

South Dakota. — *Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183.

Tennessee. — *Jones v. Waddel*, 12 Heisk. 338; *Taylor v. Mayhew*, 11 Heisk. 596; *Royston v. McCulley* (Tenn. Ch. App.), 59 S. W. 725.

Texas. — *Hays v. Hays*, 66 Tex. 606, 1 S. W. 895; *Brown v. Mitchell*,

75 Tex. 9, 12 S. W. 606; *Heard v. Busby*, 61 Tex. 13; *Neitch v. Hillman*, 29 Tex. Civ. App. 544, 69 S. W. 494.

The Provision of the Arizona and Texas Statutes extending the disability to actions by or against heirs or legal representatives of a decedent arising out of any transaction with such decedent is intended to apply to the same subject-matter as is prohibited by the portion of the statute preceding. *Parks v. Caudle*, 58 Tex. 216, where the court says: "This suit is by the heir of a decedent, and comes within the exception to the law making parties competent witnesses if that party proposes to testify as to any transaction with or statement by the decedent. The clause of the statute extending its provisions to actions by heirs, although it omits the expression 'statement by' the decedent, is not believed to be designed to make any distinction as to the subject-matter about which the party was to be precluded from testifying, whether such party were an 'executor, administrator or guardian,' or were an 'heir or legal representative' of a decedent. Before that clause was added to the statute, the decisions of this court had held its provisions applicable to suits by or against heirs, and it is believed that the purpose of the addition was to incorporate these decisions into the statutory law. Lewis

such person,⁹⁶ transactions with or declarations and admissions by him,⁹⁷ transactions or communications with and statements by him,⁹⁸ transactions or conversations with him,⁹⁹ conversations with and admissions by him,¹ or verbal statements of, transactions with, and acts done or omitted to be done by the deceased or incompetent person.²

B. AS TO MATTERS NOT PROHIBITED. — a. *Generally.* — These statutes do not serve to disqualify the witness as to any matters not prohibited by them, consequently he is competent to testify to any facts which do not involve transactions or communications with the deceased or incompetent person, or other matters prohibited by the statute.³ The mere fact that the occurrence testified to happened

v. Aylott, 45 Tex. 202; *McC Campbell v. Henderson*, 50 Tex. 601."

96. See *supra*, I, 2, B, statutes of Florida (personal), Georgia (solely with deceased or incompetent), Iowa (personal), Kansas (had personally with), New York (personal), North Carolina (personal), Oklahoma (had personally with), South Carolina, West Virginia (personal), Wisconsin (personally with). And see the following cases:

Iowa. — *In re Perkins' Estate*, 109 Iowa 216, 80 N. W. 335; *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283.

Kansas. — *Miller v. McDowell*, 63 Kan. 75, 64 Pac. 980; *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71.

New York. — *Bick v. Reese*, 3 N. Y. Supp. 757; *Martin v. Hillen*, 66 Hun 631, 21 N. Y. Supp. 309.

North Carolina. — *Luton v. Badham*, 129 N. C. 7, 39 S. E. 581.

South Carolina. — *Trammell v. Trammell*, 57 S. C. 89, 35 S. E. 533; *Williams v. Mower*, 29 S. C. 332, 7 S. E. 505.

West Virginia. — *Robinson v. James*, 29 W. Va. 224, 11 S. E. 920; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Anderson v. Jarrett*, 43 W. Va. 246, 27 S. E. 348; *Quarrier v. Quarrier's Heirs*, 36 W. Va. 310, 15 S. E. 154.

Wisconsin. — *Koenig v. Katz*, 37 Wis. 153.

97. See *supra*, I, 2, B, statute of District of Columbia.

98. See *supra*, I, 2, B, statute of Tennessee.

99. See *supra*, I, 2, B, statute of Nebraska.

1. See *supra*, I, 2, B, statute of

Minnesota. And see *Reeves v. Sawyer*, 98 Minn. 218, 92 N. W. 962.

2. See *supra*, I, 2, B, statute of Kentucky. And see *United L. & D. Bank v. Bitzer*, 25 Ky. L. Rep. 1538, 78 S. W. 183; *Cook v. Landrum*, 26 Ky. L. Rep. 813, 82 S. W. 585; *Board of Park Comrs. v. Marrett*, 25 Ky. L. Rep. 2081, 80 S. W. 166; *Trail v. Turner*, 22 Ky. L. Rep. 100, 56 S. W. 645; *Pope v. Pope*, 21 Ky. L. Rep. 1376, 55 S. W. 194; *Mann v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854.

3. *Alabama.* — *Yates v. Huntsville Hoop & Heading Co.*, 39 So. 647; *Conoily v. Gayle*, 61 Ala. 116.

Arkansas. — *Giles v. Wright*, 26 Ark. 476.

Florida. — *Ley v. Edwards*, 21 Fla. 333.

Georgia. — *Bank of Southwestern Georgia v. McGarragh*, 120 Ga. 944, 48 S. E. 393; *Purveyor v. Foster*, 91 Ga. 444, 18 S. E. 316; *Trimble v. Mims*, 92 Ga. 103, 18 S. E. 362.

Iowa. — *Foreman v. Archer*, 130 Iowa 49, 106 N. W. 372; *Sypher v. Savery*, 39 Iowa 258; *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846; *Haverly v. Alcott*, 57 Iowa 171, 10 N. W. 326; *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814; *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435.

Kansas. — *Park v. Ensign*, 10 Kan. App. 173, 63 Pac. 280; *Clary v. Smith*, 20 Kan. 83; *McKean v. Massey*, 9 Kan. 600.

Kentucky. — *Chenault v. Thomas*, 26 Ky. L. Rep. 1029, 83 S. W. 109.

Maryland. — *Smith v. Humphreys*, 104 Md. 285, 65 Atl. 57.

Minnesota. — *Harrington v. Samples*, 36 Minn. 200, 30 N. W. 671.

during the decedent's lifetime,⁴ that it affects his estate,⁵ or tends to establish a transaction between himself and decedent,⁶ does not render the witness incompetent.

b. *Facts Occurring Subsequent to Death.*—Matters occurring

Nebraska.—*Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727.

New York.—*Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

North Carolina.—*Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779; *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225.

South Carolina.—*Shaw v. Cunningham*, 16 S. C. 631.

Tennessee.—*Jones v. Waddell*, 12 Heisk. 338; *Royston v. McCulley* (Tenn. Ch. App.), 59 S. W. 725.

Texas.—*Tompkins v. McGinn* (Tex. Civ. App.), 85 S. W. 452.

Washington.—*Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131.

Where, in an action for land, the boundary line between plaintiff and defendant is in dispute, and the calls in defendant's deed are for certain natural objects, but there is a controversy as to their location, and there is testimony that at the time the plaintiff sold the land to defendant's grantor, since deceased, a line was surveyed and corner marked, which does not reach the object described in the deed, the plaintiff is competent to prove in his own behalf that at the time of his conveyance to defendant's grantor a certain line was surveyed and a corner marked by him, there being no evidence of a personal transaction or communication with deceased. *Marsh v. Richardson*, 106 N. C. 539, 11 S. E. 522.

In an action to recover advances made to defendant's testator on goods consigned to plaintiffs by him and for charges paid by them, it was held that the plaintiffs were competent to testify as to their efforts to sell the goods and the prices obtained therefor and that the charges made were correct, such testimony not relating to transactions with, or statements by, the deceased, and therefore not within the rule of § 858 U. S. Rev. St. *Steiner v. Eppinger*, 61 Fed. 253, 9 C. C. A. 483.

Action for Wrongful Death.—In an action by an administrator for damages for the malicious killing of deceased, where the evidence is wholly circumstantial and consists of distinct facts and circumstances having nothing of the character of personal transactions between the defendant and the deceased, the defendant is not rendered incompetent to testify as to the existence and true character of such facts and circumstances; and an instruction that if the defendant had not satisfactorily explained the material circumstances and transactions appearing in evidence against him by other testimony, then the fact that he was not a witness in his own behalf may be considered in evidence against him, was proper. *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814.

In an action by a partnership upon notes executed by the decedent, a member of the firm though interested may testify that prior to the execution of the notes the deceased owed the firm and that the notes were executed for money loaned by a third person, since this testimony does not involve a transaction between the witness and the decedent. *Farmers' & Traders' Bank v. Creveling*, 84 Iowa 677, 51 N. W. 178.

In a suit prosecuted by the executor of the creditor to foreclose a trust deed, when the defense relied on was that the property conveyed was at the time of making the deed a homestead, the defendant may testify to any facts tending to show that the land was a homestead at the date of the execution of the deed. *Moores v. Wills*, 69 Tex. 109, 5 S. W. 675.

4. *In re Townsend's Estate*, 122 Iowa 246, 97 N. W. 1108.

5. *Lehew v. Hewett*, 138 N. C. 6, 50 S. E. 459.

6. *Card v. Card*, 39 N. Y. 317. But see *infra*, VI, 2, J, g, (2.).

subsequent to the decedent's death cannot be transactions with him, and a witness is therefore competent as to such matters.⁷

C. MATTERS WHICH MAY OR MAY NOT HAVE BEEN TRANSACTIONS. — Where the matter testified to may or may not have been a transaction with decedent, the testimony will be admitted unless its incompetency is shown.⁸

Testimony as to facts, the knowledge of which may or may not have been derived from a transaction or communication with the decedent, is not inadmissible unless the testimony shows on its face that the knowledge was so acquired.⁹ But, although the transaction testified to is one which might or might not have been with the decedent, if the testimony of the witness shows that it was a transaction with the deceased he is incompetent.¹⁰ Thus where this appears on cross-examination the testimony may be stricken out.¹¹

D. TRANSACTIONS BETWEEN WITNESS AND FORMER REPRESENTA-

7. *Whitesides v. Green*, 64 N. C. 307; *Fogg's Admr. v. Rodgers*, 84 Ky. 558.

Transactions With Representative. — A statute disqualifying a witness as to transactions or communications with the decedent does not make him incompetent as to transactions or communications with the representative of the estate. *French v. French*, 91 Iowa 140, 59 N. W. 21.

The statute does not apply to a case where the transaction arose after the death of the decedent, and was with the surviving partner, running the business under a direction contained in the will of the testator. *Hambough v. Carney* (Tenn. Ch. App.), 62 S. W. 503.

8. *Stiff v. Cobb*, 126 Ala. 381, 28 So. 402; *Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. 531; *Comins v. Hetfield*, 80 N. Y. 261; *Denise v. Denise*, 110 N. Y. 562, 18 N. E. 368; *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620. See *Sager v. Dorr*, 51 Hun 642, 4 N. Y. Supp. 568.

Claim of Ownership by Decedent.

While a question as to whether a decedent was claiming the ownership of certain property at a certain time may be incompetent as calling for a statement of or transaction with the decedent, it is not necessarily so, since the answer may be based upon knowledge independent of any express declaration of the decedent or of any transaction with him. *Field*

v. Field (Tex. Civ. App.), 87 S. W. 726.

9. *Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. 531.

In an action by a printer against the administrator of a deceased attorney to recover a balance due on an account for printing briefs, defendant claimed that the printing had been done for the client and not his intestate. Plaintiff's testimony that the intestate knew that plaintiff had done the work and the amount charged therefor, had brought the work to the plaintiff's office and given instructions as to the work to be done, and that witness was either at intestate's office or the latter at the office of the witness every day while the work was being done, was held properly admitted, there being nothing to show that the witness' knowledge was based on any communication or transaction with the decedent. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291.

10. Thus in an action by an administrator on a promissory note given to his intestate, the testimony of the maker that the note had been paid was held improperly admitted where it appeared from the testimony of the witness that she was not claiming payment to any one other than the deceased. *Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N. W. 801.

11. *Morrissett v. Carr*, 118 Ala. 585, 23 So. 795. See *infra*, XI, 3.

TIVE.—The fact that the transactions testified to by the witness were had with a former executor or administrator of the estate, who has since died, does not serve to disqualify the witness,¹² though the contrary has been held.¹³

E. TRANSACTIONS WITH DECEDENT NOT REPRESENTED.—Although one of the parties to an action is the representative of a deceased person, an adverse witness is not incompetent as to transactions or communications between himself and another deceased person not represented in the action.¹⁴ Thus where the statute disqualifies the witness as to transactions with the predecessor in title of the adverse party, he is not incompetent as to transactions with his own predecessor in interest.¹⁵ Statutes, however, which disqualify the witness in general terms without reference to the parties

12. *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930; *Palmateer v. Tilton*, 40 N. J. Eq. 555, 5 Atl. 105.

A party in a suit in which the administrator *de bonis non* is the adverse party is not prohibited from testifying to statements and conversations of the former administrator who is dead. *Wassell v. Armstrong*, 35 Ark. 247; *Dunne v. Deery*, 40 Iowa 251.

With Guardian, Since Deceased. The death of a guardian by whom a judgment was recovered for the benefit of his ward, does not render the defendant in that judgment incompetent to testify to a conversation with the guardian after the judgment was rendered, in an action by such defendant seeking to restrain the execution of the judgment. *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086.

A claimant against the estate of an insane person upon a verbal contract with the guardian, is not incompetent to testify relative thereto against the successor of the guardian after the latter's death. The deceased guardian's executor is not interested, and could not be affected by the action. *Hart v. Miller*, 29 Ind. App. 222, 64 N. E. 239.

13. *Waldman v. Crommelin's Admr.*, 46 Ala. 580.

The representative of the deceased executor comes within the spirit of the statute, and therefore testimony by an adverse party as to a transaction between himself and the deceased executor relating to business connected with his testator's estate

is incompetent. *Redden v. Inman*, 6 Ill. App. 55.

Where a bill is filed by a vendee of a purchaser of land at an administrator's sale, averring the payment by his vendor of the purchase money and seeking to compel a conveyance of said land to the complainant, the vendor of the complainant who purchased the land at the administrator's sale is not a competent witness to testify to his having paid the purchase money to the administrator, who died before the final settlement of the estate; such witness being one interested in the result of the suit, within the meaning of the code. *Moore v. Williams*, 129 Ala. 329, 29 So. 795.

14. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797; *Caffey's Exrs. v. Cooksey*, 19 Tex. Civ. App. 145, 47 S. W. 65; *Thomas v. Kelly*, 74 N. C. 416.

In an action by an administrator, brought for the purpose of subjecting certain real property claimed by defendant, and which was formerly owned by decedent's judgment debtor, to the satisfaction of a judgment, the testimony of the defendant in reference to transactions with, and statements by such debtor, since deceased, is not incompetent. The controversy not being between the defendant and judgment debtor, since deceased, the statute has no application to such case. *Green v. Huggins* (Tenn. Ch. App.), 52 S. W. 675.

15. *Lyon v. Whittaker*, 77 Hun 107, 28 N. Y. Supp. 296.

to the action are held to exclude his testimony as to his transactions with a decedent not represented.¹⁶

F. COMMUNICATIONS. — The disqualification extends to all communications whether written or oral, direct or indirect.¹⁷ Inasmuch as a communication with the decedent is necessarily also a transaction with him they will be discussed together.

G. STATEMENTS BY DECEDENT. — a. *To Third Persons.* — Where the statute disqualifies the witness as to "statements by" the decedent, it is held to include not only statements of the deceased person to the witness, but also his statements to third persons;¹⁸ hence he cannot testify as to a conversation between the decedent and third persons.¹⁹

b. *Conduct of Decedent Not a "Statement."* — Testimony as to the conduct of the deceased toward a certain person does not involve any "statement" of such decedent.²⁰

c. *Declarations as to Pedigree.* — Declarations or verbal statements by the decedent as to pedigree are held to be an exception to the rule disqualifying a witness as to verbal statements of the decedent.²¹

H. CONVERSATIONS AND ADMISSIONS. — a. *Generally.* — A statute which confines the disqualification to conversations and admissions does not render the witness incompetent as to matters which, though relating to or forming part of a "transaction" with the decedent, do not involve any conversation or admission.²² Nor does

16. See *supra*, III, 1, and Robinson v. Redd's Admr., 19 Ky. L. Rep. 1422, 43 S. W. 435.

17. McCorkendale v. McCorkendale, 111 Iowa 314, 82 N. W. 754; Conklin v. Yates, 16 Okla. 266, 83 Pac. 910. See *infra*, VI, 2, L, u.

As to whether a communication or transaction with the decedent indirectly is within the scope of the statute, see *infra*, VI, 2, L, g, (2.); VI, 2, L, u, (8.); VI, 2, N, d, (2.), (B.); VI, 2, O, d.

18. Parks v. Caudle, 58 Tex. 216. See also Glover v. Thomas, 75 Tex. 506, 12 S. W. 684.

19. Stringfellow v. Montgomery, 57 Tex. 349, holding that such testimony involves either statements made by the decedent, or made to and acquiesced in by him, as to either of which the witness would be incompetent.

20. Edelstein v. Brown (Tex. Civ. App.), 95 S. W. 1126 (citing Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64), holding

that testimony as to the conduct of the decedent toward her alleged husband, introduced to prove their marriage, did not involve a "statement" by the decedent within the meaning of the statute.

21. Whalen v. Nesbit, 16 Ky. L. Rep. 52, 26 S. W. 188.

22. In an action of ejectment brought by an administrator, the defendant claimed under an alleged contract of purchase from the decedent, of which he demanded specific performance. It appeared that subsequent to the date of the alleged contract defendant paid decedent \$400. This was claimed by defendant to have been a payment on the contract, and by plaintiff to have been on account of rent. Defendant as a witness was asked whether at the time of this payment he owed the decedent any money except the purchase price of the land. An objection to this question as calling for the result of the conversation between the witness and the decedent

such a statute apply to written communications²³ or acts²⁴ of the witness, nor to the acts of the decedent though constituting implied admissions.²⁵ It does, however, cover oral contracts with decedent.²⁶ The statute cannot be defeated by testimony which embodies the result of a forbidden conversation.²⁷ The witness may, however, state the fact of payment to the deceased though not the manner of payment, where this involves a conversation with the decedent.²⁸

b. *Admissions*.—Testimony as to the decedent's admissions is expressly excluded by the Minnesota statute,²⁹ and is also covered by statutes applying to transactions with, or statements by, decedent.³⁰

I. INTEREST IN TRANSACTION WHEN IT OCCURRED.—The fact that the witness had no interest in the transaction at the time it occurred is immaterial on the question of his competency.³¹

J. NATURE AND PURPOSE OF TESTIMONY.—a. *To Supplement Ambiguity in Testimony of Others*.—Where the testimony of other witnesses to a transaction between the witness and the decedent has left certain portions of a transaction ambiguous, the witness is not competent to supplement the other testimony by explaining the ambiguity.³²

was held properly overruled. "The question did not in fact call for the conversation, nor the result of one with Koug (the decedent), but only for a fact, the truth of which the defendant was in a position to know, irrespective of any conversation with the deceased." *Veum v. Sheeran*, 95 Minn. 315, 104 N. W. 135.

In the case of *Parker v. Maxwell*, 51 Minn. 523, 53 N. W. 754, it was held that a survivor of two contracting parties is competent to testify to the fact that a note given for money loaned embraced a specified sum in excess of the money loaned, such evidence not being "of or concerning any conversation with, or admission of," the deceased, and therefore did not come under the prohibition of Gen. Stat. 1878, c. 73, § 8, in reference to conversations with, or admission of, deceased persons.

23. *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419; *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74.

24. *Hall v. Northwestern Endow. & L. Assn.*, 47 Minn. 85, 49 N. W. 524.

25. In *Chadwick v. Cornish*, 26 Minn. 28, 1 N. W. 55, it is held that the word "admission" refers only

to admissions by word, and that a party to an action or interested in the event may give evidence of any acts of a deceased or insane party or person, although such acts may have in law the effect of admissions, and that it was only as to conversations and oral admissions that the evidence is excluded.

26. *Madson v. Madson*, 69 Minn. 37, 71 N. W. 824.

27. *Babcock v. Murray*, 69 Minn. 199, 71 N. W. 913; *Robbins v. Legg*, 80 Minn. 419, 83 N. W. 379, holding that for the purpose of showing the loan to be usurious, the defendant maker of a note could not testify that he gave decedent a certain sum as a bonus.

28. *Merhoff v. Merhoff*, 84 Minn. 263, 87 N. W. 781, citing *Robbins v. Legg*, 80 Minn. 419, 83 N. W. 379.

29. See *supra*, I, 2, B, statutes.

30. *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735.

31. *Gillaspie v. Murray*, 27 Tex. Civ. App. 580, 66 S. W. 252; *Parks v. Caudle*, 58 Tex. 216.

32. *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681. This was an action by a widow against her husband's executor to recover moneys collected and retained by decedent

b. *For Purpose of Impeachment or Rebuttal.* — (1.) **Generally.** A witness who is rendered incompetent by the statute to testify to a transaction with a deceased person is not competent to testify to such transaction for the purpose of impeaching another witness who has previously testified fully regarding such transaction.³³ He may, however, testify to extraneous facts and circumstances which tend to show that another person, who has testified to a transaction between witness and decedent, testified falsely.³⁴

(2.) **Rebuttal Testimony Incidentally Involving Transaction.** — Where the protected party's witness has testified that a certain transaction occurred between himself and the adverse party, the latter in rebuttal may testify as to what he claims to be the truth in regard to such matter, even though it involves a transaction with the decedent.³⁵

c. *Facts Corroborating Other Evidence as to Transactions.* — The witness is not incompetent merely because his testimony tends to corroborate that of other witnesses as to a transaction with decedent.³⁶

but belonging to the plaintiff. Plaintiff's daughter had testified that on a certain occasion she had heard, through the keyhole, her father ask her mother where she had certain money, and the mother's reply that it was in her pocket, and that the father had insisted that his safe was a better place, in response to which the plaintiff said, "Here it is." For the purpose of showing that the money involved in this transaction was a certain sum in question, plaintiff was asked whether she had any other property or money at that time, and whether she ever had that money, or any of it, after that day. The admission of this testimony was held error, the court saying: "This testimony also seems to be so directly connected with a transaction between plaintiff and deceased as to be improper. Its only purpose was to show that in a transaction to which some one else had testified, such testimony being ambiguous as to what money was referred to, she had only the specific \$250. It is certainly an attempt to prove by this witness that the \$250 was the subject of the conversation between her and her husband overheard by the child; and the answer to the second question, if relevant at all, tended to justify an inference of its delivery to him at that time and a denial that he ever returned it to her."

33. *Payne v. Long*, 131 Ala. 438, 31 So. 77 (following *Miller v. Cannon*, 84 Ala. 59, 4 So. 204, and disapproving contrary dictum in *Frank v. Thompson*, 105 Ala. 211, 16 So. 634). See *infra*, X, 8.

34. *McKenna v. Bolger*, 37 Hun (N. Y.) 526.

Thus where a witness for the plaintiff administrator had testified that certain conversations occurred in his presence at a specified place between the intestate and one of the defendants, the latter was held competent to testify that such witness was not present at the place specified when any conversation or transaction occurred between himself and the deceased, and that such conversations did not occur at the place named by plaintiff's witness. *Pinney v. Orth*, 88 N. Y. 447. Compare *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45.

35. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291, holding that in rebuttal of the testimony of the witness for a protected party that the witness had given the adverse party a certain note, the latter was competent to testify that such witness had first given the note to the decedent, and that thereafter it was endorsed to himself.

36. *Fitch v. Martin* (Neb.), 104 N. W. 1072.

d. *Fact of Transaction or Conversation.* — (1.) **Generally.** — Proof of the mere fact that a transaction or conversation was had with the decedent is not incompetent,³⁷ unless such fact is the material thing to be proved.³⁸

(2.) **Presence of Others.** — In connection with testimony that a conversation or transaction occurred the witness may state what persons were present,³⁹ or that a certain person was not present at any conversation or transaction between himself and decedent.⁴⁰

e. *Time or Date of Transaction.* — Testimony as to the time or date when an alleged transaction occurred necessarily involves testimony as to a transaction, and is therefore incompetent.⁴¹ But it has been held that where the testimony is confined merely to the fact that a conversation occurred, without giving the substance

37. *Hier v. Grant*, 47 N. Y. 278; *Richards v. Munro*, 30 S. C. 284, 9 S. E. 108.

The statute does not prohibit the plaintiff from testifying to the fact that he had had conversations with defendant's intestate as to a certain matter, and when, where, and in whose presence such conversations were had, the statements of witness or of deceased not being disclosed. *Williams v. Mower*, 35 S. C. 206, 14 S. E. 483; *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291.

Receipt of Letter From Decedent.

The witness may testify that he received a letter from decedent and had lost it, though he cannot state its contents. *Montague v. Thomason*, 91 Tenn. 168, 18 S. W. 264; *Minnis v. Abrams*, 105 Tenn. 662, 58 S. W. 645, 80 Am. St. Rep. 913. See *Choate v. Huff*, 4 Tex. Civ. Cas. § 280.

Objection by Decedent. — A party to an action of ejectment may, in testifying, simply answer whether or not he has any knowledge that any objection was made by a deceased predecessor in title of the opposite party to a stated line as the boundary line between adjoining lots. *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805.

38. *Hier v. Grant*, 47 N. Y. 278;

Maverick v. Marvel, 90 N. Y. 656.

39. *Williams v. Mower*, 35 S. C. 206, 14 S. E. 483. Compare *Conger v. Bean*, 58 Iowa 321, 12 N. W. 284.

Contra. — In an action on a note by the legal representatives of a deceased payee, the defendant is not a

competent witness as to when and where the note was given, or who were present at the transaction, in order to lay the foundation for the testimony of a third person as to what the bargain really was. *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613.

40. In *Pinney v. Orth*, 88 N. Y. 447, the court says that while the language of the prohibition is sufficiently broad to prevent the survivor from testifying that any particular transaction or communication did or did not take place personally between himself and the deceased, he may state that a witness who testified to an alleged conversation was not present at any conversation between himself and decedent. Compare *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45; *Webster v. Sibley*, 72 Mich. 630, 40 N. W. 772.

41. *Gupton v. Hawkins*, 126 N. C. 81, 35 S. E. 229, holding in an action on a bond by the obligee against the obligor's executor the plaintiff could not testify that payments endorsed on the bond were made on the dates shown by the endorser.

In an action to recover land bought by the plaintiff at an execution sale under a judgment obtained by himself, he is not a competent witness to prove the date of the debt on which judgment was rendered, when the judgment debtor is since deceased and defendant claims under him. *Buie v. Scott*, 107 N. C. 181, 12 S. E. 198, citing *Sumner v. Candler*, 86 N. C. 71.

thereof, the witness may also state when it occurred.⁴² So, also, it has been held that he may testify as to the date on which the contract in controversy was executed.⁴³

f. *Res Gestae*. — It has been held that a witness may testify as to a conversation between himself and a deceased agent of the adverse party where it formed part of the *res gestae* of the transaction in question which itself was not a transaction between the witness and such agent.⁴⁴

g. *Indirect Testimony*. — (1.) *Generally*. — Testimony which is a mere evasion of the statute will not be permitted;⁴⁵ a witness cannot testify indirectly to facts to which he would be incompetent to testify directly.⁴⁶ The fact that the witness does not state in so many words that the transaction testified to was with the decedent does

42. A witness may testify to the fact that a conversation occurred and to the date of such conversation, since this does not amount to testifying to a conversation or transaction with the deceased. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291; *Williams v. Mower*, 35 S. C. 206, 14 S. E. 483.

43. *Barlow v. Buckingham*, 68 Iowa 169, 26 N. W. 58. See *infra*, VI, 2, L, f, (3.).

44. In an action for injuries received by plaintiff in a railway wreck, the latter is a competent witness to prove a conversation between himself and the conductor of the train just before the accident happened, although the conductor was killed in the wreck. *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 89, 54 S. E. 244, citing *Norris v. Clinkscates*, 47 S. C. 488, 25 S. E. 797, which according to the syllabus of the case at bar based its decision upon the ground that such a declaration is a part of the *res gestae*.

45. *Angel v. Angel*, 127 N. C. 451, 37 S. E. 479, holding that for the purpose of proving that the decedent had not paid the witness, the latter could not testify that no one had ever paid him.

Allowing the witness to testify in his own behalf that he had never heard of a particular event from any source until seven years after the death of the testator, was equivalent to permitting him to testify that he had never received any notification from the deceased during his lifetime, and was therefore improper.

Hall v. Roberts, 63 Hun 473, 18 N. Y. Supp. 480.

Testimony of the witness that he prepared certain notices to deceased, took them to deceased's house and came away without them, relates to a personal transaction with the deceased and is therefore incompetent. *Finton v. Egelston*, 61 Hun 246, 16 N. Y. Supp. 721, citing *Gregory v. Fichtner*, 14 N. Y. Supp. 891.

It was held in *Martin v. Fowler*, 51 S. C. 499, 29 S. E. 261, that to permit a defendant, in a suit by an administrator against him on a debt, to testify that he met the deceased on several occasions with certain amounts of money on his person, that he did not have it when he left him, and that he did not lose it, is a palpable effort to evade the statute.

46. *Watters v. McGreavy*, 111 Iowa 538, 82 N. W. 949; *In re Havemeyer's Estate*, 6 App. Div. 535, 39 N. Y. Supp. 550.

Thus in an action by an executor to foreclose a mortgage, defendant was not allowed to answer a question as to how much money he needed at a particular time and for what purpose, where it appeared that at the time in question he was trying to borrow a sufficient sum at a lower rate of interest to pay off all his existing indebtedness, since the question in effect called for his testimony as to payments to the decedent on the mortgage. So also it was held that his testimony that at that time he was desirous of obtaining a loan to pay certain obligations, among them, \$5000 to the estate of

not render the testimony competent where the manifest purpose of the testimony is to show such a transaction.⁴⁷

Testimony which indirectly shows a transaction or communication with the decedent by attempting to eliminate any other alternative or possibility is incompetent.⁴⁸ Thus where the delivery by the decedent to the witness of some instrument or chattel is in issue, the witness is not competent to testify to facts in relation to the possession of such instrument or chattel which tend to eliminate any other conclusion than that it was delivered to him by the decedent, even though he does not testify directly upon this question.⁴⁹

the decedent, which he considered was due at that time, all of this testimony was in effect testimony as to the payments which he had made on the debt. *Telford v. Howell*, 220 Ill. 52, 77 N. E. 82.

47. *Stocks v. Cannon*, 139 N. C. 60, 51 S. E. 802. This was an action to recover for services rendered defendant's testator. The plaintiff was permitted over objection to testify as to the nature of certain services rendered by him and payments thereon made; the testimony corresponding closely with the allegations of the complaint. "It is true the witness did not state in so many words that he had rendered services to the testator, but that he had is plainly implied in the questions and answers. It would have been futile to ask the witness about services he had not rendered to the deceased, as the question being tried was whether he had rendered services to him, and the value of any services so rendered, and not whether he had rendered services to some one else. The examination, as was said in the argument, was very adroit and skillful; but we do not think the plaintiff succeeded in avoiding the prohibition of the statute. Code § 590. We must construe and enforce that wise and salutary provision of the law, so as to effectuate the evident intention of the Legislature, which is to exclude even the indirect testimony of an interested witness as to a transaction or communication with the deceased, as the latter cannot be heard in reply. . . . The context discloses that the witness meant, when answering the questions to which objection was taken, to refer to services he had rendered to the testator. When

a witness is asked and testifies as to the value of services 'rendered,' he necessarily speaks, though perhaps indirectly, of a transaction or communication, as he could not well have rendered services to the deceased without having had some sort of transaction or communication with him, the exact nature of which depends upon the kind of services rendered. . . . If the testimony did not have reference to services rendered to the deceased, it was irrelevant, and under the circumstances it was calculated, in our opinion, to mislead the jury and to prejudice the defendant."

48. In an action on a note given to the decedent by the defendant, the latter produced the canceled note at the trial and was permitted over objection to testify that he had the note in his possession before the decedent's death; that he did not take it from the latter's drawer and did not know of any third person owning or possessing the note; that he never paid it or transferred or delivered to the decedent any property. This ruling was held error because the testimony involved personal transactions between the witness and the decedent. *Grey v. Grey*, 47 N. Y. 552. But see *Payne v. Long*, 131 Ala. 438, 31 So. 77.

49. See *infra*, VI, 2, L, g.

Where the issue was whether a deed from the decedent to the witness had been delivered, the latter's testimony that she had the custody of the deed before and after its acknowledgment, with the exception of short intervals, down to the time of the trial, was held inadmissible, being an indirect way of testifying to the delivery of the deed by the

Testimony as to facts which are mere deductions or conclusions from conversations or transactions with the decedent,⁵⁰ or which merely embodies the purport or result of a transaction or conversation,⁵¹ is not admissible.

(2.) **Facts Inferentially Showing Transaction.** — In some states it is held that testimony is not incompetent merely because it proves facts inferentially showing a transaction with the decedent.⁵² In

decedent to the witness. *Viall v. Leavens*, 39 Hun• (N. Y.) 291.

Where the question in issue was whether plaintiff had delivered a certain note to her husband, who retained possession of it, and plaintiff had testified that on a certain occasion her daughter by her direction had brought the note into the room where plaintiff and her husband were, and that they left the house soon*after, her further testimony that after she left the house she did not have the note in her possession was held improperly admitted. The testimony was either wholly "irrelevant and immaterial, or it tended very directly to establish a transaction between plaintiff and her husband.

. . . It could have been offered for no purpose save as tending to establish that the note was delivered to her husband at that time, and that he never delivered it back to her." *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681.

50. *Madson v. Madson*, 69 Minn. 37, 71 N. W. 824.

In re Arkenburgh's Estate, 58 App. Div. 583, 69 N. Y. Supp. 125, holding the witness incompetent to testify in explanation of certain items of account against him in the decedent's books introduced by the adverse party, that such items represented moneys paid the witness by the decedent for services rendered; such testimony being merely a conclusion based upon the existence of an express or implied contract between a witness and the deceased to pay that amount for his services.

In an action upon certain promissory notes made by one Deming, since deceased, and the defendants, the latter claimed that they were induced to make the notes by fraudulent representations of the deceased, and certain conclusions of fact were testified to by one of the defendants,

which were based upon a conversation alleged to have been had with the said deceased when he signed the notes, which testimony was stricken out on motion of the plaintiff as incompetent under the statute relating to conversations with, or admissions of, a deceased person. The contention of the defendant was, that inasmuch as no conversation with the deceased was sought to be detailed, the statement as to the object and purpose of signing the notes was a fact not within the prohibition of the statute. *Held*, that the fact was simply a deduction from the conversation with deceased, and the testimony incompetent. *Babcock v. Murray*, 69 Minn. 199, 71 N. W. 913.

51. Thus, to show usury, the defendant maker of a note cannot testify indirectly to a conversation between himself and decedent, by stating that he gave the latter a certain sum "as a bonus." *Robbins v. Legg*, 80 Minn. 419, 83 N. W. 379.

52. *McElhenney v. Hendricks*, 82 Iowa 657, 48 N. W. 1056; *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435. See *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461; *Cheatham v. Bobbitt*, 118 N. C. 343, 24 S. E. 13, and *infra*, VI, 2, L, h, (1.).

In an action by an administrator upon certain promissory notes the defendant pleaded payment by means of checks upon a bank made payable to the intestate or bearer. *Held*, that it was competent for the defendant to testify that said checks were not delivered to other persons than the intestate. Section 3639 of the code does not exclude the facts from which by inference of other facts may be found. *McElhenney v. Hendricks*, 82 Iowa 657, 48 N. W. 1056.

Denial of Transaction With Any Other Person. — Testimony that a witness never transferred a note

other jurisdictions, however, where the term transactions is given a broader interpretation it is held that while the statute does not prohibit testimony as to any fact from which a transaction may be inferred,⁵³ it does serve to exclude testimony as to all facts which originated in or proceeded from such a transaction.⁵⁴

h. Negative Testimony. — (1.) *Generally.* — Negative testimony may as effectively show a transaction with the decedent as affirmative testimony, and when it does so is equally incompetent.⁵⁵

and mortgage to any other person than the decedent is not evidence of a personal transaction with the latter within the prohibition of the statute. *Walkley v. Clarke*, 107 Iowa 451, 78 N. W. 70.

53. The statute "does not prevent all testimony coming from the lips of the party, which, if believed, might tend to establish the fact in issue, viz., that the transaction alleged to have taken place with the deceased did happen as alleged." There are facts not coming within the exception to which the witness might testify which would warrant an inference of the transaction claimed. *Card v. Card*, 39 N. Y. 317.

54. See *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58; *Parker v. Parsons*, 79 App. Div. 310, 79 N. Y. Supp. 688; *In re Havemeyer's Estate*, 6 App. Div. 535, 39 N. Y. Supp. 550; *Richardson v. Emmett*, 61 App. Div. 205, 70 N. Y. Supp. 546; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084.

In an action by a surviving partner on a promissory note, where the defense is payment, defendant is not a competent witness to the fact that he had the note in his possession during the life of deceased, because such testimony is in fact the relation of the transaction with decedent. The court says: "It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings and permitting the survivor to testify to what on its

face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction. It is too broad a statement that where the ultimate fact cannot be proved under this section by a witness, he cannot testify to any of a series of facts from which the ultimate fact may be inferred; but if there is introduced into this statement the qualification that he cannot testify as to any of the particular facts, which originated in a personal transaction with the deceased, or which proceeded from such transaction as a cause, the statement so qualified may be substantially correct." *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392.

An incompetent witness cannot be permitted to testify indirectly to matters as to which his direct testimony would be incompetent; hence in an action by an administrator for the wrongful killing of his intestate, it was held that the defendant was improperly allowed to testify to his conduct prior to the killing in question where the sole purpose of the testimony was to show that he was not the aggressor in the fight. *Cibb v. Owens* (Ala.), 43 So. 826.

"Of course, the statute, . . . has a clear and obvious purpose, which is to prevent the survivor to a transaction from benefiting by his own evidence thereto when the other party's mouth is closed by death as to a different version, and testimony which with reasonable directness tends to establish that a transaction did or did not take place between the witness and the deceased is within the reason of the prohibition; but the connection must be reasonably direct." *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681.

55. *Negative Testimony.* — In an action by an administrator to require

(2.) **Denial of Transaction.** — A denial of an alleged transaction with the decedent is as much within the inhibition of the statute as testimony affirming the existence of the transaction,⁵⁶ although the contrary has been held.⁵⁷ So also testimony, though only an indirect

the execution of a sheriff's deed to himself, defendants claimed that decedent had in his lifetime assigned to them the certificate of redemption, by virtue of which they were entitled to the deed. Plaintiff claimed that the alleged assignment was a forgery. Defendant testified that he never signed the name of deceased to the paper in controversy. This testimony was objected to as incompetent under the statute making an interested person incompetent as to a transaction with the decedent. On appeal the admission of this evidence was held error on the ground that since no claim was made that anyone else besides the decedent and the witness had anything to do with the transaction, witness was in fact testifying as to the transaction between himself and decedent. The court says: "The statute excludes all testimony on the part of a surviving or interested party 'concerning a personal transaction' with the deceased. This prohibition cannot be evaded by any indirection, as by offering testimony of some negative fact. When it appears that there was a personal transaction and that the testimony offered tends to show either what did take place between the parties or what did not, it must be excluded by force of the statute so long as it concerns the transaction or justifies an inference as to what it really was. The statute may be as effectually violated by testimony of a negative character as by affirmative proof of what actually took place." *Boyd v. Boyd*, 164 New York 234, 58 N. E. 118. Compare *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; and see *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613.

56. *Garretson v. Kinkead*, 118 Iowa 383, 92 N. W. 55; *Carney v. Wadhams*, 9 N. Y. Civ. Proc. 204; *Pinney v. Orth*, 88 N. Y. 447 (cited with approval in *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45); *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266; *Fountain v. Tinn*, 57 N. J. L. 503, 31

Atl. 982; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563.

In *Jarvis v. Andrews*, 80 Ark. 277, 96 S. W. 1064, which was an action against the executor on a note alleged to have been executed jointly by the executor and the decedent, but in which only the estate was sought to be charged, the testimony of the executor denying the execution of the note was held incompetent. But see *Saratoga County Bank v. Leach*, 37 Hun (N. Y.) 336.

Testimony as to the neglect or failure of the decedent to inform the witness of certain facts is testimony as to a transaction with him. *Dunn v. Beaman*, 126 N. C. 764, 36 S. E. 174.

Where there was evidence to prove that the witness mistreated the decedent by refusing to speak to him, the witness is not competent to deny that he refused to speak to the decedent. The court says: "It matters not whether the object of the testimony was to prove a speaking affirmatively or negatively. It was to prove something material between the witness and the deceased, about which the deceased could have testified if alive." *Pepper v. Broughton*, 80 N. C. 251, approved in *In re Peterson*, 136 N. C. 13, 48 S. E. 561.

A Denial of Payment by decedent is testimony as to a transaction with him. *Johnson v. Lockhart*, 16 Tex. Civ. App. 32, 40 S. W. 640. And see *infra*, VI, 2, L, 1.

57. *Griffin v. Earle*, 34 S. C. 246, 13 S. E. 473; *Richards v. Munro*, 30 S. C. 284, 9 S. E. 108 (denial that decedent had ever demanded payment).

Where one of the parties to an action is an heir of a deceased person, who claims that the title to the land in controversy was transferred to his ancestor by the adverse party, such adverse party may testify that he had no transaction personally with the deceased, and that no transfer of title was ever made by him to the de-

denial of an alleged transaction, is equally objectionable under the statute.⁵⁸

K. FORM OF QUESTION. — a. *Generally*. — Whether testimony will involve a transaction or communication between the witness and decedent is not to be determined merely from the form of the question or answer, since these may be so worded as to avoid the appearance of calling for or relating to prohibited matters and yet be a clear violation of the statute. A question which is so worded as to require the witness to exclude from his answer any matters constituting transactions or communications with the decedent is proper in form,⁵⁹ as is one which does not relate to prohibited matters.⁶⁰

b. *Assuming Transaction for Purpose of Question*. — Although the witness is incompetent as to a certain class of facts, the existence of such facts may be assumed as the basis of questions relating to other competent matters.⁶¹

L. NATURE OF TRANSACTION AND COMMUNICATION. — a. *Generally*. — General definitions have been given of the term transactions,⁶² but no definite rule can be laid down as to what constitutes

ceased. *Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850.

58. *Haughey v. Wright*, 12 Hun (N. Y.) 179.

59. *Raulerson v. Rockner's Admr.*, 17 Fla. 809.

In a suit to recover for services performed for defendant's testator, the plaintiff was asked and permitted to testify as to what services he rendered, except personal transactions or communications with the deceased. *Held*, that the question was proper in form, and if any improper evidence was given under it, it was defendant's duty to object and move to strike out so much of the answer as exceeded the legitimate scope of inquiry. *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58.

In an action against the administrator of a deceased person on an alleged partnership note, it was proper to ask the surviving partner whether he knew, outside of any personal transactions or communications with the deceased, if the deceased was a member of such partnership. *Charlotte Oil & Fertilizer Co. v. Rippey*, 23 N. C. 656, 31 S. E. 879.

60. In an action by administrators for the conversion of notes (payable to bearer) belonging to their decedent at the time of his death, one of the defendants, as a witness

for the defense, was asked to "state the facts and circumstances under which he obtained possession of the notes." *Held*, that as there was nothing in the question or in the record to show that it called for any conversation or transaction between the witness and the deceased, it was error to reject the question on that ground. *Adams v. Allen*, 44 Wis. 93.

61. Thus in an action against an executor upon an account with the decedent for services rendered the latter by plaintiff, the plaintiff was asked the following questions: "Has anything been paid to you since his death on account of any services rendered by you to him during his lifetime, if you rendered any such services?" and "If any balance upon any account was due to you upon the death of K. (the decedent) does that balance still remain unpaid?" The exclusion of these questions upon the ground that they necessarily carried with them the fact of an account existing prior to the decedent's death was held error. *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

62. Transaction means the doing or performing of any business, the management of an affair, the adjustment of a dispute. *Belote v. O'Brian's Admr.*, 20 Fla. 126.

"By 'personal transaction' the

a transaction which will determine the matter for every case;⁶³ nor do the statutes agree as to the interpretation to be placed on this term. A transaction imports mutuality, some occurrence to which both decedent and the witness were parties,⁶⁴ and of which they both had knowledge,⁶⁵ and to which the decedent if alive could testify.⁶⁶ It is not, however, essential that all the facts constituting a transaction should have been within the decedent's knowledge where

statute means some business or negotiations between two or more individuals." *Martin v. Shannon*, 92 Iowa 374, 60 N. W. 645.

The language and intent of the statute "embraces every variety of affairs; all means of communication, oral, written, signs, or gestures, direct or indirect, positive or negative, or evidence of facts, the plain inference from which is a personal transaction between the witness and the party deceased. If the deceased could contradict, explain, or qualify the testimony, if living, it comes within the rule." *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771, *quoting* from *Van Vechten v. Van Vechten*, 65 Hun 215, 20 N. Y. Supp. 140.

"Transactions and communications embrace every variety of affairs which can form a subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another." *Heyne v. Doerfler*, 124 N. Y. 505, 26 N. E. 1044; *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875; *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282; *Fitch v. Martin* (Neb.), 104 N. W. 1072; *Holcomb v. Holcomb*, 95 N. Y. 316.

63. "It is impossible to define what, under all circumstances, will constitute a personal transaction. The question is to be determined largely by the facts peculiar to each case presented." *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659.

64. A transaction "implies mutuality—something done by both in concert in which both take some part." *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701.

65. *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553; *Dysart v. Furrow*, 90 Iowa 59, 57 N. W. 641. See also

German v. Brown, 145 Ala. 364, 39 So. 742; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *Johnson v. Lockhart*, 16 Tex. Civ. App. 32, 40 S. W. 640; *Gist v. Gans*, 30 Ark. 285; *Steiner v. Eppinger*, 61 Fed. 253, 9 C. C. A. 483; *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19.

"Personal transactions and communications, as contemplated in the statute, are transactions and communications between the parties, of which both must have had personal knowledge." *Dysart v. Furrow*, 90 Iowa 59, 57 N. W. 644.

66. *Kauffman v. Baillie* (Wash.), 89 Pac. 548 (*distinguishing* *Spencer v. Terrell*, 17 Wash. 514, 50 Pac. 468; *Kline v. Stein*, 30 Wash. 189, 70 Pac. 235; *Bay View Brew. Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553).

In *German v. Brown*, 145 Ala. 364, 39 So. 742, the court in defining what are transactions with or statements by a deceased person, says, *quoting* from *Wood v. Brewer*, 73 Ala. 259: "To come within the former class, it must be some act done by the deceased, or in the doing of which he personally participated. To be within the latter class, there must have been a conversation to which he was a party, in which his statements, replies, or presumed admissions from silence are sought to be introduced in evidence. In each case, to fall within the prohibited line, the transaction or statement must be of such a character, and so connected with the deceased, as that, if living, the presumption would be he could deny, qualify, or explain it."

Where the beneficiaries under a will sign a compromise contract respecting the division of property under its provisions, some of such beneficiaries are not incompetent against the representative of the deceased beneficiary to testify to the

they constitute part of one continuous transaction.⁶⁷ The witness is incompetent if it appear that the transaction was not conducted through an agent.⁶⁸

b. *Acts or Statements of Third Parties to Transaction.*—The witness cannot testify to the acts or statements of third parties forming part of a transaction between decedent and himself,⁶⁹ unless the presence and participation of such third person takes the case out of the statute.⁷⁰

c. *Construction of Statute.*—(1.) *Generally.*—The construction which has been given the terms transactions and communications

fact that when they signed the contract they did so relying upon the previous representations of the deceased. Such evidence was not as to a personal transaction which the deceased, if living, could have contradicted, because he would have been ignorant as to the state of the witness's mind. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

A transaction with the decedent necessarily implies some participation by the latter; hence matters of which he had no personal knowledge cannot be considered transactions with him. *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19; *Steiner v. Eppinger*, 61 Fed. 253, 9 C. C. A. 483.

In *Hagan v. Powers*, 103 Iowa 593, 72 N. W. 771, it is held that where a husband buys land and has it deeded to his wife without her knowledge there is no personal transaction between him and her within the meaning of the transaction.

67. See *infra*, VI, 2, L, f, (8.), and VI, 2, L, u, (8.).

In an action against an administratrix of plaintiff's agent for a settlement of the accounts of the latter and to recover the amount alleged to be due from his estate, testimony of the plaintiff in her own behalf that she visited the house of decedent and called for a tin box containing her securities, and received the same from him and took the box into another room, examined and made a list of securities and further testified as to the amount thereof, related both to a conversation and personal transaction with the decedent and was therefore held inadmissible. *Doolittle v. Stone*, 55 Hun 604, 8 N. Y. Supp. 605.

68. In *Owens v. Owens' Admr.*, 14 W. Va. 88, Haymond, J., in discussing what constitutes a transaction or communication within the meaning of the statute says: "My mind is impressed with the conviction, that the true and proper construction or interpretation of the words 'any transaction or communication had personally with a deceased person,' as used in the law, is, that it is thereby meant, any transaction or communication had with a deceased person otherwise than through an agent or third person. The spirit of the law, as I think, is not to allow a party to a suit against an executor, administrator, etc., to testify on his own behalf in respect to any transaction, or communication, had by such party with a deceased person otherwise than through an agent or third person; and that generally all transactions or communications must be considered and held to have been had personally with the deceased, when it does not appear that they were had with an agent or third person, that the intention of the law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes or perhaps falsehoods of such survivor."

69. *Ballard v. Ballard*, 75 N. C. 190 (signing by the subscribing witness, where this was essential). See also *Halyburton v. Dobson*, 65 N. C. 88.

70. See *infra*, VI, 2, M, b.

varies in the different states and in particular classes of transactions. But some states are inclined to give them a very broad application,⁷¹ while others adopt a stricter rule.⁷²

(2.) *Tendency of Decisions.*—In some states the tendency of the courts in construing the terms “transactions” and “communications” has been to narrow their scope;⁷³ while in other jurisdictions there is a contrary tendency.⁷⁴

d. *Facts Ascertainable by Mere Observation.*—Although facts are connected with the transaction in question, if they are ascertainable by observation alone⁷⁵ and knowledge of them is not de-

71. See following discussion, and especially New York cases.

The words “transactions and communications” are given a broad interpretation to effect the purpose of the legislature in disqualifying the witness as to certain matters. *Seabright v. Seabright*, 28 W. Va. 412.

In Texas the terms transactions and statements are given a very broad interpretation. See *Johnson v. Lockhart*, 16 Tex. Civ. App. 32, 40 S. W. 640; *McC Campbell v. Henderson*, 50 Tex. 601.

In *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681, it is said that the New York rule has been adopted in Wisconsin in the case of *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919.

72. See following discussion, and especially Iowa and North Carolina cases.

73. In an action to establish a note as a claim against the estate of the deceased maker, testimony of the plaintiff payee and of the surviving joint maker that plaintiff had ordered the delivery of the note by the person having it in keeping to such joint maker, and that it was afterwards in the latter's possession, is admissible although the defendant claims the note was never executed, or, if executed, that it had been paid. The court says: “Under the interpretation which the court has placed upon the statute, the admission of this testimony was not erroneous. *Gable v. Hainer*, 83 Iowa 457; *Dysart v. Furrow*, 90 Iowa 59; *McElhenney v. Hendricks*, 82 Iowa 657; *Walkley v. Clarke*, 107 Iowa 451. The writer is inclined to the view that our decisions have gone to the extreme limit of liberality in this respect, but the

rule of the cited cases has been so long and so frequently followed it must be regarded the settled policy of our law until changed by legislative enactment. . . . It is sufficient to say that, in our view, the matters to which these witnesses testified do not constitute ‘personal transactions’ or ‘personal communications’ within the meaning of the statute, as we have construed it.” *Curd v. Wisser*, 120 Iowa 743, 95 N. W. 266.

74. *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633.

75. *Hutton v. Dorse*, 116 Iowa 13, 89 N. W. 79; *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118. See *Kendall v. Hillsboro & P. P. Tpk. Road*, 23 Ky. L. Rep. 2372, 67 S. W. 376. Compare *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

In an action to recover the value of the services of slaves alleged to have been furnished the decedent, plaintiff was held competent to prove that the deceased had enjoyed the services during certain years. The court says: “That the intestate had the possession of the slaves during the years in question, was a fact which the plaintiff might know, and which he says he did know, otherwise than from a transaction or communication with the intestate. Being as to a matter of a *quasi* public nature, the testimony, if not true, might have been contradicted by others; notably, by the slaves themselves. We think that this point comes within the principle of *Whitesides v. Green*, 64 N. C. 307; *Isenhour v. Isenhour*, Id. 604, and *State ex rel.*

pendent upon a transaction or communication with the decedent,⁷⁶ they may be testified to by a party or interested witness.

e. Facts Relevant Only Because of Decedent's Implied Acquiescence or Assent.—Facts which are relevant merely because they are in the nature of admissions by the decedent when coupled with his implied acquiescence or assent, necessarily involve a transaction with him.⁷⁷ Thus testimony as to entries made in the presence of

Peoples v. Maxwell, 64 N. C. 314.”
Gray v. Cooper, 65 N. C. 183.

In an action to recover for goods sold the decedent under a contract whereby they were to be paid for when resold, the plaintiff to prove that his cause of action had not accrued at a particular time may properly testify that he saw certain of the goods in question in the decedent's store at that time. Such testimony did not involve a communication with the decedent, nor did it call for any act or transaction between plaintiff and the deceased. “While the proposed evidence would tend to establish a liability against the estate of deceased, yet it would be merely proving facts from which, by inference, other facts might be found.” It was concerning a fact ascertainable from observation alone. *Martin v. Shannon*, 92 Iowa 374, 60 N. W. 645. See also *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291.

In an action against an administrator for board, washing, fuel, attention, etc., furnished the decedent by the claimant and his wife, the testimony of the latter that the decedent came to her house on a certain date and stayed continuously until a date following, when he left and went elsewhere, does not involve a transaction with the decedent, although the period testified to was the period covered by the claim, and the witness is therefore not incompetent as to such matters. “The witness was not testifying to a transaction with deceased, but to a fact open to the observation of other persons as well as to herself,—open and apparent to the public, and about which, any person knowing the fact might testify, without touching any transaction between deceased and the witness. The fact deposed to could not be said to be particularly within

the knowledge of the deceased, and neither the rule of exclusion provided in the statute (Code § 1794), nor the reason of it as we have heretofore held applies in such a case.” *Borum v. Bell*, 132 Ala. 85, 31 So. 454.

⁷⁶. See *infra*, VI, 2, L, m and n; and *O'Connor v. Ogdensburg*, 51 App. Div. 70, 64 N. Y. Supp. 501.

⁷⁷. Thus in an action against the estate on a note executed by the decedent, endorsements by the plaintiff of payments on the note were relied on as tolling the statute of limitations. The testimony of the plaintiff and other witnesses interested in the proceeds as to the length of time plaintiff had held possession of the note and that the endorsements thereon were in the latter's handwriting and made during the lifetime of the decedent, was held improperly admitted. “Each circumstance had a material bearing upon the issue, and each was important only because it was a transaction to which the decedent was a party. To the first, as acquiescing in the continued possession of the note and thereby permitting an implication of its validity, and to the other, as payer of the money referred to in the indorsement. Unless that money was paid by her, or the indorsement made with her implied assent, it was of no significance.” *Mills v. Davis*, 113 N. Y. 243, 21 N. E. 68.

Where the witness claimed that a law partnership existed between himself and the decedent, his testimony as to whether money was paid into the office and who received the receipts of the office was held to be material, if at all, only “because the receipt and payment of the money were transactions in which both parties were concerned. The money was paid to and received by one with

the decedent or subject to his inspection and to which he has made no objection, is incompetent.⁷⁸

f. *Contracts*. — (1.) *Generally*. — A contract of any sort between the witness and the decedent constitutes a transaction between them, and the witness is therefore incompetent in his own behalf to prove such contract.⁷⁹ He cannot, for instance, testify that he purchased the property in question from the decedent.⁸⁰ He may, however, testify as to whether legal proceedings have ever been taken for the enforcement of the contract.⁸¹

(2.) *Consideration or Inducement*. — A witness is not competent to testify as to the consideration for a contract or deed between himself and the decedent,⁸² though he may state independent facts in relation thereto which of themselves do not constitute a transaction with

the consent and acquiescence of the other, and this in some sense involved a personal transaction." *Adams v. Morrison*, 113 N. Y. 152, 20 N. E. 829.

78. Plaintiff, to prove partnership between himself and deceased, offered himself as a witness to prove that at the time the partnership was formed the deceased made an entry in his presence, in a docket register, of name of himself and plaintiff as a firm. *Held*, that this involved a personal transaction between the witness and deceased and was incompetent under the code (§ 829). *Adams v. Morrison*, 113 N. Y. 152, 20 N. E. 829.

Testimony that entries made by the witness in his books were examined and apparently acquiesced in by the decedent involves a transaction with the latter. *Sucke v. Hutchinson*, 97 Wis. 373, 72 N. W. 880.

79. *Alabama*. — *Strange v. Graham*, 56 Ala. 614.

Arkansas. — *Rainwater v. Harris*, 51 Ark. 401, 11 S. W. 583.

Georgia. — *Hudson v. Hudson*, 98 Ga. 147, 26 S. E. 482.

Indian Territory. — *James v. Smith*, 3 Ind. Ter. 447, 58 S. W. 714.

Iowa. — *Sauer v. Nehls*, 121 Iowa 184, 96 N. W. 759; *Wertz v. Merritt*, 74 Iowa 683, 39 N. W. 103; *Cochrane v. Breckenridge*, 75 Iowa 213, 39 N. W. 274; *Stevens v. Witter*, 88 Iowa 636, 55 N. W. 535; *Nordman v. Meyer*, 118 Iowa 508, 92 N. W. 693; *Grimes v. Ellyson*, 130 Iowa 286, 105 N. W. 418.

Kentucky. — *Raison's Admr. v. Steele*, 16 Ky. L. Rep. 671, 29 S. W. 454; *Jones v. Tennis Coal Co.*, 29 Ky. L. Rep. 623, 94 S. W. 6.

North Carolina. — *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232; *Poston v. Jones*, 122 N. C. 536, 29 S. E. 951; *Benedict v. Jones*, 129 N. C. 475, 40 S. E. 223; *Gray v. Cooper*, 65 N. C. 183; *Luton v. Badham*, 129 N. C. 7, 39 S. E. 581; *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. 215.

Texas. — *Heard v. Busby*, 61 Tex. 13.

Contract for Conveyance. — *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Wood v. Brolliard*, 40 Iowa 591; *Brown v. Weaver*, 113 Ala. 228, 20 So. 964.

In an Action by a Warehouseman against the administrator of a deceased owner of goods stored, the plaintiff is an incompetent witness as to any transaction with the deceased in reference to the amount to be paid for such service. *Tobin v. South*, 18 Ky. L. Rep. 350, 36 S. W. 1039.

80. *Morrisett v. Carr*, 118 Ala. 585, 23 So. 795; *Madson v. Madson*, 69 Minn. 37, 71 N. W. 824.

81. In an action against the decedent's estate to foreclose a mortgage, testimony that no action or proceeding has been had for the recovery of the debt secured by the mortgage does not involve any statement by or transaction with the decedent. *Alexander v. Ransom*, 16 S. D. 302, 92 N. W. 418.

82. *Sachse v. Loeb* (Tex. Civ. App.), 101 S. W. 450; *Reinhardt v.*

decedent.⁸³ Nor can a surviving party to a contract testify as to the inducements or representations made to him by the decedent.⁸⁴

(3.) **Date of Contract.** — Testimony as to the date on which a written contract between the deceased and the witness was executed does not involve a personal transaction, and is therefore competent even though the date is a material issue in the case.⁸⁵

(4.) **Performance.** — Although the action taken under a contract by the surviving party thereto may be a transaction with the decedent, it is not necessarily so merely because it is in performance of the contract.⁸⁶ Nor does testimony as to non-performance of the con-

Marks' Admr., 29 Ky. L. Rep. 388, 93 S. W. 32; *Townsend v. Wilson*, 24 Ky. L. Rep. 1276, 71 S. W. 440; *Andrews v. Hayden's Admr.*, 88 Ky. 455, 11 S. W. 428.

The plaintiff, in an action upon a due bill purporting to have been given to him by a person since deceased, testified in respect to the delivery to the deceased of a note against her husband, as a consideration for the alleged due bill. It was held that such testimony related to a personal transaction with the deceased and should have been excluded. *Campion v. Schinnick*, 93 Wis. 111, 67 N. W. 11.

The obligor in a note being dead, the plaintiff in an action against his administrator was not competent to testify as to the consideration for the note. *Andrews v. Hayden's Admr.*, 88 Ky. 455, 11 S. W. 428.

Where defendant is sued on a note given to one since deceased, he is an incompetent witness on the question of want of consideration for the note. *Luke v. Koenen*, 120 Iowa 103, 94 N. W. 278.

83. Thus in an action by creditors of a decedent to set aside an alleged fraudulent assignment by the decedent to the defendants, the latter claimed that the consideration therefor was the payment by them of certain debts and obligations of the decedent. There was some evidence in support of defendants' claim as to certain debts which they had paid, and that the assignment was made in consideration of such payments. It was held that the defendants were competent witnesses to prove that they had made these payments although they could not testify as to

the terms of the contract, and that their testimony involved only transactions with third persons. *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232.

84. *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765.

85. *Barlow, Admx. v. Buckingham*, 68 Iowa 169, 26 N. W. 58. This was an action on a note payable to the plaintiff's intestate one year after date, which by mistake of the parties had been erroneously dated. It appeared that an attempt had been made to correct the error after the payee's death, but another mistake had been made. It was held that the defendant makers were competent to testify as to the correct date. "It is as to the facts and circumstances of the transaction between them and the deceased that they are forbidden . . . to testify. The date on which it occurred is a matter quite distinct from that, and we think it is not included within the prohibition." *Compare, supra*, VI, 2, J, c.

86. See *infra*, VI, 2, L, f, (8.); VI, 2, L, 1; *Fitch v. Martin* (Neb.), 104 N. W. 1072 (VI, 2, L, f, (8.), (A.)).

Action Taken in Performance of Contract. — In a suit growing out of a contract for the erection of a building, after the decease of one of the other parties thereto, the testimony of the plaintiff is competent to prove materials furnished for, and labor and work done on the building, it being shown that the contract, which was the only personal communication or transaction between the parties prior to the time that plaintiff quit work on the building,

tract with one since deceased necessarily involve a transaction with him.⁸⁷ But where the contract is such that performance or non-performance would constitute or involve a transaction between the witness and the decedent he is incompetent to testify thereto.⁸⁸

(5.) **Implied Contract.**—In an action on an implied contract with the decedent, the plaintiff is not competent in his own behalf to testify to facts which would raise such an implied contract,⁸⁹ though

was complete in itself, and was on record. What the plaintiff might testify to as to furnishing labor or materials for the building could in no possible way tend to prove what the transaction was between them. *Fouse v. Gilfillan*, 45 W. Va. 213, 32 S. E. 178.

In an action to recover on contract for sawing lumber, testimony of plaintiff in respect to the quantity of lumber which he sawed for the defendant, under a contract made with the latter's agent, since deceased, that he measured such lumber and entered the amount in his book, is not subject to the objection that it relates to personal transactions with the deceased agent. *Sucke v. Hutchinson*, 97 Wis. 373, 72 N. W. 880.

In an action against the defendant, as executor, for labor and services performed and money expended by the plaintiff for the deceased during his lifetime, as an architect and agent in the building of a house, it was held that the plaintiff was properly admitted to testify as to his work and expenditures. The work and services in question were transactions for the testator, but he was not present when such acts were performed, nor did he, by deed, word or presence, participate in their doing, and while the deceased was interested in such matters, they were not "transactions with him." The provisions of the statute disqualifying a party from giving testimony "as to any transaction with or statements by any testator or intestate represented in such action," has no effect but to exclude personal transactions with the testator and intestate, and the plaintiff having proved a contract with the deceased, he was then entitled as a witness to show what he had expended and

what work he had done out of the presence of the decease. *Provost v. Robinson*, 58 N. J. L. 222, 33 Atl. 204. Compare *Buckler v. Kneezell* (Tex. Civ. App.), 91 S. W. 367.

⁸⁷. *Horton v. Smith*, 115 Ga. 66, 41 S. E. 253. But see *infra*, VI, 2, L, 1, (3.).

⁸⁸. See *infra*, VI, 2, L, f, (8.); VI, 2, L, 1.

Part Performance.—On a bill filed against the administrator of a deceased person for the specific performance of an oral contract for the sale of land, alleged to have been made with the decedent, the complainant cannot testify as to the purchase and his payment of a part of the purchase money, and as to having been put into possession of the land by the decedent. *Brown v. Weaver*, 113 Ala. 228, 20 So. 964.

⁸⁹. *Ballinger v. Connable*, 100 Iowa 121, 69 N. W. 438; *Smith v. Johnson*, 45 Iowa 308; *Williams v. Walden* (Ark.), 100 S. W. 898; *Cash v. Kirkham*, 67 Ark. 318, 55 S. W. 18; *Dunn v. Currie*, 141 N. C. 123, 53 S. E. 533 (citing *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779; *Kirk v. Barnhart*, 74 N. C. 653; *Stocks v. Cannon*, 139 N. C. 60, 51 S. E. 802; *Boyd v. Cauthen*, 28 S. C. 72, 5 S. E. 170).

In an action against an administrator to recover upon an implied contract for services rendered the deceased, the plaintiff is not competent to testify to the facts which would raise an implied promise. The contract, if established, would be based upon the personal relations and transactions between the parties. *Peck v. McKean*, 45 Iowa 18.

In an action against an administrator to recover for services rendered his intestate, the plaintiff proposed to testify as a foundation of an implied contract, "to facts connected with the condition of his

the contrary has been held where the connection between decedent and the facts shown is made by other testimony.⁹⁰

(6.) **Distinction Between Implied and Express Contract.** — Testimony which may be objectionable in support of an implied contract with the decedent may be competent in an action on an express contract. Thus testimony as to the performance of work or services offered for the purpose of showing an implied contract to pay the reasonable value thereof is held to involve a personal transaction between witness and the decedent; while the same testimony in support of an express contract may not be open to this objection.⁹¹

father, his age, etc. This was held properly excluded under § 3639 of the code. *Wilson v. Wilson*, 52 Iowa 44, 2 N. W. 615.

In an action of assumpsit for services rendered the decedent, plaintiff was held incompetent to testify as to what she had done while acting as decedent's housekeeper, as that she had taken charge of his household affairs, sold produce and bought provisions for him, and had nursed him in sickness. The court says: "A contract, whether express or implied by law, is a transaction. And it seems to me, that when one person testifies that he did work and labor for another, generally, he must be taken and considered as testifying to a transaction, in legal contemplation, between him and such other person, within the true meaning and intent of the law now under consideration, because the testimony of the witness tends to prove, in legal effect, not only a request to do the work, but also a promise to pay him therefor, what the sum was reasonably worth, and also that he did the work in consideration of such request. The doing of the work and labor is the consideration of the contract or promise to pay, whether express or implied, and, it seems to me, cannot be separated from the contract or transaction very easily." *Owens v. Owens' Admr.*, 14 W. Va. 88.

90. In an action against the personal representative to recover on an implied contract the value of work done for the decedent in building and repairing houses, the plaintiff is competent to testify as to what work was done by him on the premises of the intestate, it appearing that the latter was at home and could not

have been ignorant of the facts testified to. Such testimony relates only to the plaintiff's own acts and not to transactions with the decedent, since the testimony in no way attempts to connect the deceased with such acts, the connection being made by other testimony. *Foggette v. Gaffney*, 33 S. C. 303, 12 S. E. 260, following *Rookhart v. Dean*, 21 S. C. 597.

91. *Hutton v. Dorse*, 116 Iowa 13, 89 N. W. 79. This was an action by a son against his father's estate in which the complaint contained a common count for work and labor, and a second count for damages for breach of the decedent's contract to convey the land upon which the work and labor claimed in the first count had been expended. Defendant claimed that in consideration of his caring for the land in question, paying the taxes thereon and the interest on a mortgage, the decedent agreed to convey the same to him. His testimony that he had been in possession of the premises during a certain period, had made improvements thereon and had paid the interest on the mortgage, was held inadmissible under the first count, but competent under the second count, since the mere paying of the mortgage and the taking possession of the premises and making improvements thereon were not personal transactions with the deceased except when shown for the purpose of establishing an implied contract. "The matters referred to with reference to the possession and occupancy of the farm related to facts ascertainable from observation alone, and were in no sense transactions with . . . the deceased."

(7.) **Correctness of Account.** — Testimony that the account sued upon is correct is testimony as to a transaction on which the account is based.⁹²

(8.) **Services.** — (A.) **GENERALLY.** — The general rule before stated⁹³ applies to contracts for services.⁹⁴ The courts are not in harmony as to what constitutes a transaction with the decedent in this class of cases; some give the term a very broad application including every fact bearing upon the terms of the contract or the nature of the services rendered.⁹⁵ Other courts give it a narrower meaning

92. In an action against the administrator of a deceased person on an account for services rendered his intestate, plaintiff is prohibited from testifying that the account is correct, as such testimony is, in substance and effect, a statement that the services had been rendered under a contract or upon request, and related to a transaction between the witness and intestate. *Boyd v. Cauthen*, 28 S. C. 72, 5 S. E. 170.

93. See preceding sections.

94. *Green v. Green*, 26 Ky. L. Rep. 1007, 82 S. W. 1011; *Patterson v. Carter*, 147 Ala. 522, 41 So. 133; *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176, 60 S. W. 573; *In re Havemeyer's Estate*, 6 App. Div. 535, 39 N. Y. Supp. 550.

Fact of Employment. — Testimony that the witness was employed by the decedent involves a transaction with the latter. *German v. Brown*, 145 Ala. 364, 39 So. 742. See also *William Tarr Co. v. Kimbrough*, 17 Ky. L. Rep. 1284, 34 S. W. 528.

In an action against an administrator for the board of the intestate, testimony of the plaintiff that such intestate had lost her position and did not have ready cash to meet her current expenses for room rent with her landlord, and came to plaintiff to board her, and that she was not working for plaintiff for her board, is inadmissible. *Bartlingck v. Harriman*, 16 Tex. Civ. App. 462, 41 S. W. 884, citing *Pinney v. Orth*, 88 N. Y. 447.

95. See *Owens v. Owens' Admr.*, 14 W. Va. 88; *Williams v. Walden* (Ark.), 100 S. W. 898.

Under the Kentucky statute it was held in an action against an administrator to recover for services alleged to have been rendered the decedent in his last illness that it

was error to allow the plaintiff to testify to the details of the decedent's physical condition for a year prior to her decease, the manner in which she was treated, and how she had to be cared for. It was contended that this evidence did not relate to any verbal statement made by, or transaction with, or act done or omitted to be done by deceased. "In a limited sense this is correct. But this code provision should not be given a narrow or strained construction to permit persons having claims against the estates of deceased persons to testify with reference thereto. If the language of the code was strictly confined to statements of actual transactions with, or positive acts done or omitted to be done by, the deceased, and persons in interest were permitted to testify indirectly as to transactions with or acts done or omitted to be done, the reason and purpose of this code provision would be seriously impaired, if not destroyed. No person will be permitted to give testimony in his behalf against the estate of a deceased person that will have a tendency to strengthen or make good his claim, or that will leave the impression upon the court or jury that his demand must be just and reasonable, because in substance and effect this would be testifying, although indirectly, to transactions with and acts done or omitted to be done by the deceased. In the case before us, the mere fact that the condition of Mrs. Northrip may have been known by a number of persons who could have described her condition does not affect the question. If appellee's evidence conduced to establish her claim, or tended to influence the jury in fixing the amount that should be allowed, it was incompetent and

and allow the witness to testify to what are called independent facts, showing the character of the services rendered.⁹⁶

It has been held that a person claiming compensation for alleged services rendered the decedent cannot testify that he rendered the

prejudicial. That it had this effect we have no doubt. The uniform tendency of this court has been to restrict the right of persons in interest from making in their own behalf against decedent's estates." *Northrip's Admr. v. Williams*, 30 Ky. L. Rep. 1279, 100 S. W. 1192; *citing and quoting among other cases, Newton v. Field*, 98 Ky. 186, 32 S. W. 623.

In an action to recover for services rendered to defendant's testator under an alleged express contract, it was held that the plaintiff was competent to testify to certain acts which would not directly prove or inferentially establish a personal transaction with the deceased, but that if the employment in any manner or to any extent rested upon an inference drawn from the character of the acts done, the testimony would be incompetent and, therefore, testimony in reference to the character of the business of the deceased and that plaintiff's work was keeping the books, keeping track of contracts, attending to houses, renting houses and buying and selling property, was incompetent as relating to a personal transaction with decedent. *Moses v. Hatch*, 38 App. Div. 140, 56 N. Y. Supp. 561.

96. In an action against an administrator to recover for board and lodging furnished to the decedent, the plaintiff may be permitted to testify that deceased had boarded with him, and for how long a time, for how long he had been absent, and what kind of board he furnished, these being independent facts and not personal transactions with the deceased, under § 4069, Rev. Stat. *Pritchard v. Pritchard*, 69 Wis. 373, 34 N. W. 506.

A Transaction Imports Mutuality, hence a physician who presents a claim for medical attention to his testator may testify as to the physical condition of testator within the period of the services rendered, and the proportion of a physician's time

which had been required in looking after the patient's health. "It seems to us that this testimony was from the observation of Dr. Latimer (the witness), as to what he saw, which could not be said to be a 'transaction.'" *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701.

In an action to recover for services as a domestic in the family of a decedent, testimony is admissible on the part of plaintiff to show that he was employed in the house of the decedent, and the character of the work performed by him there, as such testimony does not come within the prohibition of the statute. *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639.

In an action against an administrator to recover for services rendered the decedent, plaintiff's testimony that she gave the decedent medicine, prepared his nourishment, kept him clean and cared for him generally, was held to involve a personal transaction with the decedent and therefore to be incompetent. The court distinguished those cases where the witness was allowed to testify to substantive and independent facts not involving communications or transactions with the deceased, such as *Gray v. Cooper*, 65 N. C. 183; *March v. Verble*, 79 N. C. 19; *Lane v. Rogers*, 113 N. C. 171, 18 S. E. 117; *Cowan v. Layburn*, 116 N. C. 526, 21 S. E. 175, in which latter case the plaintiff suing for provisions furnished the deceased was allowed to testify that she carried provisions to the deceased at her house, and that she had no other provisions, the court being careful to add "that it did not appear whether the deceased accepted or refused the provisions, thus excluding any 'personal transaction,' the actual delivery." *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779, *holding* that "the plaintiff was competent to testify that she went to the house of defendant's intestate, and (to) his condition, and what she saw or heard, so

services⁹⁷ or as to what he did,⁹⁸ and when he did it,⁹⁹ and that he was not paid,¹ or that he expected compensation.² Nor can the rendering of such services be proved as the consideration for a conveyance.³ But where the contract does not call for services to be rendered directly to the deceased, the witness may state what he did,⁴ and the same rule has been laid down where the services, while for the decedent, were not rendered directly to him, and their connection with the alleged contract is otherwise shown.⁵ So also it has been held that where the decedent, if living, could not have testified to the character of the services rendered the witness is

long as these were independent facts, and did not tend to show a 'communication or personal transaction' between her and the deceased."

97. *Peck v. McKean*, 45 Iowa 18; *Smith v. Johnson*, 45 Iowa 308; *Lodge v. Fraim*, 5 Pen. (Del.) 352, 63 Atl. 233.

98. *Delaware*. — *Lodge v. Fraim*, 5 Pen. 352, 63 Atl. 233.

Iowa. — *Herring v. Herring's Estate*, 94 Iowa 56, 62 N. W. 666; *Cowan v. Musgrave*, 73 Iowa 384, 35 N. W. 496.

Kentucky. — *Newton's Exr. v. Field*, 98 Ky. 186, 32 S. W. 623.

New York. — *Taylor v. Welsh*, 92 Hun 272, 36 N. Y. Supp. 952; *Mitchell v. Hollands*, 72 App. Div. 224, 76 N. Y. Supp. 120; *Meehan v. Heffernan*, 73 App. Div. 615, 76 N. Y. Supp. 789.

North Carolina. — *Kirk v. Barnhart*, 74 N. C. 653.

West Virginia. — *Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 526.

One claiming against a decedent's estate for services rendered during decedent's last illness cannot testify as to the duration and character of the services. *Green v. Teutschmann*, 29 Ky. L. Rep. 1149, 97 S. W. 7.

99. *Taylor v. Welsh*, 92 Hun 272, 36 N. Y. Supp. 952.

1. *Peck v. McKean*, 45 Iowa 18.

2. *Cowan v. Musgrave*, 73 Iowa 384, 35 N. W. 496.

3. In an action by an administrator to cancel a deed made by his intestate, the grantee is not a competent witness to prove that the consideration for the deed was services rendered by himself to the decedent, since the rendering of such services is a transaction between the witness and the deceased. *Parker v. Ballard*, 123 Ga. 441, 51 S. E. 465.

4. In an action against the administrator of a deceased person to recover for services performed as a night watchman, it was held competent for the plaintiff to testify that he rendered services as a night watchman, as the subscription paper under which the services were performed did not call for services to be rendered directly to the subscriber, and the question did not call for proof of service rendered to the deceased; this did not imply a personal transaction. *Shedrick v. Young*, 72 App. Div. 278, 76 N. Y. Supp. 56.

5. *Provost v. Robinson*, 58 N. J. L. 222, 33 Atl. 204.

A person who has filed a claim against the estate of a deceased person for legal services performed under a yearly contract is not incompetent to testify as to what he did on several occasions in making examinations as to the title of lands belonging to the decedent. His testimony as to these independent facts without any statement that they were in pursuance of any contract with the decedent did not show any transaction with the decedent. "The testimony might corroborate the evidence given by other witnesses as to the existence of a transaction, but it would not be evidence of the transaction itself." The court cites *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58, an action against an executor by an attorney for services rendered the testator, where it was held that after the employment had been completely proved the plaintiff might describe the things which he did, provided such acts were done in the absence of the deceased and without his immediate or personal participation, and which could not

competent thereto.⁶ But in any case the witness may state facts which, while bearing upon the truth of the claim, do not tend to show any transaction between himself and decedent.⁷ And it has been held that the claimant may testify as to what he did where the facts testified to do not of themselves connect the services with the deceased or show a connection with him, but other testimony is necessary to show to whom they were rendered.⁸

for that reason be contradicted by the testimony of the decedent, if living. The plaintiff in this latter case was permitted to testify that he went to an office and got the papers in a case in which the deceased was a party, and went to Albany to prepare the case. The court further says: "And so, in this case, any examination of title by Fitch or journeymen to other points made by him upon business, the nature of which is shown to be connected with the deceased's affairs and as to which the deceased did not personally participate, are proper to be admitted in evidence as independent facts. The line, however, should be carefully drawn by the trial court, so that the protection thrown around the estate of deceased persons by the statute may be preserved, and yet the rights of the living be not interfered with. Where the act was one with which the deceased had no personal connection so far as disclosed by the evidence of the interested witness, it is admissible, if it tends to establish the truth of the claim he makes; but, if any act or conversation of the deceased is involved, the statute excludes it." *Fitch v. Martin* (Neb.), 104 N. W. 1072.

6. One suing the representatives of a decedent to establish his rights in land of the decedent through an alleged contract made with the latter, may properly testify as to services performed by him under the contract where the testimony is as to transactions concerning which decedent, if living, could not have testified, having no personal knowledge thereof. *Kauffman v. Baillie* (Wash.), 89 Pac. 548 (citing *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *Belden v. Scott*, 65 Wis. 425, 27 N. W. 356). In *Marvin v. Yates*, the plaintiff relying upon an

oral contract was held properly permitted to testify to acts done and services performed by him in the course of his employment by the decedent, but in the latter's absence. In *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639, after the contract of employment was shown, the plaintiff was permitted to detail the work he had done and the services he had performed in the course of his employment, eliminating from his testimony all personal transactions and communications between himself and the decedent. This testimony was held to be not in relation to a transaction with or statement by the decedent.

7. In an action upon an account embracing items for services rendered, and for board and rent of room furnished by plaintiffs to deceased, it is not error to permit one of the plaintiffs to testify that they operated a boarding house during the time named in the account, when it appears that such fact in nowise involved any transaction or communication had by plaintiffs with deceased. *Gomez v. Johnson*, 106 Ga. 513, 32 S. E. 600.

8. In an action by an architect to recover for plans and specifications furnished the defendant's testator, the plaintiff was held a competent witness to prove that he made certain plans and specifications, and that they were reasonably worth a certain sum, where the testimony did not refer to any conversation or transaction with the testator with reference either to the plaintiff's employment or the making of the plans. And the fact that plaintiff's testimony was connected with the cause of action by other evidence did not render it incompetent. *Buckler v. Kneezell* (Tex. Civ. App.), 91 S. W. 367. Compare *Provost v. Robinson*, 58 N. J. L. 222, 33 Atl. 204.

(B.) *VALUE.* — Where the rendition and character of the services has been established the claimant is a competent witness to prove their value, since such testimony does not involve a personal transaction or communication.⁹

(C.) *PHYSICIAN'S OR NURSE'S SERVICES.* — A physician's¹⁰ or nurse's¹¹ services to the decedent necessarily involve a transaction with him

In a suit against an executor to recover commissions on sums of money collected by the plaintiff for the executor's testator in his lifetime, after the establishment by proper proof of an agency to collect money for said testator, it is competent for the plaintiff to testify as to the amount of money collected, and, also, in the absence of an express agreement fixing the amount of compensation, as to what is a reasonable compensation for collecting the same. This would not be testifying to a transaction or communication with the deceased, and prohibited by the statute. *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19.

9. *Burrows v. Butler*, 38 Hun (N. Y.) 157; *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19; *Buckler v. Kneezell* (Tex. Civ. App.), 91 S. W. 367; *Deans v. King's Exrs.*, 20 Fla. 533. But see *contra*, *Meehan v. Hefferman*, 73 App. Div. 615, 76 N. Y. Supp. 789; *Yates v. Root*, 4 App. Div. 439, 38 N. Y. Supp. 663; *Cash v. Kirkham*, 67 Ark. 318, 55 S. W. 18; *Dunn v. Currie*, 141 N. C. 123, 53 S. E. 533; *Newton's Exr. v. Field*, 98 Ky. 186, 32 S. W. 623.

10. *Cash v. Kirkham*, 67 Ark. 318, 55 S. W. 18; *Temple v. Magruder*, 36 Colo. 390, 85 Pac. 832. But see *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701. See also *Dickerson v. Payne*, 66 N. J. L. 35, 48 Atl. 528.

A physician is not a competent witness in his own behalf in an action against an estate for professional services rendered the decedent to testify that he treated the deceased during a certain period, wrote prescriptions for him and gave him medicine. Such testimony comes within the term "transaction," as used in the statute. *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176, 60 S. W. 573.

In an action by a physician against a decedent's estate for professional services rendered the decedent, the

plaintiff is not a competent witness to testify as to the number of visits he made the deceased and what he did to relieve him, since such testimony involves a "transaction" with the deceased, as that term is used in the statute. *Duggar v. Pitts*, 145 Ala. 358, 39 So. 905 (citing *Ross v. Ross*, 6 Hun (N. Y.) 182; *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176, 60 S. W. 573, which are both to the same effect). The court distinguishes *Morrisett v. Wood*, 123 Ala. 384, 26 So. 307 as simply holding that the physician in such case "was not incompetent to testify that deceased had a certain disease and the cause of his death;" and also states that the case of *Wood v. Brewer*, 73 Ala. 259 is differentiated from the case at bar by the discussion of *Stone, C. J.*, in *Miller v. Cannon*, 84 Ala. 59, 4 So. 204. The case of *Borum v. Bell*, 132 Ala. 85, 31 So. 454, is also distinguished.

11. *Heyne v. Doerfler*, 124 N. Y. 505, 26 N. E. 1044; *Williams v. Walden* (Ark.), 100 S. W. 898. See *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779; *Northrip's Admr. v. Williams*, 30 Ky. L. Rep. 1279, 100 S. W. 1192.

In an action by a nurse against the executors for professional services rendered the decedent, the plaintiff is not a competent witness to prove what services he rendered, since such testimony shows a transaction with the decedent; nor is the plaintiff's testimony as to services rendered outside the sick room, such as attending to correspondence, calling a doctor, etc., admissible, since it is objectionable for the same reason. *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875.

In such an action, plaintiff was held incompetent to prove the character of the services rendered by her and their value, the condition of the health of the testatrix and the trouble plaintiff had in waiting on

and such claimant is therefore incompetent to prove his claim. However, as to just what constitutes a transaction in such cases there is some conflict.¹²

(9.) **Goods or Supplies Furnished.**—One seeking to recover on a contract for goods or supplies sold the decedent is incompetent as to any matter in connection therewith constituting a transaction with such decedent.¹³

g. Delivery.—(1.) **Generally.**—The fact of delivery by the decedent¹⁴ to the witness, and vice versa,¹⁵ whether of property or of an instrument,¹⁶ constitutes a transaction between them; thus testimony as to delivery pursuant to an alleged gift¹⁷ or agreement¹⁸ or as to the delivery of a note¹⁹ or deed²⁰ is incompetent.

her, as these are to be regarded as transactions with the deceased person. *Newton's Exr. v. Field*, 98 Ky. 186, 32 S. W. 623.

12. See notes to preceding sections.

13. In an action for the price of a stock of goods, to be paid for when decedent sold the same, plaintiff was asked, "Do you know about what the goods were that were traded to him? From what you saw in the store there, about what per cent. of the goods traded for by Shannon remained in the store?" Such questions were held improper as relating to a personal transaction with decedent. *Martin v. Shannon*, 92 Iowa 374, 60 N. W. 645.

In an action by a survivor against the estate of deceased for medicines furnished the latter, the former may testify as to the ingredients of which the medicine was composed. *Belote v. O'Brien's Admr.*, 20 Fla. 126.

14. *Lee v. Patton*, 50 W. Va. 20, 40 S. E. 353; *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681.

Delivery of Contract.—The delivery by the decedent of an alleged contract between himself and the incompetent witness is a transaction within the meaning of the statute. *Samson v. Samson*, 67 Iowa 253, 25 N. W. 233.

Contra.—Testimony as to the delivery of goods by the intestate to the incompetent witness does not involve a personal communication or transaction, but testimony that the goods were purchased does. *Cheat-ham v. Bobbitt*, 118 N. C. 343, 24 S. E. 13, holding that the administra-

tor's testimony merely that goods were delivered would not open the door to the adverse party to explain the contract under which the delivery was made, but that testimony that the goods were purchased rendered the adverse party competent.

15. *Montague v. Thomason*, 91 Tenn. 168, 18 S. W. 264; *Munnally v. Becker*, 52 Ark. 550, 13 S. W. 79.

Evidence by defendant in an action by an administrator for the conversion of goods, which defendant had sold deceased before the conversion, as to the delivery to deceased of the goods and invoices, is incompetent. *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498.

16. *Viall v. Leavens*, 39 Hun (N. Y.) 291; *Grey v. Grey*, 47 N. Y. 552.

17. *Lee v. Patton*, 50 W. Va. 20, 40 S. E. 353.

18. A party suing an executrix should not be permitted to testify that he entrusted money to the deceased to be loaned, for this would be evidence as to a transaction with deceased, within the meaning of the statute. *Altgelt v. Brister*, 57 Tex. 432.

19. *Campion v. Schinnick*, 93 Wis. 111, 67 N. W. 11; *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681; *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579.

In a proceeding to revive an execution, instituted by the administrator of the assignee, it is error to permit the defendant to testify that he had placed two notes in the hands of the deceased assignee to collect. *Monts v. Koon*, 21 S. C. 110.

20. In *Parker v. Parsons*, 79 App.

Delivery to a third person for the benefit of the witness would perhaps not be a transaction with him,²¹ but delivery by mail or express would be.²²

Testimony which attempts to negative any other possibility or alternative than the delivery of an instrument by decedent to the witness, is incompetent in those jurisdictions giving the statute a liberal construction.²³

(2.) **Sending Matter to Decedent by Mail or Express.** — The sending of matter through the mail or otherwise to the decedent is a transaction or communication with him, and the sender is therefore incompetent to testify to facts in relation thereto.²⁴

Div. 310, 79 N. Y. Supp. 688, a deed conveying the real estate in question to defendant was found in a box with the other papers belonging to plaintiff's testator and in order to prove a delivery of such deed to defendant, the latter offered to testify in his own behalf that such deed had been placed in decedent's box, to which he had access, by himself. In holding that such testimony was inadmissible, the court said: "The obvious design of the statute (§ 829), . . . is to prevent a living witness who is interested in the event of an action taking advantage of the silence of the grave by attempting to detail a conversation or transaction had with one who cannot be present to contradict him; and, while it is easy to repel any attempted infraction of the rule by direct methods, it often happens, as is the present case, that a party seeks to accomplish by indirection that which would fail of accomplishment if a more direct method were pursued, and in such cases it is necessary to resort to some test in order to determine the competency of the evidence offered. Such a test . . . has been furnished in the comparatively recent case of *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58, in which Judge Finch states the rule to be that, if the fact sought to be proven in any manner or to any extent rests for its establishment upon an inference to be drawn from the character of the fact, such evidence would be incompetent."

Conditional Delivery of Deed. Testimony by the grantor in a deed that it was delivered upon a condition, the non-performance of which

required its re-delivery, was held incompetent against the heirs of the grantee. *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765.

21. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579.

Delivery of Deed to Third Person.

A party to a proceeding to partition a deceased person's land is not disqualified from testifying that she saw the deceased deliver to the witness' husband the deed under which the witness claims, since such testimony does not involve a transaction between the witness and the decedent. It appeared, however, that the witness' interest was a contingent dower interest which only became vested upon the subsequent death of her husband. *Johnson v. Cameron*, 136 N. C. 243, 48 S. E. 640.

22. *Montague v. Thomason*, 91 Tenn. 168, 18 S. W. 264.

23. *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681; *Viall v. Leavens*, 39 Hun (N. Y.) 291. See also *Richardson v. Emmett*, 170 N. Y. 412, 63 N. E. 440, and *supra*, VI. 2, L. c. But see *Stewart v. Stewart*, 41 Wis. 624; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73; *Mortimer v. Chambers*, 63 Hun 335, 17 N. Y. Supp. 874, and *supra*, VI, 2, L. h. (1.).

24. Thus the sender is not competent to prove that letters were written and sent to the decedent, or that they were received and retained by the latter, or what the contents of the letters were. *Resseguie v. Mason*, 58 Barb. (N. Y.) 89.

Where it was claimed that a certain sum of money had been sent in a package by express to the decedent, the sender was held incompetent to prove that he had directed the pack-

h. Possession. — (1.) **Of Witness.** — (A.) **GENERALLY.** — Testimony by the witness that he had²⁵ or did not have²⁶ in his possession a certain chattel or instrument does not alone show a transaction or communication with the decedent. But the circumstances may be such that the testimony shows by necessary inference a transaction with decedent, in which event it is held incompetent in some jurisdictions,²⁷ though in others this is not a sufficient reason for excluding it.²⁸ The witness cannot identify such chattel or instrument

age to the decedent personally and not to a partnership of which the latter was a member. *Stuart v. Paterson*, 37 Hun (N. Y.) 113.

25. Possession of Letter From Decedent. — *Minnis v. Abrams*, 105 Tenn. 662, 58 S. W. 645, 80 Am. St. Rep. 913; *Montague v. Thomason*, 91 Tenn. 168, 18 S. W. 264.

Possession of Check. — While a witness may testify to his possession of a check he cannot state that he received it from the decedent. *In re Havemeyer's Estate*, 6 App. Div. 535, 39 N. Y. Supp. 550. But see *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, *infra*, next succeeding note but one.

Possession of Deed. — In an action of ejectment against the representative of a deceased person founded on a deed alleged to have been delivered by decedent to plaintiff, the latter is a competent witness to the fact that she had the deed signed by decedent in her possession during his lifetime. Such testimony does not show from whom the witness received the deed, nor does it involve a personal transaction between the witness and decedent. *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73.

Possession of Note. — In an action to charge the real estate devised by deceased with the amount due on certain promissory notes alleged to have been given by the testatrix, the plaintiff is a competent witness in her own behalf to testify that the notes in suit had been in her possession prior to the month in which testatrix died, and were in her possession at the time of such death, as such testimony did not relate to any personal transaction with the deceased within the meaning of § 829. *Mortimer v. Chambers*, 63 Hun 335, 17 N. Y. Supp. 874.

26. In an action by a contractor for a balance alleged to be due on a

house built for the decedent according to certain plans and specifications agreed upon, it was held that the plaintiff was properly permitted to testify whether "he had a contract in his possession or under his control between him and the decedent relating to the erection of the house, and if he ever had the contract or knew where it was placed." The court said: "The testimony was not of a personal transaction, but touching an 'independent fact,' which the deceased, if alive, could not dispute. By it, it was shown that no such contract had ever been in the plaintiff's possession." *Stevens v. Witter*, 88 Iowa 636, 55 N. W. 535.

27. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579.

28. Plaintiff in an action against the administrator of a deceased person claimed the stock sued for, by virtue of a gift of the same from decedent. The stock had been issued in her name by order of the decedent. On the question as to whether the gift had been executed by delivery, plaintiff was held to be incompetent to testify that immediately after the issuance of the certificates they were in her possession, since this, in effect, was testimony as to both a transaction and a communication with decedent. *Richardson v. Emmett*, 170 N. Y. 412, 63 N. E. 440 reversing 61 App. Div. 205, 70 N. Y. Supp. 546, and *distinguishing* *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73. See *In re Havemeyer's Estate*, 6 App. Div. 535, 39 N. Y. Supp. 550.

Though the grantees in a deed, after the death of their grantor, are not competent witnesses in their own behalf to prove any personal transaction or communication had between them and the deceased grantor, under Tay. Stats., 1600, § 174, and can-

as one which previously passed between himself and the decedent.²⁹

(B.) POSSESSION OF NOTE EXECUTED BY WITNESS. — Testimony as to the possession of a note payable to the decedent and made by the witness, although offered to create the presumption of a gift³⁰ or payment³¹ of the debt, is not incompetent, though the contrary has been held.³²

(2.) *Of Decedent.* — Testimony as to the possession of the decedent does not violate the statute.³³ Where, however, it appears that the

not testify that he delivered the deed to them, nor state any conversations between him and themselves in relation thereto, yet they may testify to other facts which have a bearing upon the question of delivery, as that the deed was in their possession, or under their control, from the day of its date until they placed it on record, and the refusal to permit such testimony in this case was error. *Stewart v. Stewart*, 41 Wis. 624.

29. Where the witness contended that the obligation in suit had been paid by him to decedent and the written evidence thereof had been delivered to him and had been subsequently lost, his testimony that he had possession of such writing and had lost the same was held to be equally objectionable with direct testimony to the fact of payment and delivery of the writing. The court says: "Suppose the plaintiff had filed with his bill what he alleged therein, to be the note or bond given by him to Prindle for said debt, could it be maintained that he would be a competent witness in his own behalf under the statute to prove the truth of the allegation. Manifestly to permit him to do so would be to permit him to testify in his own behalf to a transaction, had personally by him with Prindle, the intestate. How could he as a witness identify a note or bond in his possession, as being the note or bond given by him to Prindle for the debt in question without testifying that he executed the same note or bond to Prindle for the debt. If he produced a note or bond, it would be competent for him to identify it by evidence other than his own, as being the note or bond executed by him to Prindle for the said debt. But plaintiff would clearly be incompetent to do so by

his testimony given in his own behalf. How then, the note or bond not being produced, can he be permitted to testify in his own behalf, that he had the note or bond given by him to Prindle in his possession after its delivery to Prindle, and that it was lost or destroyed while in his possession. Certainly he could not be permitted to do so without violating both the letter and spirit of the act." *Calwell v. Prindle*, 11 W. Va. 307.

30. The possession of the witness prior to the death of the decedent of his own note payable to the latter, which he claimed to be a gift from the decedent, and his exhibition of the note to others, are independent facts and not personal transactions with the deceased. *Pritchard v. Pritchard*, 69 Wis. 373, 34 N. W. 506.

31. In an action by an administrator to recover possession of a promissory note payable to the intestate and containing no endorsement, it was held that the testimony of the defendant that the note had been in his possession since the commencement of the action and was his property, did not on its face show any transaction with the decedent. *Thompson v. Olney*, 96 N. C. 9, 1 S. E. 620.

32. In an action on a promissory note plaintiff is a *prima facie* incompetent witness to establish his possession of the same previous to decedent's death. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579.

33. *Gallagher v. Kiley*, 115 Ga. 420, 41 S. E. 613.

In an action against an administrator, the plaintiff's testimony that a note executed by plaintiff in favor of the decedent and offered in evidence was in the latter's possession on a certain date, was held not to be

knowledge of the witness can only be based on a transaction with the decedent he is incompetent.³⁴

Finding Things Amongst Deceased's Papers. — Testimony by a witness that he found a certain document or chattel amongst the deceased's papers or effects does not involve any transaction with the decedent.³⁵

(3.) **Of Third Persons.** — Testimony as to the possession of third persons is not objectionable.³⁶

i. **Gift.** — (1.) **Generally.** — An incompetent witness cannot testify to the fact of a gift to himself by the decedent,³⁷ though it has been

testimony as to a personal transaction with the decedent. "This was merely a fact not involving a personal transaction, though, when coupled with others, a personal transaction might be inferred therefrom. This court has often held that the statute was not designed to exclude evidence, not itself obnoxious to its prohibition, from which inferences of what was done between the parties might be drawn." *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435.

The plaintiff in a suit against an administrator for his intestate's trespass in taking plaintiff's tools, having testified to their loss may testify that he afterwards found them in a shop belonging to the intestate during the latter's life. Such testimony does not relate to any statement by or transaction with defendant's intestate. *Miller v. Clay*, 57 Ala. 162.

34. Thus where the witness is claiming that he delivered to decedent a tin box containing money which the latter converted, he can neither testify that he delivered the box to decedent, nor that he saw the same in decedent's safe, where his knowledge of the latter fact is based wholly on the alleged transaction of delivery. *Nunnally v. Becker*, 52 Ark. 550, 13 S. W. 79.

35. Upon the trial of an issue *devisavit vel non*, the widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valuable papers of the deceased. *Cornelius v. Brawley*, 109 N. C. 542, 14 S. E. 78.

In an action by an administrator to quiet title, where the defendants claimed through the decedent, their father, a brother of defendants who

was nominally a party defendant but did not appear in any way, was called as a witness for the plaintiff administrator and allowed to testify that for many years he and his father, the decedent, had occupied the same office for business purposes, in which was a safe owned by the witness containing a locked drawer used solely by the father for keeping private papers; that prior to the decedent's death the witness was ignorant of the contents of the drawer; that immediately after his father's death the latter's servant gave him the decedent's keys, and that shortly thereafter, in the presence of others, he unlocked the private drawer in the safe and found the deeds in question, which were then taken away by the defendants; that prior to that time he had no knowledge of the existence of such deeds. *Shetler v. Stewart* (Iowa), 107 N. W. 310.

36. Evidence that the witness saw in the possession of B. a deed from the decedent to B. to the property in controversy, and that B. gave the witness the deed, was held not to involve a transaction with the decedent nor a statement by him. *Walker v. Pittman*, 18 Tex. Civ. App. 519, 46 S. W. 117.

37. *Alabama.* — *Stuckney v. Bel-lah*, 41 Ala. 700; *Thomas v. Tilley*, 147 Ala. 189, 41 So. 854.

Indiana. — *Wolfe v. Kable*, 107 Ind. 565, 8 N. E. 559.

Iowa. — *Lowery v. Lowery*, 117 Iowa 704, 89 N. W. 1118.

Kentucky. — *Overbeck v. Lec-quire*, 19 Ky. L. Rep. 164, 39 S. W. 254; *Albro v. Albro*, 23 Ky. L. Rep. 1555, 65 S. W. 592.

South Carolina. — *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735.

held that testimony merely as to his possession of the thing in question does not violate the statute.³⁸

(2.) *Advancements*. — Testimony as to the nature and extent of advancements received by the witness from the decedent, or as to whether a particular transaction was an advancement, necessarily involves transactions between them.³⁹

j. *Demand and Notice*. — The witness cannot testify as to whether he gave⁴⁰ or received⁴¹ notice from the decedent, since these matters involve transactions with the latter. And the same rules apply to demand,⁴² though it is held that a denial of any demand by the decedent is competent.⁴³

k. *Value*. — Testimony as to the value of things which were the subject of a contract between decedent and the witness, does not of itself show a transaction with the decedent,⁴⁴ although it is held to the contrary.⁴⁵

1. *Payment*. — (1.) *Generally*. — Testimony by the witness as to the fact of payment to the deceased involves a transaction with the latter and is therefore incompetent.⁴⁶ The payment of money on

Texas. — James v. James, 81 Tex. 373, 16 S. W. 1087.

West Virginia. — Lee v. Patton, 50 W. Va. 20, 40 S. E. 353.

38. In an action against an administrator where plaintiff claims the property in question by a gift *inter vivos* from the decedent, it was held under the statute disqualifying plaintiff's testimony as to transactions with or statements by the deceased that the plaintiff could testify merely to her possession and the contents of a package, and not to the fact that the package had been delivered to her by the decedent with the statement that it was to be plaintiff's. Wilson v. Edwards, 79 Ark. 69, 94 S. W. 927; Nunnally v. Becker, 52 Ark. 559, 13 S. W. 79. But see *supra*, VI, 2, L, h.

39. Ballinger v. Connable, 100 Iowa 121, 69 N. W. 438; Craffon v. Inge, 30 Ky. L. Rep. 313, 98 S. W. 325; Wolfe v. Kable, 107 Ind. 565, 8 N. E. 559.

An heir is not a competent witness to prove that he paid rent to his ancestor for land of the latter occupied by the heir, in an action to charge him with the use of such land as an advancement. Garrott v. Rives, 26 Ky. L. Rep. 10, 80 S. W. 519.

40. Finton v. Egelston, 61 Hun 246, 16 N. Y. Supp. 721; Hazer v.

Streich, 92 Wis. 505, 66 N. W. 720.

41. Testimony that no notice had been received from any source is equivalent to testimony that notice had not been received from decedent. Hall v. Roberts, 63 Hun 473, 18 N. Y. Supp. 480.

42. Conway v. Moulton, 6 Hun (N. Y.) 650.

43. Richards v. Munro, 30 S. C. 284, 10 S. E. 108.

44. Marvin v. Yates, 26 Wash. 50, 66 Pac. 131. See *infra*, VI, 2, L, f, (8.), (B.).

45. See *supra*, VI, 2, L, f, (8.), (B.).

In an action against an executor to recover certain goods of the plaintiff's alleged to have been converted by the defendant's testator, the plaintiff is incompetent as a witness in her own behalf to testify as to the value of such goods; such evidence relating to a personal transaction with the deceased. Gregory v. Fichtner, 14 N. Y. Supp. 891.

46. *Alabama*. — Brown v. Weaver, 113 Ala. 228, 20 So. 964; Hagan v. Easter, 111 Ala. 480, 18 So. 308.

Iowa. — Cochrane v. Breckenridge, 75 Iowa 213, 39 N. W. 274.

Kentucky. — Garrott v. Rives, 26 Ky. L. Rep. 10, 80 S. W. 519.

Minnesota. — Madson v. Madson, 69 Minn. 37, 71 N. W. 824.

New York. — German-American

behalf of the decedent to other persons, however, is not;⁴⁷ nor is payment after decedent's death,⁴⁸ or to a third person.⁴⁹ The statute cannot be defeated by indirect or evasive testimony in effect showing payment, but not expressly so stating.⁵⁰

Manner of Payment. — The disqualification extends not only to the fact but to the manner of payment.⁵¹

(2.) **Payment by Decedent.** — Payment by decedent to the witness is a transaction between them.⁵² One seeking to enforce an alleged debt of the decedent cannot prove partial payments by the latter tolling the statute of limitations,⁵³ though the contrary has been held where there was nothing to show that the witness' knowledge of such fact might not have been obtained otherwise than by a transaction with the decedent.⁵⁴

Bank v. Slade, 15 Misc. 287, 36 N. Y. Supp. 983.

North Carolina. — *Lewis v. Fort*, 75 N. C. 251.

South Carolina. — *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884 (*holding* that the witness might properly testify that he had placed certain money in the hands of deceased, but not that the money was in payment of a certain obligation, since the latter testimony involved the act of the deceased in receiving the money as payment).

Tennessee. — *Montague v. Thomas*, 91 Tenn. 168, 18 S. W. 264.

Texas. — *Bridge v. Carter*, 33 Tex. Civ. App. 591, 77 S. W. 245; *Neitch v. Hillman*, 29 Tex. Civ. App. 544, 69 S. W. 494.

Wisconsin. — *Koenig v. Katz*, 37 Wis. 153; *Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N. W. 801.

Payment by the witness to the decedent and the delivery by the latter of the canceled obligation constitutes a transaction within the meaning of the statute. *Calwell v. Prindle*, 11 W. Va. 307.

Testimony by the claimant in support of a claim for the value of goods sold the decedent, that "no one had paid him for such goods," is incompetent, being the same in effect as testimony that decedent had not paid him. *Angel v. Angel*, 127 N. C. 451, 37 S. E. 479.

47. In an action against the administrator of a deceased person to recover certain money alleged to have been expended by plaintiff for the deceased while acting as her agent, the claimant is competent to

testify that he paid certain debts of decedent out of his own money, as such testimony does not relate to a personal transaction with the deceased. *Matter of Zinke*, 90 Hun 127, 35 N. Y. Supp. 645. See also *Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N. W. 801.

48. *Fort's Admr. v. Davis*, 67 Ala. 481.

49. *Wormley v. Hamburg*, 46 Iowa 144.

50. *Martin v. Fowler*, 51 S. C. 499, 29 S. E. 261; *Telford v. Howell*, 220 Ill. 52, 77 N. E. 82.

51. *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659, where it was claimed that services had been paid for by certain check, testimony as to whether payments had been made in any other manner was held incompetent.

52. *Simpson v. Simpson*, 107 N. C. 552, 12 S. E. 447.

53. In an action on a claim against a decedent's estate, the claimant is incompetent to testify to payments made by the decedent in her lifetime to avoid the statute of limitations. *Pierce v. Stitt*, 126 Wis. 62, 105 N. W. 479.

54. In an action against an administrator on a note made by his decedent, plaintiff may testify that of his own knowledge deceased had made payments on the note, removing the bar of the statute of limitations, as the court will presume that he could have obtained this knowledge by other means than from transactions with decedent, unless it otherwise affirmatively appears.

(3.) **Non-Payment.** — Testimony that a debt contracted by one since deceased has not been paid involves a transaction with such decedent, and cannot therefore be given against the latter's representative by the party to whom payment is due.⁵⁵

m. *Physical Condition of Decedent.* — Testimony as to the physical condition of the decedent prior to his death does not involve a transaction with him, where it is derived merely from his observation.⁵⁶ And it has been held that in an action for services rendered in caring for the decedent prior to his death, the claimant is a competent witness in his own behalf to prove the physical condition of the decedent during the period in which the services were rendered, and the care and attention which he required by reason thereof, where he is not allowed to state what he himself did or was required to do.⁵⁷ But it has been held that where the knowledge of the

Crebbin v. Jarvis, 64 Kan. 885, 67 Pac. 531.

55. *Alabama.* — Scarborough v. Blackman, 108 Ala. 656, 18 So. 735.

Arkansas. — Rainwater v. Harris, 51 Ark. 401, 11 S. W. 583.

Iowa. — Ridler v. Ridler, 93 Iowa 347, 61 N. W. 994; Van Sandt v. Cramer, 60 Iowa 424, 15 N. W. 259.

New York. — Meyer v. Hunt, 60 Hun 579, 14 N. Y. Supp. 471; Brayman v. Stephens, 79 Hun 28, 29 N. Y. Supp. 526.

North Carolina. — Davis v. Evans, 139 N. C. 440, 51 S. E. 956; Angel v. Angel, 127 N. C. 451, 37 S. E. 479; McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27 (holding that the plaintiff in a suit to foreclose a trust deed given by one since deceased was not a competent witness to prove non-payment of the secured debt); Dunn v. Beaman, 126 N. C. 764, 36 S. E. 174.

Texas. — Abbott v. Stiff (Tex. Civ. App.), 81 S. W. 562.

In an action to recover for services alleged to have been rendered defendant's testator, after proof of services rendered, plaintiff, as a witness in his own behalf, was asked if he had received payment therefor, to which question objection was made as involving a personal transaction with the deceased, which objection was overruled and plaintiff answered "No." It was held, that while the objection was good, the evidence was immaterial and could have done no harm, as payment was an affirmative defense, and the burden of proving it was upon the de-

fendant. Lerche v. Brasher, 104 N. Y. 157, 10 N. E. 58.

In an action by an administrator to cancel a note executed by his intestate, alleging payment, the defendant, who had purchased the note, was held incompetent to prove that it had never been paid. Johnson v. Lockhart, 16 Tex. Civ. App. 32, 40 S. W. 640.

56. Kosteletzky v. Scherhart, 99 Iowa 120, 68 N. W. 591; Sim v. Russell, 90 Iowa 656, 57 N. W. 601 (holding competent the testimony of the plaintiff in a proceeding attacking the will on the ground of decedent's mental incapacity).

In an action by heirs upon a policy of insurance payable to them, the heirs may testify as to the condition of decedent's health at the time he applied for a transfer from one class to another, under the statute providing that neither party can testify to transactions prior to the death of the ancestor in suits affecting his property, by or against heirs, etc. Supreme Lodge K. P. v. Andrews, 31 Ind. App. 422, 67 N. E. 1009.

In a proceeding to probate an alleged will, it was held that the testimony of a daughter of the deceased as to her father's physical condition when she reached home and whether he left his bedroom after she arrived, did not relate to a personal communication or transaction with the deceased and was admissible. *In re McCarthy's Will*, 65 Hun 624, 20 N. Y. Supp. 581.

57. Marietta v. Marietta, 90 Iowa 201, 57 N. W. 708, distinguishing

witness is based upon a transaction or communication with the decedent, his testimony is incompetent.⁵⁸

n. Mental Condition and Capacity. — (1.) *Of Decedent.* — (A.) *GENERALLY.* — The cases are not entirely in harmony as to what testimony respecting the mental condition or capacity of the decedent is not a violation of the statute.

A witness disqualified by the statute cannot testify as to transactions or communications with the decedent for the purpose of showing his mental capacity,⁵⁹ though it has been held that testimony as to the daily conduct and statements of the decedent open to the knowledge of others does not infringe the prohibition of the statute.⁶⁰ But the testimony of such a witness as to what he had observed with respect to the mental condition of the decedent does not necessarily involve a transaction or conversation with the latter, and is therefore not incompetent without some further showing.⁶¹ Where,

Wilson v. Wilson, 52 Iowa 44, 2 N. W. 615, where testimony as to facts constituting the foundation for an implied contract was excluded on the ground that in the case at bar no contract could be implied from the plaintiff's testimony.

Testimony of Physician. — In an action by a physician against an executor, to recover for medical services rendered by the plaintiff to the defendant's testator, the statement by the plaintiff, upon being examined as witness, that he knew the defendant's testator, that he had a certain disease, and that he died from the effects of that disease complicated with another, involves no transaction with the deceased. *Morrisett v. Wood*, 123 Ala. 384, 26 So. 307.

^{58.} *Holcomb v. Holcomb*, 95 N. Y. 316. See also *Trowbridge v. Stone's Admr.*, 42 W. Va. 454, 26 S. E. 363.

^{59.} In *In re Bartholick's Will*, 59 Hun 616, 12 N. Y. Supp. 640, it was held that a legatee who was the housekeeper for testator was incompetent to testify in reference to transactions and communications in connection with the making of the testator's will and as to what was seen and heard by her bearing upon the capacity of the testator to execute a will.

^{60.} In a contest on a will on the ground of testator's mental unsoundness, a party, not being an expert, cannot testify as to the mental un-

soundness of testator without giving the facts upon which his opinion rests, so he should be permitted to state every fact which could be reasonably made the foundation of an opinion as to the mental condition of the testator, and under this rule the party to the suit was properly permitted to testify to the conduct and conversations of the testator and his family. The daily conduct and conversations of testator are supposed to be open equally to all the members of his family, the appellants as well as appellees. *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118. See also *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

^{61.} Where the issue is as to whether testamentary capacity has been impaired or destroyed by sickness, the testimony of a witness that he observed no difference in the testator's mental condition before and after the sickness is not testimony as to a personal transaction or communication between the testator and the witness. *Severin v. Zack*, 55 Iowa 28, 7 N. W. 404. See *Sim v. Russell*, 90 Iowa 656, 57 N. W. 601.

In an action on a note executed by the decedent the testimony of plaintiff's sister, who held a similar note, to the effect that before and after the date of the note her father, the decedent, "was very bright," was held not to involve a personal transaction or communication with him. *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854.

however, the testimony is necessarily based upon and the result of transactions or communications with decedent, it is a violation of the statute.⁶² And it is held in New York that the witness cannot testify to the acts and statements of the decedent in his presence for the purpose of showing mental incapacity.⁶³

(B.) OPINION. — A witness may give his opinion as to the mental condition of the decedent or incompetent person if it is not based upon transactions or communications as to which he could not testify; and he may testify to the facts upon which it is based,⁶⁴ though the contrary has been held.⁶⁵ But an opinion based upon facts as to which the witness is incompetent cannot be given.⁶⁶

In proceedings to probate a will, the mental capacity of the testator being in controversy, it is competent for one of the contestants of the will to testify as to the verbal acts of the deceased prior to the date of will, and to state what he said when he was angry and violent, such matters not tending to draw out any conversation between the witness and the deceased relative to the will, but simply to show the state of testator's mind. *In re Brown*, 38 Minn. 112, 35 N. W. 726.

62. *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498; *Holcomb v. Holcomb*, 95 N. Y. 316.

63. *In re Dunham's Will*, 121 N. Y. 575, 24 N. E. 932; *In re Eysaman*, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599.

64. *McLeary v. Norment*, 84 N. C. 235.

An opinion as to the mental condition of the decedent before and after a particular transaction if not based upon transactions or communications with him is competent. *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854.

A question calling for an opinion as to the decedent's mental capacity when a contract with him was made, based upon the witness' association and conversations with the decedent and the latter's actions and conduct during her visit with the witness (during which time the contract in question was made) was held not objectionable as calling for a transaction or communication with the decedent. *Grimshaw v. Kent*, 67 Kan. 463, 73 Pac. 92.

An opinion as to sanity, based on what witness saw testator do and heard him say to others, is not open

to the objection that it states a "personal transaction" with decedent; nor is it objectionable to state whether decedent recognized witness. *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69.

While an opinion as to sanity based wholly on transactions between the witness and the deceased as to which the witness would not be competent, is probably also incompetent, nevertheless the wife of the decedent in an action in which she defends as his executrix, is not incompetent to testify as to acts, conduct, or transactions had by the deceased within her observation if wholly unparticipated in or uninfluenced by her, and she may properly give her opinion as to his sanity based upon such observation. *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234.

65. Testimony of non-experts that they knew and had observed the mental and physical condition of the plaintiff, who was of unsound mind and represented in the action by a next friend, and that the plaintiff was too weak, both mentally and physically, to have performed labor of any value, was held to necessarily involve transactions or communications between the witness and such incompetent person. *Trowbridge v. Stone's Admr.*, 42 W. Va. 454, 26 S. E. 363.

66. It is not competent for a contestant of a will to give his opinion as to the mental capacity of the testatrix, based upon conversations with deceased. *In re Goldthorpe's Estate*, 94 Iowa 336, 62 N. W. 845.

Compare Pattee v. Whitcomb, 72 N. H. 249, 56 Atl. 459, holding that, under a statute disqualifying the witness as to matters occurring in the

Testimony by the witness as to his long acquaintance with the decedent, for the purpose of basing an opinion thereon as to the latter's mental capacity, does not violate the statute.⁶⁷ But an opinion as to the decedent's mental capacity on a particular occasion has been held incompetent as being necessarily based upon transactions or communications between him and the decedent at that time.⁶⁸

(C.) INTENT OF DECEDENT. — Where the intent of the decedent characterizes a particular transaction it forms a part thereof, and

decedent's lifetime, an opinion as to decedent's mental condition based upon such facts was likewise incompetent, inasmuch as the opinion could not exist independently of facts affording a basis therefor.

67. Where a deed was attacked on the ground that the grantor had not capacity to contract, and that the deed was procured by undue influence, it was error to refuse to allow the grantee, the grantor being dead, to testify that the grantor had lived in her home for several months and she had seen and talked with him daily. To give an opinion based on these facts is not such testimony as to transactions or communications had with the deceased as should be excluded. *Cato v. Hunt*, 112 Ga. 139, 37 S. E. 183.

68. In a contested application by the administrator for an order to sell lands for the payment of debts where the issue was the validity of a promissory note signed by the intestate and payable to the administrator, which the heirs claimed was made when the intestate was not of sound mind, and it further appeared that the administrator was the decedent's family physician for a number of years, it was held that his testimony as to the condition of the intestate's mind at the time the note was made, would come within the exception excluding statements by or transactions with the deceased. "The appellant could doubtless have testified that in his opinion, the intestate was generally of a sufficient understanding to act with discretion in the ordinary affairs of life. His personal relation with the intestate, his long acquaintance with him, and the opportunity he had of observing and knowing his habits, temper, character, and capacity, would have authorized an inquiry into the opinion he had formed

as to the soundness and degree of the understanding of the intestate. This opinion would have been formed on facts independent of and distinct from the conduct, acts, or declarations of the intestate, when the note was executed. But it is not the opinion of the appellant as to the general sanity of the intestate which is sought to be elicited. Having testified as to his general sanity, he is asked if he knew the condition of the mind of the intestate on the day the note was executed. Answering that question affirmatively he is asked what then was the condition of his mind. His opinion or knowledge of the mental condition of the intestate must have been derived in part, or wholly, from his conduct and declarations on that day, and from his freedom from, or subjection to the influence of disease with which he was afflicted. Insanity is most often shown by the acts and declarations of him to whom it is imputed. It is the impression these made upon the minds of the physician, or of his acquaintances who have the opportunity of observing him closely and frequently, that is an opinion they may communicate as legal evidence. When, therefore, a physician, or a relative is asked to express an opinion as to the sanity of a person at a particular point of time, he is asked, in effect, what was his conduct made up of his acts and declarations at that time. It is these acts and declarations the statute prohibits the living party from testifying to when the estate of the decedent is interested. The prohibition cannot be avoided by any general forms of question, nor by covering up evidence of them under the expression of an opinion founded upon them. They are excluded by the terms of the exception, and its policy will be defeated, if

testimony as to such intent is equally incompetent with more direct testimony as to the transaction itself.⁶⁹

(D.) DECEDENT'S KNOWLEDGE. — It has been held that testimony as to decedent's knowledge of a certain fact is not incompetent.⁷⁰

(2.) Condition of Witness' Mind During Transaction. — The condition of the witness' mind during a transaction with the decedent has been held not to be a part of that transaction within the meaning of the statute, and he is therefore competent to prove it.⁷¹

c. *Partnership*. — The existence or nature of a partnership between the witness and decedent necessarily involves a transaction between them, and the former is incompetent to prove it.⁷²

p. *Marriage* is a transaction between the parties, and the survivor cannot therefore testify as to this fact.⁷³ He is not competent to prove the fact of marriage,⁷⁴ nor is one who cohabited with decedent competent to deny that they were married.⁷⁵ These rules, of course,

evidence of them in whatever form it may be presented, is not excluded." *Davis v. Tarver*, 65 Ala. 98.

69. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177, recognizing this as the rule laid down in *Tooley v. Bacon*, 70 N. Y. 34, but holding that that case was very close to the border line, and that the rule there enunciated should not be extended.

70. *Richards v. Munro*, 30 S. C. 284, 9 S. E. 108.

71. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177, in which the question was whether the representations made by decedent to the witness to induce him to enter into a contract were believed and relied upon by the witness. He was held competent to testify as to the condition of his own mind in this respect, since such facts were not part of the transaction and could not have been testified to by decedent if living. The case of *Tooley v. Bacon*, 70 N. Y. 34, is distinguished.

72. *Sikes v. Parker*, 95 N. C. 232; *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

The executors of a deceased member of a firm sued the surviving partners for an account and settlement of the co-partnership business. One of the defendants was allowed to testify that plaintiff's testator agreed with witness and the other partners upon a certain basis (which witness stated at length) for the adjustment of the affairs of the firm between the members thereof; and

assented to a statement of each partner's interest in the firm, which appeared on the books of the firm. It was held that such testimony was incompetent as relating to a transaction with a deceased person. But the witness had a right to testify that the books alluded to were kept among the papers of the firm, that decedent had access to them, and that many entries were in his handwriting. *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461.

73. *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084, holding that one claiming to be decedent's wife could not testify as to her identity with a person of the same name in a marriage license.

74. *In re Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803.

An alleged widow who is a party to an action by the heirs at law of the husband is not competent to prove the fact of the marriage or that she lived with him as man and wife, when the marriage is in issue. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1.

75. Under a statute providing that in actions by or against executors, etc., neither party shall be competent "as to" transactions with or statements by the decedent unless called by the other party, in an action by children to recover the alleged community interest of their deceased mother in the property held by the defendant father, the latter is not a competent witness to prove that he

are not applied in proceedings to which the statute is held inapplicable.⁷⁶

q. *Fraud*. — Testimony as to facts constituting fraud on the part of the decedent involve a transaction or communication with him.⁷⁷

r. *Occupancy of Land*. — The witness is incompetent to testify that he was placed in possession of land by the decedent,⁷⁸ but he may state that he⁷⁹ or the decedent⁸⁰ was occupying land at a particular period.

s. *Testimony as to Seeing Decedent*. — Testimony merely that the witness at a certain time and place saw the decedent does not of itself involve a transaction or communication with the latter, although given to corroborate other testimony that at the same time and place the decedent made the contract in issue and under which the witness is claiming.⁸¹ Witness may testify as to what he saw

was not lawfully married to the decedent. "The phrase 'as to' is defined thus: 'So far as it concerns; as regards; as respects; in regard to; in respect to.' That the proof which was offered to be made by the witness Edelstein had respect to, and was in regard to, and in fact came within every phase of the definition of the terms of the statute, cannot be doubted, because it undertook to explain the state of facts which constituted the transaction — the cohabitation of Edelstein and the woman, so as to make it wilfully unlawful, whereas, the jury might have found from the evidence that the parties had contracted marriage according to the common law." *Edelstein v. Brown* (Tex.), 100 S. W. 129.

76. *Buchanan v. Buchanan*, 103 Ga. 90, 29 S. E. 608 (contest for appointment as administrator).

77. *Carr v. Fife*, 44 Fed. 713; *Langford v. Broadhead*, 63 Hun 624, 17 N. Y. Supp. 290; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765.

In an action to set aside a deed from the plaintiff to the decedent, testimony as to the facts which constitute fraud on the part of the deceased necessarily include personal transactions or conversations with the latter, and the plaintiff is therefore an incompetent witness as to such facts. *Conklin v. Yates*, 16 Okla. 266, 83 Pac. 910; *Carr v. Fife*, 44 Fed. 713.

78. *Brown v. Weaver*, 113 Ala. 228, 20 So. 964. But see *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9.

In an action of ejectment against the executors of the estate of a decedent from whom plaintiffs claimed to derive title sufficient to establish adverse possession, evidence on plaintiffs' part of having been put in possession of the land by decedent, under an agreement for a deed which was subsequently executed, but by mistake failed to incorporate all the land of which they had been put in possession under their purchase, is inadmissible. *Kline v. Stein*, 30 Wash. 189, 70 Pac. 235.

79. *Wood v. Brewer*, 73 Ala. 259; *Britton v. Tischmacher* (Tex. Civ. App.), 31 S. W. 241.

Testimony of the defendant claiming title to land under a deed from his deceased grantor, in an action for partition, that he had occupied the property, rented it and collected the rent, did not relate to a personal transaction with his deceased grantor and he was not competent to give such evidence under § 829 of the code. *Strough v. Wilder*, 3 N. Y. Supp. 567.

80. *Meadows v. Meadows*, 78 Ala. 240.

In an action by the owner of land to recover rent, brought against an executor, evidence by the plaintiff to the effect that the testator was in possession and cultivated the land is admissible. *Parker v. Salmons*, 113 Ga. 1167, 39 S. E. 475, citing *Gomez v. Johnson*, 106 Ga. 513, 32 S. E. 600.

81. See *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435; *Cowan v.*

the decedent do if that does not involve any transaction with himself.⁸²

t. *Recognition of Witness by Decedent.* — A witness testifying to the mental condition of decedent may properly state whether at a particular time the decedent recognized him; such testimony does not involve the transaction or communication between the witness and the deceased.⁸³

u. *Writings and Written Communications or Transactions.* — (1.) **Generally.** — Written as well as oral transactions and communications are covered by the statute.⁸⁴ A party to such a transaction is incompetent against the decedent's representative to testify as to its real character.⁸⁵ The statute, however, does not serve to exclude the writings themselves, but merely the testimony of the witness as to their character, contents or execution.⁸⁶

(2.) **Genuineness of Writing.** — (A.) **GENERALLY.** — It has been held that a witness is not competent to prove that a writing, purporting to evidence a transaction between himself and decedent, is a forgery.⁸⁷ He may, however, deny that he forged the decedent's name,⁸⁸ or testify to other facts tending to disprove an alleged

Davenport, 30 App. Div. 130, 51 N. Y. Supp. 478.

Hamlin v. Stevens, 59 App. Div. 522, 69 N. Y. Supp. 255. In this case the witness was claiming specific performance of an alleged oral contract between the deceased and the witness' parents, claimed to have been made while decedent was visiting the latter. There was evidence to show that at the time and place in question decedent made the alleged contract. The witness was held competent to testify that he saw the decedent at his mother's house at the time in controversy, such testimony not involving a personal transaction with the decedent.

82. McCall v. Wilson, 101 N. C. 598, 8 S. E. 225.

83. Denning v. Butcher, 91 Iowa 425, 59 N. W. 69.

84. McCorkendale v. McCorkendale, 111 Iowa 314, 82 N. W. 754; Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

"Personal" Transactions and Communication Include Writings. Transactions or communications had "personally" with the decedent are not confined to conversations, but include writings as well, and cover any and all transactions or communications between the witness and the de-

cedent. Conklin v. Yates, 16 Okla. 266, 83 Pac. 910.

85. In an action by the administratrix of the payee of a due bill to recover the amount due thereon, the payer is incompetent to testify for himself that such due bill was a mere sham. Burns v. Ross, 17 Ky. L. Rep. 181, 30 S. W. 641.

86. Howe v. Richards, 112 Iowa 220, 83 N. W. 909; and see *infra*, VI, 2, L, u, (8.), (A.).

87. In an action by a husband against his deceased wife's estate to recover the share in the estate coming to him under the law, which he had elected to take, he is not a competent witness in his own behalf to prove that that portion of an antenuptial agreement providing that the wife might will her property as she chose was a forgery. Watson v. Duncan, 84 Miss. 763, 37 So. 125.

88. In an action brought by an administrator to recover possession of certain certificates of deposit, it was alleged that the defendant had obtained possession of the same by fraud and had endorsed thereon the name of deceased. On the trial the defendant testified that she did not endorse the name of deceased on said certificates, that she had them in her possession for over two months

forgery where they do not show a transaction with the decedent.⁸⁹

(B.) HANDWRITING OR SIGNATURE. — (a.) *Of Decedent.* — Identifying the decedent's handwriting or giving an opinion as to the genuineness of his purported signature is not testifying to a transaction or communication with decedent, even though the writing in question constitutes or evidences such a transaction or communication.⁹⁰ It has, however, been held to the contrary,⁹¹ especially where the testimony was given in answer to the question whether the decedent

before he died and denied that she had forged his name thereto, to all of which testimony the plaintiff objected on the ground that it related to a personal transaction with a deceased person. It was held that none of the testimony was open to this objection. *Murphy v. Quinn*, 99 Wis. 466, 75 N. W. 168, citing *Stewart v. Stewart*, 41 Wis. 624.

89. Where the question involved in a suit is the genuineness of a certain paper alleged to have been executed by plaintiff's testator, the plaintiff is competent to testify that he first saw the paper in testator's office at a certain time, such testimony involving no verbal statement of or transaction with the deceased. *Eve's Exr. v. Saylor*, 19 Ky. L. Rep. 1697, 44 S. W. 355.

90. *Iowa.* — *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659; *Sankey v. Cook*, 82 Iowa 125, 47 N. W. 1077. *Missouri.* — *Jesse v. Davis*, 34 Mo. App. 351.

New York. — *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73; *Wing v. Bliss*, 55 Hun 603, 8 N. Y. Supp. 500, affirmed without opinion, 138 N. Y. 643, 34 N. E. 513.

North Carolina. — *Ferebee v. Pritchard*, 111 N. C. 83, 16 S. E. 903; *Hussey v. Kirkman*, 95 N. C. 63; *Rush v. Steed*, 91 N. C. 226; *Ballard v. Ballard*, 75 N. C. 190; *State ex rel Peoples v. Maxwell*, 64 N. C. 313; *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779; *Sawyer v. Grandy*, 113 N. C. 42, 18 S. E. 79.

Texas. — *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255.

When the witness has testified, without objection, to his familiarity with deceased's signature, testimony that the signature in question was that of deceased is not evidence of a personal transaction, but is an opin-

ion. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, affirming 69 App. Div. 381, 74 N. Y. Supp. 1069.

Testimony, without anything further appearing, that certain entries were in the handwriting of the decedent does not show a personal transaction with him. *Goetting v. Weber*, 71 App. Div. 503, 75 N. Y. Supp. 820.

Expert Opinion. — In an action by a bank on a promissory note against the executors of the endorser thereon, the cashier of the bank who received the note, signed by the maker and endorsed by the decedent, as the agent of the bank, was held a competent witness to give his opinion as an expert as to the genuineness of the endorser's signature, where such opinion was based on a comparison with other writings and signatures of the decedent proved to be genuine. *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664, citing *Cato v. Hunt*, 112 Ga. 139, 37 S. E. 183.

Signature to Letter. — Testimony identifying a decedent's signature to a letter offered in evidence is not incompetent under the statute (*Britt v. Hall*, 116 Iowa 564, 90 N. W. 340; *Wing v. Bliss*, 55 Hun 603, 8 N. Y. Supp. 500), although it was received by the witness from decedent. *Minnis v. Abrams*, 105 Tenn. 662, 58 S. W. 645.

Signature to Contract. — Testimony of the plaintiff, in an action upon a contract with one since deceased, that the signature to the contract and a letter offered in evidence as a standard for comparison therewith, are in the handwriting of such deceased party, is not within the prohibition of the statute. *Sankey v. Cook*, 82 Iowa 125, 47 N. W. 1077.

91. *Ware v. Burch* (Ala.), 42 So. 562 (citing *Merritt v. Shaw*, 6 Ind. App. 360, 33 N. E. 657; *Holliday v.*

executed the writing,⁹² or would of itself prove execution.⁹³ The

McKinne, 22 Fla. 153; Neely v. Carter, 96 Ga. 197, 23 S. E. 313, and Kirksey v. Kirksey, 41 Ala. 626, which latter case though overruled with respect to other points is still the law on the point in question, having been approvingly cited in Harwood v. Harper, 54 Ala. 659).

In Neely v. Carter, 96 Ga. 197, 23 S. E. 313, which was a proceeding to establish a copy of an alleged lost deed, the grantee was held incompetent to prove the genuineness of the decedent's signature on the original, since this in effect would be proving the execution of the deed by the decedent.

In an action by an administrator on a note executed by defendant to plaintiff's intestate, defendant who offers in evidence a receipt signed by decedent in support of his defense of payment, cannot testify to the handwriting of the deceased in letters and papers handed to him while testifying in order to show by comparison the genuineness of the signature to the receipt. Merritt v. Shaw, 6 Ind. App. 360, 33 N. E. 657.

The payee of a note and mortgage is not a competent witness against the estate of the deceased payer and mortgagor to prove the genuineness of the latter's signature to the instrument under §606, Civ. Code Prac. disqualifying a witness as to transactions with deceased persons. Clark v. Clark, 28 Ky. L. Rep. 1069, 91 S. W. 284.

92. In Chaffee v. Goddard, 42 Hun (N. Y.) 147, which was an action on a contract between the plaintiff and the decedent, the plaintiff on his own behalf was permitted over objection, in answer to the question whether he executed the contract, to state that the signature thereon was his own. He was also permitted over objection to prove the signature of the decedent. Both these rulings were held error. The court says: "The agreement being one *inter partes*, it would not be binding upon either, unless executed by both with a mutual understanding, that upon placing their signatures thereto, that it should be con-

sidered a complete agreement binding and operative on both as parties. The law implies, the contrary not appearing, that the parties thereto both signed the agreement at the same time and in the face of each other. Without personal negotiations, mutual in their character, no agreement could have been made and concluded between the parties. The written instrument is the record and the only legitimate proof of the oral contract. It seems plain, beyond all rational argument, that the execution and delivery of the instrument was a mutual transaction between the parties. The defendant's answer put in issue the execution and delivery of the agreement and it was essential for the plaintiff to prove, in order to sustain a recovery, that he did, on his part, execute the contract at a time and under such circumstances so as to give it the character of mutuality. It may be true that the agreement bears the genuine signature of the plaintiff as well as that of the defendant, but it might also be true, as a matter of fact, that the plaintiff's signature was written by him long after the deceased subscribed the same, or even after his death. Proving the plaintiff's signature, as the execution of the agreement on his part, was not evidence proving an extrinsic and isolated and independent fact, separate and distinct from the transaction which gave validity to the agreement. The court *distinguishes* the case of Simmons v. Havens, 101 N. Y. 427, 5 N. E. 73, where the grantee in a deed was permitted to prove the genuineness of his deceased grantor's signature on the ground that it did not appear that the grantee received the deed from the hands of the grantor, and her evidence did not therefore necessarily involve a personal transaction with the latter, since the deed if delivered through some third party would be effective even though there had never been any previous negotiations between the parties."

93. Holliday v. McKinne, 22 Fla. 153.

reason for the rule is that such testimony is based upon the familiarity of the witness with the decedent's handwriting or signature.⁹⁴ Consequently where the testimony is manifestly based upon the actual knowledge of the witness acquired during and as the result of a transaction with decedent, he is not competent.⁹⁵

(b.) *Of Witness.* — A party is competent to prove the genuineness⁹⁶ of his own signature or handwriting in a contract with decedent, or to deny the same,⁹⁷ since such testimony does not necessarily involve any transaction with deceased. Such testimony

94. Testimony as to the actual signing by the decedent involves a transaction with him, but proving his handwriting does not. "The distinction is that handwriting is proved by general knowledge of it, and the proof is abstract and as applicable to one case as another. But proof (by the witness) that he saw the deceased sign the particular paper is proof of a transaction between him and the deceased." *Ballard v. Ballard*, 75 N. C. 190, following *State ex rel. Peoples v. Maxwell*, 64 N. C. 313.

95. Where the witness has attempted to testify that he saw deceased write the signature in question, his opinion as to its genuineness is not competent, because it would be manifestly based on his actual knowledge, to which he is incompetent to testify. *Boyd v. Boyd*, 164 N. Y. 234, 58 N. E. 118.

96. In an action against an administrator to recover overpayments on a note executed by the plaintiff to the decedent, plaintiff's testimony in proof of the genuineness of the signature to the note was held improperly excluded, since it would not have disclosed any personal transaction with the decedent. *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435.

97. **Denial of Signature on Note.** In an action on a note in which the decedent was the payee and defendant the maker, the latter was held a competent witness to prove that his signature appearing on the note was not genuine. The court after stating the reason for the disqualification to be the unfairness of permitting one party to testify when the mouth of the other was closed by death, says: "Now applying that reason to the present case we see that for a person to testify in regard

to a name at the bottom of a note, 'that is not my signature,' has no element of unfairness. The genuineness of a signature is a matter which may be shown by evidence not in the least connected with any personal transaction between the alleged maker and the payee. It is not a transaction personal between maker and payee. When there is an attempt to prove a verbal contract or a conversation between a witness and a deceased party, the only possible evidence may be that of the two persons. But the genuineness of a signature is shown by comparison and by the testimony of those familiar with handwriting. Indeed to a great extent the testimony of the person whose the signature is claimed to be, is based only on familiarity with his own signature, and is, therefore, of the same character with that of other witnesses to handwriting. . . . The plaintiff urges that as he had proved *prima facie* the signature, the law presumed from that fact the delivery, and that the delivery must have been a personal transaction, and hence the defendant cannot himself testify that the signature is not his because that testimony inferentially denies the delivery, which must be a personal transaction. It is not quite accurate to say that the genuineness of the signature is the presumptive evidence of delivery. Rather it is the plaintiff's possession, which is presumptive evidence of delivery. Proof of the genuineness of the signature of a note which is in the maker's possession, affords not the least presumption that the note has been delivered. The possession by the maker affords a presumption to the contrary. On the other hand, the possession by the payee, or one

has, however, been held incompetent when offered for the purpose of showing the execution of the instrument by the witness.⁹⁸

(c.) *Actual Signing.* — (AA.) *GENERALLY.* — Testimony that the deceased or incompetent person actually signed the instrument in question is, however, incompetent where such instrument embodies or evidences a transaction or communication between the witness and the decedent.⁹⁹

(BB.) *By Subscribing Witness.* — Testimony by a party to a contract with the decedent that he saw a subscribing witness place his signature thereon has been held incompetent.¹

(3.) *Identifying Parties to Writing.* — It has been held that where a writing has been introduced purporting to evidence a transaction between the witness and decedent, he cannot identify himself as the party therein named,² though he would be competent to prove

claiming under him, does afford a presumption of delivery. Therefore the argument fails that for the alleged maker to testify that the signature is not his, is to give evidence touching the fact of delivery, and hence of a personal transaction with the payee. The personal transaction, if any, must have been the delivery of the note (by whomever signed) to the deceased by or for the defendant. On this point the defendant was not questioned." *Saratoga County Bank v. Leach*, 37 Hun (N. Y.) 336.

98. In *Garvey v. Owens*, 37 Hun (N. Y.) 498, the plaintiff was held incompetent to prove his own signature to a contract with the decedent for the purpose of showing its execution.

99. *Hobart v. Verrault*, 74 App. Div. 444, 77 N. Y. Supp. 483; *State ex rel. Peoples v. Maxwell*, 64 N. C. 313; *Ballard v. Ballard*, 75 N. C. 190; *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779; *Sawyer v. Grandy*, 113 N. C. 42, 18 S. E. 79; *Bryant v. Stainbrook*, 40 Kan. 356, 19 Pac. 917; *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313.

Where recovery was sought against an insane person on notes payable to plaintiff's order, plaintiff's testimony that he saw defendant sign the notes was held properly excluded. *Watters v. McGreavy*, 111 Iowa 538, 82 N. W. 949.

Where the original payee of a note brings an action thereon against the administrator of the maker, he is in-

competent to testify that he saw the maker sign it, where the execution of the same was a part of a trade between the maker and himself; but when the execution of the note is established fully by other and competent evidence, the error in permitting the plaintiff to testify is not reversible. *Bryant v. Stainbrook*, 40 Kan. 356, 19 Pac. 917.

1. In an action against the administrator of a deceased person to recover the amount due on an alleged note of the deceased, the payee was held to be incompetent to testify that he saw one who purports to have signed said note as a witness affix his mark thereto, as that would be to testify that, at the request of the deceased maker and himself, the said person was witness to the transaction, thereby proving the transaction. *Bright v. Marcom*, 121 N. C. 86, 28 S. E. 60. See *Cunningham v. Speagle*, 106 Ky. 278, 50 S. W. 244.

Where the decedent's assignment to the witness was signed by making his mark, which was witnessed, the assignee was held incompetent to testify that he saw the subscribing witness sign his name to the paper. This testimony being necessary to render effectual the transaction between the witness and the decedent is indirect but conclusive testimony as to a transaction between the witness and the deceased. *Ballard v. Ballard*, 75 N. C. 190.

2. "It was not only necessary to prove that a marriage ceremony had

his signature thereto under the rule hereinbefore discussed.³

(4.) **Execution of Deed or Contract.** — The execution of a deed or contract to which the witness and decedent are parties is a transaction between them.⁴

(5.) **Condition and Contents of Writing.** — (A.) **PRIOR TO DELIVERY TO DECEDENT.** — Testimony by a surviving party to a written contract with the decedent as to the condition of the writing prior to its delivery to the decedent does not necessarily involve a transaction with the latter.⁵

been performed, but, further, that the plaintiff was the identical woman who did marry Bowman. Consequently her personal identity, as an integral and essential constituent of the 'transaction had with' Bowman, cannot be segregated from that 'transaction,' and cannot be treated as an independent circumstance. Hence whatever disability she was under to prove by her own testimony the fact of marriage equally included the proof in the same way of her identity as a party to that marriage. It is conceded that the plaintiff could not go on the witness stand and say: 'I am the Catharine McGranigan who married George W. Bowman.' If this be so, upon what principle can she be allowed to testify to facts A, B, C and D, which, if they prove anything, prove the very identity that she could not establish by her direct testimony? Her identity except as indicating that she was a party to the alleged marriage, was wholly irrelevant. If she were permitted to testify to collateral facts from which that identity could be inferred, she would indirectly testify to the 'transaction had with' the deceased, though expressly inhibited from testifying directly to that fact. The difference between proving by direct testimony a transaction with a man since deceased, and proving the same transaction by proving facts from which the transaction may be inferred, is a difference in the kind of evidence adduced, and not a difference in the thing to be proved. In the one case the evidence is direct; in the other it is circumstantial; but in both the fact to be proved is precisely the same transaction. The statute declares that 'no party to a cause shall be allowed to

testify as to any transaction had with' a person since deceased; but it does not say the restriction shall extend no farther than to the exclusion of direct testimony. Proving a transaction by witnesses is testifying as to a transaction, whether that testimony be direct or circumstantial." *Bowman v. Little*, 101 Md. 273, 61 Atl. 223. But see dissenting opinion, 61 Atl. 657, 1084.

3. See *supra*, VI, 2, L, u, (2.), (B.).

4. See *supra*, VI, L, u, (2.), (B.), and *Cunningham v. Speagle*, 106 Ky. 278, 50 S. W. 244; *Chaffee v. Goddard*, 42 Hun (N. Y.) 147; *Hillens v. Brinsfield*, 108 Ala. 605, 18 So. 604; *Parks v. Caudle*, 58 Tex. 216. But see *Royston v. McCulley* (Tenn. Ch. App.), 59 S. W. 725.

One named as grantee in an instrument purporting to be a deed executed by a deceased person is not, on a trial in the result of which he is interested, competent to testify in his own favor to any facts tending either directly or indirectly to show the execution of the paper. *Chambers v. Wesley*, 113 Ga. 343, 38 S. E. 848.

In an action on a note by a surviving partner, the defendant is not competent to deny having executed the note during a transaction with the deceased partner alone, where there is other evidence tending to show that such a transaction between the witness and decedent culminated in the execution of the note. *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266.

5. In an action by an administrator on a bond payable to the intestate and purporting to be signed by both defendants, one defendant was held competent on behalf of himself and his co-defendant to prove that when

(B.) AT TIME OF AND SUBSEQUENT TO EXECUTION AND DELIVERY. — (a.) *Generally.* — Testimony, however, by the survivor as to condition and contents of the writing at the time it was executed is held to involve the general transaction between the parties and is therefore incompetent.⁶

the bond was signed by them the amount payable was left blank and that the words and figures showing this amount were subsequently inserted by the witness without authority from his co-defendant. This testimony was held to be competent because it did not relate to a transaction or a communication with the decedent, but was a matter which took place in his absence. *Isenhour v. Isenhour*, 64 N. C. 640. See also *Brower v. Hughes*, 64 N. C. 642.

In an action by executors upon a note, alleged to have been executed and delivered by defendants to plaintiff's testator, and in which he is named as payee, but which defendants allege to have been altered after execution, one of the defendants, as a witness for the defense, might properly be asked when and with what ink he signed the note; whether he struck out words in the printed form which appeared to have been stricken out, such questions not calling for any transaction or communication had by defendants with such testator personally. *Page v. Danaher*, 43 Wis. 221.

Where bonds endorsed in blank had been deposited for safe keeping, and the bailee, since deceased, had filled in his own name and transferred them, the bailor was held a competent witness against the transferee to prove that when he deposited the bonds the name of the deceased bailee was not on the bonds anywhere. The court said: "That the name was not in the bonds when Hill left them in the safe amounted only to a description of the bonds and indorsement as thus left. Neither in its essential nature nor by reason of the proofs did it involve a personal transaction between the two, either by way of affirmation or denial. Both Hill's knowledge and Fellows' act were, in their essential character, separate and independent of each other. . . .

The assignee defending was allowed to show the condition of the bonds at one time with the name of Fellows in. Was it, then, improper for Hill to show their condition at another time with the name of Fellows out? Did not the dead man have enough of advantage when he was allowed to reach out from his grave and put into the middle of this trial his declaration in writing that he owned these bonds? The spirit and purpose of this provision of the code is equality, to prevent undue advantage; and that purpose should be kept in view when border questions arise and lines of distinction are to be drawn. We think the courts below applied the rule fairly, and committed no error in overruling the objections." *Wadsworth v. Heermans*, 85 N. Y. 639, *affirming* 22 Hun 455, *sub nom.* *Hill v. Heermans*, 17 Hun 470.

In an action against the maker and payees of a note by the executors of an indorser, who had paid the same and claimed to recover the amount paid on the ground that their testator's indorsement was merely for the accommodation of the payees, the defendants were competent to testify that such indorsement was on the note when it was delivered to the payees, such testimony not being in respect to any transaction or communication by them personally with the deceased, within the meaning of § 4069, Rev. Stat. *Sawyer v. Choate*, 92 Wis. 533, 66 N. W. 689.

6. *Gist v. Gans*, 30 Ark. 285.

In an action against the estate of a deceased endorser of a promissory note, it appeared that the words "demand, notice and protest waived" were between the names of the endorsee and endorser, apparently forming part of the endorsement. The endorser's signature was witnessed by a third party. It was contended by defendant that such words were inserted after the endorsement. It was held that the endorsee was not

(b.) *Alterations and Additions.* — A surviving party to the writing is not competent against the decedent's representative as to whether alterations or additions to the instrument have been made subsequent to the delivery to the decedent.⁷ An alleged alteration in a note by decedent after delivery is, if a fact, a transaction between him and the surviving maker.⁸

(6.) *Endorsement or Entry of Payment.* — An endorsement or entry by the witness of a payment made by the decedent⁹ does not on its face show the presence or participation of the decedent in this act, and does not therefore constitute a transaction with him without some further showing by the objecting party. It has, however, been

competent for the plaintiff to testify that such words were on the note before the name of the witness to decedent's endorsement was written thereon; the whole occurrence being a single transaction. *Benton County Sav. Bank v. Strand*, 106 Iowa 606, 76 N. W. 1007.

Contra. — In *Harnett v. Holdrege* (Neb.), 97 N. W. 443, it was held that where suit has been brought against an indorser on a promissory note by the representative of a deceased person, the indorser is a competent witness on his own behalf to testify in reference to the condition of the note at the time it was endorsed by the witness, as such testimony does not involve a personal transaction between the witness and the deceased.

7. In an action to recover for services alleged to have been rendered deceased and which services were alleged to have been paid for in full, and receipt showing such fact having been produced by defendant on the trial, plaintiff, as a witness in her own behalf, testified that "In full of all demands" etc., had been added to the receipt after she signed it. *Held*, that such evidence was inadmissible as relating to a personal transaction between the witness and deceased. *Boughton v. Bogardus*, 35 Hun (N. Y.) 198.

Contents of Check When Received and Endorsed. — Where the decedent's check reciting the purpose for which given and containing the endorsement of the adverse party has been offered in evidence as a receipt or admission by the latter, his testimony as to whether the check when offered in evidence contained words

which were not on it when delivered to and endorsed by him involves a transaction with the decedent and is therefore incompetent. The transaction embraced not only the execution and delivery of the check, but also the endorsement of it by the witness, and it therefore is an instrument to which both decedent and the witness were parties. The presumption being that the check when offered in evidence was in the same condition as when received and endorsed by the witness, to permit him to testify as to its condition when received by him and endorsed will be admitting evidence not of an independent fact, but "as to what the transaction between the parties in fact was." *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659 (but see dissent); *distinguishing* *Wadsworth v. Heermans*, 85 N. Y. 639; *Carlton v. Western & A. R. Co.*, 81 Ga. 531, 7 S. E. 623.

Contents of Draft When Accepted. The acceptance by the witness of a draft drawn on him by the decedent is a transaction with the latter where it is done after negotiations between the parties, and the witness cannot, therefore, testify that certain words were not upon the draft at the time he endorsed his acceptance thereon. *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 So. 140.

8. *Mitchell v. Woodward*, 2 Marv. (Del.) 311, 43 Atl. 165; *Jewell v. Walker*, 109 Ga. 241, 34 S. E. 337.

9. *Lockhart v. Bell*, 90 N. C. 499, (*approving s. c.* 86 N. C. 443, and *distinguishing* *Woodhouse v. Simmons*, 73 N. C. 30; *Sumner v. Candler*, 86 N. C. 71). "The bonds belonged to and were in possession of the defendant, and he entered the

held to the contrary;¹⁰ and it has likewise been held that an obligor cannot testify to having seen credits endorsed on the writing while it was in the deceased obligee's possession.

(7.) *Lost Instruments.* — Testimony as to the loss of a writing as a preliminary to proof of its contents is not testimony as to a transaction with the decedent, although the writing embodies or evidences such a transaction, where there is other competent proof of its contents.¹¹ Testimony as to the contents of such a writing is, however, incompetent,¹² although the contrary has been held;¹³ nor can the witness identify the alleged lost instrument as one which he had given to or received from decedent.¹⁴

(8.) *Letters, Telegrams, Etc.* — (A.) *GENERALLY.* — A letter or telegram passing between the witness and decedent is a communication

credits on them. It does not appear from them, or any words in them, that the intestate was present at the time they were made, nor that she, in person, paid the money or knew anything about the credits. There was no obligation resting on her to be present, nor did the nature of the transaction require that she should be. . . . The mere entry of a credit on the bond of a lady who did the most of her business through an agent, without any recital as to who paid the money or how it was paid in that respect, is too slight a fact, whether reference be had to its terms or its nature and effect, to raise the *presumption* of fact, that she was present at the entry of such credit, and had knowledge of a 'transaction or communication' about the same between herself and the party making the entry. To raise such a presumption in the absence of other evidence, at least, the nature of the transaction must be such as to *require* the presence of the deceased person about the 'transaction or communication' in question."

10. The payee on a promissory note is incompetent to testify in his own behalf to explain endorsements on the back of a note, when the maker of such note is dead at the time the testimony is offered to be given, though the maker was absent at the time such endorsements were made. *Vannatta v. Willett's Admr.*, 103 Ky. 354, 45 S. W. 85.

In an action on a note by the administrator of the payee, the defendant maker was held incompetent to

testify that when he last saw the note in the possession of the payee, since deceased, there were certain credits endorsed on the same. *Cornelius' Admr. v. Miles*, 21 Ky. L. Rep. 947, 53 S. W. 517.

11. *Montague v. Thomason*, 91 Tenn. 168, 18 S. W. 264 (loss of a letter received from decedent); *Choate v. Huff*, 4 Will. Tex. Civ. Cas. § 280.

In an action against the estate of a deceased debtor, on a lost promissory note, after evidence of others had been given of the existence of such note and the plaintiff's possession thereof, the court properly permitted the plaintiff to testify that she had lost such instrument out of her own possession. *Milam v. Milam*, 60 Ind. 58.

In an action by a surviving partner on account for goods sold and delivered by the partnership, where the execution and contents of a receipt given to him by a deceased partner is otherwise proved, the defendant may testify to the loss of the receipt. *Parker v. Edwards*, 85 Ala. 246, 4 So. 612.

12. *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735; *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771; *Hussey v. Kirkman*, 95 N. C. 63.

13. *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73. See *Kendall v. Hillsboro & P. P. Tpk. Road*, 23 Ky. L. Rep. 2372, 67 S. W. 376.

14. *Caldwell v. Prindle*, 11 W. Va. 307. But see *Choate v. Huff*, 4 Will. Civ. Cas. § 280.

or transaction between them,¹⁵ although it is not deemed to be a conversation within the meaning of the Minnesota statute.¹⁶ The letter itself, however, is admissible when properly identified, because it does not constitute testimony by the incompetent witness.¹⁷

(B.) RECEIPT AND CONTENTS OF LETTER. — Testimony as to the receipt and contents of a letter from decedent to the witness involves a transaction or communication between them and is therefore incompetent.¹⁸ But the witness may testify as to his possession¹⁹ or receipt²⁰ of a letter purporting to be from decedent, and, it has been

15. *McCorkendale v. McCorkendale*, 111 Iowa 314, 82 N. W. 754; *Montague v. Thomason*, 91 Tenn. 168, 108 S. W. 264; *Holliday v. McKinne*, 22 Fla. 153; *Sabre v. Smith*, 62 N. H. 663.

The contents of letters, telegrams and cablegrams, not identified except by a party interested in the event of the suit, and which passed between the deceased and the parties to the suit in a business transaction, are incompetent evidence against the deceased's personal representative, under § 329 of the Code of Civil Procedure relating to transactions and conversations with a deceased person. *Harte v. Reichenberg* (Neb.), 92 N. W. 987, citing *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282.

In an action by an executor to cancel the testator's deed as a cloud upon the title on the ground that the conveyance of the land was never consummated, because there was no delivery of the deed, and the pretended grantee never accepted the conveyance or acquired possession of the land, the grantee is incompetent, under art. 2302, Rev. Stats., to testify that in reply to a letter from the grantor, he stated he would accept the latter's offer to deed the property to him. *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886.

Identification of Letters From Decedent. — The witness is not competent to identify letters received by him from the decedent. *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282.

Proof of Copies. — The witness is not competent to prove copies of letters sent by him to the decedent. *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282.

16. *Hall v. Northwestern Endow. & L. Assn.*, 47 Minn. 85, 49 N. W. 524; and see *supra*, VI, 2, H.

17. *Howe v. Richard*, 112 Iowa 220, 83 N. W. 909. This was a will contest grounded on lack of testamentary capacity. Contestants contended that the testator's lack of affection for them was evidence of unsoundness of mind, and on this issue offered letters written by them to testator showing their love and affection for him. An objection to the letters as personal communications with the deceased was held properly overruled. "If, instead of writing these letters, the contestant, Ruth W. Howe, had made the same statements to the deceased in the presence of a third person, and deceased had made reply, or had remained silent, it would surely be competent for contestants to show by that third person that the statements were made to deceased, and his reply thereto, or that he made no reply. These letters are the third person. It is not Ruth W. Howe who is testifying, but the letters, and they are admissible, because they were received by the deceased."

18. *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771.

In an action against the administrators of decedent, plaintiff cannot testify to the contents of letters written by decedent to her and destroyed, to show that he admitted his indebtedness to her and agreed to pay her, where she claims she never received nor was paid the money for which action was brought. *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735.

19. *Montague v. Thomason*, 91 Tenn. 168, 108 S. W. 264. Compare *Wing v. Bliss*, 55 Hun 603, 8 N. Y. Supp. 500.

20. *Daniels v. Foster*, 26 Wis. 686.

Receipt of Letter Through the Mail. — Thus in an action against an executor by an illegitimate child of

held, may testify as to its contents,²¹ though this is contrary to the general rule.

(9.) **Testimony in Support of Account Books.** — The testimony of a party as to the preliminary facts rendering admissible his books of account containing an account with decedent does not involve a communication or transaction with the latter, and is therefore not incompetent under the statute.²²

(10.) **Bills and Notes.** — An original party to a note cannot testify as to the execution,²³ delivery²⁴ or consideration²⁵ of a note against the representative of a deceased original party thereto.

The maker cannot testify as to character of his signing, whether as principal or surety,²⁶ nor as to how or why²⁷ or for whose debt²¹ the note was executed.

Where the maker of a note is dead, the payee or holder is not a competent witness in his own behalf as to any transaction with the

decedent claiming to inherit because he had been recognized in writing by the decedent as the latter's child, plaintiff offered in evidence a letter to her from her father containing a recognition of her sufficient under the statute. Her testimony identifying the signature of the decedent and to the fact that she had received a letter through the mail, was held to involve no transaction or communication with the deceased. *Britt v. Hall*, 116 Iowa 564, 90 N. W. 340, *distinguishing* *McCorkendale v. McCorkendale*, 111 Iowa 314, 82 N. W. 754, which was an action involving the same issue of recognition in writing and to which the mother of the illegitimate was a party. The letter was offered by the plaintiff tending to show recognition of her by the decedent, but was insufficient evidence of such recognition without further explanation. The admission of the testimony of the mother that she received the letter through the mail, and as to her illicit relations with the decedent, who, however, was shown by other evidence to be the plaintiff's father, was held error. The ground of distinction made by the court is that in the latter case the letter did not show on its face a sufficient recognition as it did in the former case.

Contra. — Where a letter from the decedent has been sent through the postoffice to the witness, the latter's receipt of the same is a transaction within the meaning of the statute.

Kroh v. Heins, 48 Neb. 691, 67 N. W. 771, *citing* among other authorities, *Howard v. Zimpelman* (Tex.), 14 S. W. 59; *Nunnally v. Becker*, 52 Ark. 550, 13 S. W. 79, and *disapproving* *Daniels v. Foster*, 26 Wis. 686, which is to the contrary.

21. *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73.

22. *Dysart v. Furrow*, 90 Iowa 59, 57 N. W. 644, *holding* the exclusion of such testimony by the claimant in support of his books to be error. The court says: "For him to testify that his book . . . was his book of original entries, that the charges were made at or near the time of the transactions therein entered, and that he believed them to be just and true, would not be stating anything that the deceased, if living, could deny from personal knowledge. The deceased might, if living, deny that he received any one or all of the items charged, but this would be denying that which the book tends to show, and not any of the three preliminary facts which defendant was prevented from showing."

23. See *supra*, VI, 2, L, u, (4.).

24. See *supra*, VI, 2, L, g.

25. See *supra*, VI, 2, L, f, (2.).

26. *Neitch v. Hillman*, 29 Tex. Civ. App. 544, 69 S. W. 494.

27. *Chapman v. Chapman*, 132 Iowa 5, 109 N. W. 300.

28. *Englehart v. Richter*, 136 Ala. 562, 33 So. 939.

decedent.²⁹ Thus he is incompetent to prove the execution of the note.³⁰

(11.) **Wills.** — (A.) **EXECUTION AND ATTESTATION.** — Testimony as to the execution of a will does not violate the statute,³¹ although the witness was an attesting witness, since the mere act of attestation does not involve any transaction or communication with the decedent.³² Where, however, the witness takes an active part in the transaction of having the will drawn and executed, he is a party and incompetent.³³

(B.) **CONTENTS OF WILL.** — Testimony as to the contents of a will does not of itself show a transaction with the testator³⁴ though it may be incompetent where it appears to be based upon such a transaction.³⁵

M. **TRANSACTIONS KNOWN TO OR PARTICIPATED IN BY OTHERS.**
a. *Generally.* — The mere fact that the transaction or communication may be known to other persons besides the witness and decedent, whose testimony is competent and available, does not remove the

29. *Leslie v. Leslie*, 20 Ky. L. Rep. 35, 45 S. W. 99.

30. *Cunningham's Admr. v. Speagle*, 106 Ky. 278, 50 S. W. 244.

31. *Kump v. Coons*, 63 Ala. 448; *Snider v. Burks*, 84 Ala. 53, 4 So. 225; *Hays v. Ernest*, 32 Fla. 18, 13 So. 451. See *In re Townsend's Estate*, 122 Iowa 246, 97 N. W. 1108. But see *In re Eysaman's Will*, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599.

In an action for the probate of a will, a devisee under such will who was present at the time of the making the same is competent under § 829 to corroborate the testimony of an attesting witness thereof in reference to the due execution of the same. *In re Bernsee's Will*, 63 Hun 628, 17 N. Y. Supp. 669.

The execution of a will by the testator is not a transaction with the devisees and legatees, and the latter are therefore competent to prove the handwriting of the decedent. *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255.

32. *Reeve v. Crosby*, 3 Redf. Sur. (N. Y.) 74 (*holding* that although the testator "publishes" the will and requests the witness to sign, this does not constitute a communication or transaction under the statute).

Bates v. Officer, 70 Iowa 343, 30 N. W. 608, where the court says: "It is not necessary, under the law of this state, that a testator should

proclaim or state to the subscribing witnesses that the instrument is his will; and it is wholly unnecessary that there should be any personal transaction between the testator and the subscribing witnesses. *In re Hulse*, 52 Iowa 662. The mere act of subscribing the will as a witness did not, therefore, disqualify Bates as a witness in this proceeding."

The act of attesting the execution of a will is probably not a transaction with the deceased within the meaning of the statute. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687.

33. The testimony of an interested witness, who aided the testator in procuring the will to be drawn and took part in its execution, that the will was read and explained to the testator before he signed it, involves a personal transaction or communication between him and the testator and is therefore incompetent. *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345. See also *In re Smith*, 95 N. Y. 516.

34. *In re Townsend's Estate*, 122 Iowa 246, 97 N. W. 1108.

35. Testimony as to the execution and contents of a lost will is incompetent where it appears that the witness was the draftsman of the will and was instrumental in having it executed, the knowledge of the witness as to the contents of the will being derived from his relation to the

disability,³⁰ though in some states such a rule seems to be laid down by the courts,³⁷ or is provided by statute.³⁸

b. *Presence or Participation of Third Person.* — (1.) *Generally.* The presence or participation of a third person in the transaction or communication does not remove the disqualification of the witness.³⁹ But in such case the witness is incompetent not only as to what passes between himself and the decedent, but also as to statements by the latter to other persons present and participating.⁴⁰ It has been held, however, that where other persons jointly interested with the decedent participated in the transaction or conversation and are alive and able to testify thereto, the statute does not apply.⁴¹

transaction and the testatrix. *In re Smith*, 95 N. Y. 516.

36. See *infra*, X, 8, A, c. For the rule in states where the disability is not confined to transactions or communications with the decedent, see *infra*, VI, 7.

37. In an action by a printer to charge the administrator of a deceased attorney for printing briefs in certain cases where the administrator claimed that the printing had been done for the decedent's clients in those cases, the testimony of the plaintiff that he had not done any of the work for such parties was held admissible because the latter were living and competent to contradict the witness; the purpose of the statute being to protect the estate of the decedent from testimony as to matters known only to the witness and the decedent. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291.

Attendance at Court as Witness for Decedent. — One claiming witness fees for attendance at court as a witness for the decedent during the latter's lifetime may testify to the number of days that he attended court as a witness, where it appears that the witness tickets issued to him and filed with the clerk had been burned. The purpose of the statute as construed by the courts is to exclude the witness merely as to those matters as to which the deceased alone could contradict him. The court says that the fact testified to "does not seem to be a transaction or communication between plaintiff and defendant's intestate; but it is certainly not such a transaction or communication as the intestate alone

had knowledge of and could have contradicted." *Johnson v. Rich*, 118 N. C. 268, 23 S. E. 1007, citing *Gray v. Cooper*, 65 N. C. 183; *March v. Verble*, 79 N. C. 19; *Cowan v. Layburn*, 116 N. C. 526, 21 S. E. 175, and distinguishing *Kirk v. Barnhart*, 74 N. C. 653. But see *In re Peterson*, 136 N. C. 13, 48 S. E. 561.

38. See *Bigelow v. Ames*, 18 Minn. 527, and *infra*, VI, 7, B.

39. *Donnell v. Braden*, 70 Iowa 551, 30 N. W. 777; *Brague v. Lord*, 67 N. Y. 495; *Heyne v. Doerfler*, 124 N. Y. 505, 26 N. E. 1044; *Healy v. Malcolm*, 66 App. Div. 501, 73 N. Y. Supp. 259; *Jaquith v. Davidson*, 21 Kan. 341. See *infra*, VI, 2, O, e.

"Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and deceased. If they participated, it does not change its character because others were present. A contrary rule would defeat the reasonable intent of the statute that a surviving party should be excluded as one interested from maintaining by his testimony an issue which in any degree involved a communication or transaction between himself and a deceased person." *Holcomb v. Holcomb*, 95 N. Y. 316.

40. Thus where in the course of a business transaction between the witness and the decedent the latter made certain statements relating to the matter to another person who was engaged in drawing the papers involved, the witness was held incompetent as to such statements. *Kraushaar v. Meyer*, 72 N. Y. 602.

41. See *Bennett v. Frary*, 55 Tex.

But this latter rule does not apply where such survivor though in law a party to the transaction did not actually participate therein,⁴² nor where all the other joint participants in the transaction are

145; *Brown v. Cave*, 23 S. C. 251; *Thompson v. Humphrey*, 83 N. C. 416.

Peacock v. Stott, 90 N. C. 518, holding a party competent to testify as to a conversation had with the decedent and another person in reference to a contract made in such conversation between the witness and such other persons. The court says that the conversation was not strictly one with the deceased but with him and another, and further the case does not come within the mischief which the statute was designed to provide against, namely, allowing one party to a transaction to testify thereto when there is no living witness to contradict him.

The statute does not incapacitate a party or interested person from testifying concerning a transaction between such witness, on the one side, and the decedent and others on the other, when the associates of such decedent in the transaction are living and are co-plaintiffs with the decedent's personal representative. *Johnson v. Townsend*, 117 N. C. 338, 23 S. E. 271 (citing *Comstock v. Hier*, 73 N. Y. 269, 280).

In *Blake v. Blake*, 120 N. C. 177, 26 S. E. 816, the court points out the principle on which the decision in these cases rests, namely, that where the conversation or transaction is between several persons associated in interest, that the death of one of them does not prevent the testimony of the others as to the transaction when the surviving parties thereto are living and parties to the action.

In an action against the surviving partner, upon a contract made with the firm, the court held that the plaintiff was a competent witness to testify in reference to a personal transaction with the deceased member of the firm, if the defendant was present at the time the transaction occurred. *Kale v. Elliott*, 18 Hun (N. Y.) 198.

⁴². *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 So. 140. The

transaction in this case was the written acceptance by the witness of a draft drawn on him in the name and for the benefit of the partnership. Only one of the partners, who had since died, actually participated in the transaction. It was held that while the surviving partner was in law a party to the transaction, he could not be deemed to be a participant therein for the purpose of determining the competency of the witness to testify that certain words were not upon the draft when he endorsed thereon his acceptance. The court says: "Does or should the mere fact that at the time of this transaction there was another person jointly interested with C. F. Robinson, and jointly bound by his acts, exempt Harris from the exclusion which the statute places upon him in a case where no third person would be so interested in or bound by the dealings of Robinson?" And after stating the purpose of the statute to be to place the parties on an equality and prevent perjury, it further says: "In no way does the fact that a third person, having no actual participation in the transaction, has a joint interest with the deceased person supply the same or like guarantees of the attainment of the truth, or of the protection of those claiming under the deceased, that the exceptions to the excluding terms of the proviso gives. Such joint interest has not been made an exception to the proviso, though others were made. It would be hard to conceive a sound reason why the survivor should testify in his own behalf as to a transaction conducted by him and the deceased alone, simply because a third person was interested with the deceased party, and yet be excluded from testifying as to another transaction conducted in the same manner, but in which he and the deceased alone were interested. The fact of such joint interest has, to our minds, in itself, no effect upon the question whatever."

dead, in which event the witness is incompetent as to what took place between decedent and such other persons.⁴³

(2.) **Presence of Adverse Party.** — (A.) **GENERALLY.** — Where the witness is disqualified as to transactions or communications with the deceased, the fact that they occurred in the presence of the adverse party, who is competent to testify thereto, does not remove the incompetency,⁴⁴ though it has been held to the contrary.⁴⁵

(B.) **PRESENCE OF REPRESENTATIVE.** — An interested person or party is not competent to testify to conversations with a decedent merely because the latter's representative was present at the conversation.⁴⁶

(3.) **Presence of Decedent's Agent.** — The presence of the decedent's agent at the transaction or conversation does not render the witness competent.⁴⁷

Transaction Completed by Representative. — The fact that a transaction began by the decedent has been completed by his personal representative does not entitle the other party thereto to testify as to what occurred between himself and decedent.⁴⁸

N. **TRANSACTIONS BETWEEN OTHER PERSONS AND THE DECEDENT.** — a. *Generally.* — Where the statute disqualifies the witness as to transactions and communications between himself and the decedent, he is not incompetent as to communications or transactions between the deceased and another person.⁴⁹ It has, however, been

43. *Halyburton v. Dodson*, 65 N. C. 88.

44. *Hatch v. Peugnet*, 64 Barb. (N. Y.) 189.

45. *Burton v. Hill's Exrs.*, 23 Ky. L. Rep. 1080, 64 S. W. 736, *holding*, however that where there are several adverse parties whose claims are indivisible, all of them must have been present to remove the disability of the witness.

46. *In re Peterson*, 136 N. C. 13, 48 S. E. 561. This was a will contest in which the representative of the testator's deceased wife was one of the proponents of the will. The testimony of one of the contestants as to a conversation between the testator and his wife, since deceased, was held incompetent although the conversation occurred in the presence of the representative of the deceased wife's estate, who, however, was at the time only fourteen or sixteen years of age, took no part in the conversation, and was at that time but remotely related to the testator. The court *distinguishes* *Peacock v. Stott*, 90 N. C. 518; *Johnson*

v. Townsend, 117 N. C. 338, 23 S. E. 271, in which the conversation was between the decedent and several other persons still alive and parties to the action, saying: "Clark, J., in *Blake v. Blake*, 120 N. C. 177, 26 S. E. 816, points out clearly the principle upon which these cases are based: 'In those cases the personal transaction was had with two or more persons associated in interest, and it was held that the death of one of them does not prevent such transactions being given in evidence when the associates of the decedent are living and parties to the action.'"

47. *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729. But see *Bennett v. Frary*, 55 Tex. 145.

48. *Rogers v. Chambers*, 112 Ga. 258, 37 S. E. 429.

49. *Alabama.* — *Smith v. Bryant*, 60 Ala. 235.

Georgia. — *Elliott v. Banks*, 115 Ga. 926, 42 S. E. 218; *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52.

Indiana. — *Denbo v. Wright*, 53 Ind. 226.

Iowa. — *Swezey v. Collins*, 40

held to the contrary.⁵⁰ So it has been held, under a statute disqualifying both parties as to statements by or transactions with the decedent that, the disability extends to statements to, and transactions with, not only the witness, but also third persons.⁵¹ So also where the statute disqualifies the witness as to acts done or omitted

Iowa 540; *Jacobs v. Jacobs*, 104 N. W. 489; *Parson v. Parson*, 66 Iowa 754, 21 N. W. 570; *McElroy v. Al-free*, 131 Iowa 112, 108 N. W. 116; *Smith v. James*, 72 Iowa 515, 34 N. W. 309.

Nebraska.—*Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771.

South Carolina.—*Kenmore v. Kenmore*, 26 S. C. 251, 1 S. E. 881; *Shaw v. Cunningham*, 16 S. C. 631; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701 (conversations between decedent and witness' wife); *McLaurin v. Wilson*, 16 S. C. 402 (same); *Moore v. Trimmer*, 32 S. C. 511, 11 S. E. 548, 552; *Hughey v. Eichelberger*, 11 S. C. 36 (*following Roe v. Harrison*, 9 S. C. 279).

A witness is competent as to transactions or communications between the decedent and another, where his knowledge thereof is gained otherwise than by a personal communication or transaction between himself and the decedent. *Gable v. Hainer*, 83 Iowa 457, 49 N. W. 1024, *holding* the witness competent as to written communications between decedent and another, his knowledge of which had been gained otherwise than by a transaction or communication between himself and the decedent.

The plaintiff, who sues a husband on a note made by his dead wife, may testify to a statement which she heard the wife make to the husband. *Leipird v. Stotler*, 97 Iowa 169, 66 N. W. 150.

Plaintiff assignee of a judgment is a competent witness in his own behalf as to a conversation or communication between his deceased assignor and the deceased judgment debtor, in an action against the latter's administrator. *Colvin v. Phillips*, 25 S. C. 228.

^{50.} *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

^{51.} See *Barrett v. Eastham Bros.* (Tex. Civ. App.), 86 S. W. 1057.

In *Parks v. Caudle*, 58 Tex. 216, the court says: "In our opinion, a party is prohibited from testifying, not merely as to statements by the deceased to him, or transactions between him and the deceased, but also as to such statements to or transactions between deceased and third persons, and that, too, although occurring when the witness had no interest therein. The statute had in view, primarily, a transaction between parties, one of whom had since died, and whose heirs or representatives were engaged in a suit with the survivor. As to such a transaction neither party was allowed to testify. The survivor should not, because the mouth of the other party to the transaction was forever closed. But the heir or representative, if perchance he knew aught of the facts, although it was not a transaction with him, was also forbidden to testify about it; for, to allow him to do so, would be to give him the advantage over one whose mouth the statute had closed. In the present case both parties to the alleged transaction were dead, but that does not make it less within either the terms or the spirit of the law."

Contra.—In an action by the children of a deceased wife against the husband and father to recover her alleged community interest, one of the plaintiffs is not incompetent to testify, in proof of the marriage, as to the conduct of their mother toward the defendant; such testimony is not a "statement by" the deceased, nor does it show "any transaction with" the deceased under Rev. Stat. 1895, art. 2302, as it does not show that the witness received his knowledge of the facts from the deceased. *Edelstein v. Brown* (Tex. Civ. App.), 95 S. W. 1126, *citing Brown v.*

to be done by decedent, it includes transactions between the latter and third persons.⁵²

Under the Minnesota Statute a party or interested person is not competent to testify to conversations with or admissions of a deceased party, whether had with or made to himself, or with or to a third person in his presence.⁵³

b. *Transactions Between Decedent and Co-Party With Witness.* The witness although a party to the action and interested in the result is not incompetent to testify to transactions between the decedent and a co-party of the witness.⁵⁴

c. *Transaction With Witness' Spouse.* — Although the statute disqualifies the husband or wife of a party or interested person, if the incompetency extends only to transactions or communications between the decedent and the witness, the latter is not disqualified as to matters occurring between his spouse and the decedent.⁵⁵ If, however, the spouse was a party to the transaction testified to, he is incompetent.⁵⁶

d. *Presence or Participation of Witness.* — (1.) **Presence.** — The fact that a transaction or communication between the decedent and another occurred in the presence of the witness does not render him incompetent thereto if he did not participate therein.⁵⁷

Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

52. Witt v. Moberley, 19 Ky. L. Rep. 847, 42 S. W. 338; Hopkins' Admr. v. Faerber, 86 Ky. 223, 5 S. W. 749.

53. *In re* Pederson's Estate, 97 Minn. 491, 106 N. W. 958.

54. Brickle v. Leach, 55 S. C. 510, 33 S. E. 720; Mayes v. Turley, 60 Iowa 407, 18 N. W. 731. But see Wills v. Wood, 28 Kan. 400.

The statute does not serve to exclude a party's testimony in favor of a co-party as to a conversation between decedent and such co-party, in which witness took no part, although the evidence tends to show the oral agreement alleged in the complaint. Powers v. Crandall (Iowa), 111 N. W. 1010 (citing Erusha v. Tomashi, 98 Iowa 510, 67 N. W. 390; Mallow v. Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158).

55. Iowa. — Lucas v. McDonald & Son, 126 Iowa 678, 102 N. W. 532; Allison v. Parkinson, 108 Iowa 154, 78 N. W. 845; Smith v. Fry, 103 N. W. 1002; Johnson v. Johnson, 52 Iowa 586, 3 N. W. 661; Drefahl v. Security Sav. Bank, 132 Iowa 563,

107 N. W. 179; Dettmer v. Behrens, 106 Iowa 585, 76 N. W. 853; Lines v. Lines, 54 Iowa 600, 7 N. W. 87.

South Carolina. — Brickle v. Leach, 55 S. C. 510, 33 S. E. 720.

Auchampaugh v. Schmidt, 77 Iowa 13, 41 N. W. 472, (overruling decision on previous appeal in 72 Iowa 656, 34 N. W. 460), which was an action by an administrator against the joint maker of a promissory note given to his intestate. The wife of one of the defendants was held competent on his behalf to prove that he signed as surety and not as maker. The transaction although occurring in the presence of the witness was between her husband and the decedent, and therefore not within the prohibition of the statute.

56. Samson v. Samson, 67 Iowa 253, 25 N. W. 233; Stolenburg v. Diercks, 117 Iowa 25, 90 N. W. 525.

57. Georgia. — Ray v. Camp, 110 Ga. 818, 36 S. E. 242; Reid v. Sewell, 111 Ga. 880, 36 S. E. 937; Elliott v. Banks, 115 Ga. 926, 42 S. E. 218.

Indiana. — Denbo v. Wright, 53 Ind. 226.

Iowa. — Allbright v. Hannah, 103 Iowa 98, 72 N. W. 421; *In re* Gold-

thorp's Estate, 94 Iowa 336, 62 N. W. 845; Foreman *v.* Archer, 130 Iowa 49, 106 N. W. 372; Dettmer *v.* Behrens, 106 Iowa 585, 76 N. W. 853; Auchampaugh *v.* Schmidt, 77 Iowa 13, 41 N. W. 472; Sweezy *v.* Collins, 40 Iowa 540; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Drefahl *v.* Security Sav. Bank, 132 Iowa 563, 107 N. W. 179; Wright *v.* Reed, 118 Iowa 333, 92 N. W. 61.

New York. — Simmons *v.* Havens, 101 N. Y. 427, 5 N. E. 73; Hildebrant *v.* Crawford, 65 N. Y. 107; Burns *v.* Mullin, 42 App. Div. 116, 58 N. Y. Supp. 933; *In re* Hartman's Estate, 13 Misc. 486, 35 N. Y. Supp. 495; Simmons *v.* Sisson, 26 N. Y. 264; Sanford *v.* Sanford, 61 Barb. 293; Lobdell *v.* Lobdell, 36 N. Y. 327.

South Carolina. — Sloan *v.* Hunter, 56 S. C. 385, 35 S. E. 658, 879, 76 Am. St. Rep. 551.

Wisconsin. — Wollman *v.* Ruehle, 104 Wis. 603, 80 N. W. 919.

A party is not disqualified as a witness to transactions or communications between the deceased and third persons had in the presence of the witness, if the latter did not participate therein and the transaction or communication was not affected by his presence. Wollman *v.* Ruehle, 104 Wis. 603, 80 N. W. 919; Anderson *v.* Laugen, 122 Wis. 57, 99 N. W. 437; Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234.

A party's testimony as to what he heard the deceased testify to in another proceeding with reference to the notes sued on in the pending action is not testimony as to a transaction with the decedent within the letter or spirit of the statute. Worth *v.* Wrenn, 144 N. C. 656, 57 S. E. 388, following Costen *v.* McDowell, 107 N. C. 546, 12 S. E. 432.

§ 1095 Rev. Stat. 1892 does not prohibit an interested person from testifying to a conversation had exclusively between the decedent and a third party as against the decedent's administrator, provided the interested witness took no part in the conversation, either actual or by acquiescence. Withers *v.* Sandlin, 44 Fla. 253, 32 So. 829, saying that the statute was adopted from New

York, being almost identical in language with the statute in that state, and that this was the construction given the statute by the courts of New York in numerous cases, to wit: Simmons *v.* Sisson, 26 N. Y. 264; Lobdell *v.* Lobdell, 36 N. Y. 327; Cary *v.* White, 59 N. Y. 336; Hildebrant *v.* Crawford, 65 N. Y. 107; Holcomb *v.* Holcomb, 95 N. Y. 316.

Where plaintiff claimed title to land as against the representatives of her father's estate, by reason of an alleged oral conveyance from decedent, her husband was held a competent witness as to the conversation between decedent and plaintiff, wherein the alleged oral conveyance was made, at which he was present but in which he did not participate. So also the plaintiff was held a competent witness as to a conversation between her husband and the decedent, in which a receipt was given, but in which plaintiff did not participate. Smith *v.* Fry (Iowa), 103 N. W. 1002.

One claiming against the estate of a decedent for services rendered the latter is a competent witness as to conversations between the decedent and a third person tending to show an agreement by decedent to pay for the services in question. Griffith *v.* Robertson, 73 Kan. 666, 85 Pac. 748 (citing McKean *v.* Massey, 9 Kan. 600; Jaquith *v.* Davidson, 21 Kan. 341; McCartney *v.* Spencer, 26 Kan. 62).

Testimony by the witness that a note drawn by a third person in the presence of herself and her husband was payable to the latter, was held not inadmissible, being merely evidence as to the contents of a written paper and therefore not "improper within the rule of Page *v.* Danaher, 43 Wis. 221." Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681.

Agent. — Although an agent of a party is incompetent by statute to testify to transactions between himself and decedent, on behalf of his principal, he is nevertheless competent as to transactions at which he was present but did not participate in. McCamy *v.* Cavender, 92 Ga. 254, 18 S. E. 415.

In New York,⁵⁸ the rule of the earlier cases has been modified until at present the mere presence of the witness at the transaction seems to be sufficient to disqualify him, and the same is true in North Carolina⁵⁹ and one or two other states.⁶⁰

(2.) Participation. — (A.) GENERALLY. — Any participation, however, by the witness, either active or passive, is sufficient to make him a party to the transaction, in which event he is of course incompetent.⁶¹ As to what constitutes participation there is some apparent conflict

58. *Burdick v. Burdick*, 180 N. Y. 261, 73 N. E. 23; *Burnham v. Burnham*, 46 App. Div. 513, 62 N. Y. Supp. 120. Compare *Cary v. White*, 59 N. Y. 336; *Stern v. Eisner*, 51 Hun 224, 4 N. Y. Supp. 406; *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587, all to the contrary.

An heir and legatee cannot on the probating of a will testify as to conversations between the testator and third persons, in his presence, for the purpose of showing testator's testamentary incapacity. The ground for the ruling is that communications in the presence of the witness are deemed to be made to him, "While the ruling may be said to be stretched to the extremest tension, it has the merit, possibly, of being in furtherance of justice." *In re Dunham*, 121 N. Y. 574, 24 N. E. 932.

In an action against heirs to establish a trust in lands of the estate alleged to have been created by the deceased intestate, plaintiff is not a competent witness as to a conversation in his presence between the alleged trustee and a third person, tending to establish the trust. The court, after reviewing and distinguishing all the previous cases on this point, lays down the rule: "That all conversations or transactions between persons since deceased and a third party in the presence or hearing of the witness may not be testified to by such witness if he by word or sign participated in the transaction or conversation, or is referred to in the course of it, or was in any way a party to it. *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633, reversing 74 App. Div. 284, 77 N. Y. Supp. 523.

Where it does not appear that the witness participated by word or sign,

or was referred to in the conversation, or was a party thereto, he is competent within the rule laid down in *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633; *Farrar v. Farmers' Loan & Tr. Co.*, 85 App. Div. 367, 83 N. Y. Supp. 172.

Where the probate of a will is contested on the ground of want of testamentary capacity on the part of the testator, and that the will was not duly executed, a legatee or devisee, who is not a subscribing witness, is not competent to testify to personal transactions or communications with the decedent, preceding, attending or succeeding the execution of the will. This rule excludes not only the testimony of transactions directly between the witness and the deceased and communications made by the latter to the former, but of any transaction between the deceased and others, in any portion of which the witness participated, or any conversation in his hearing, although not with or addressed to him; also, any testimony as to the acts and conduct of the testator observed by the witness tending to show mental capacity. *In re Will of Eysaman*, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599.

59. *Wilson v. Featherston*, 122 N. C. 747, 30 S. E. 325, where the court says: "We think a true construction of that much construed section excludes the evidence of a third party to such conversation if the third party is interested in the result of the action, and there is no one to contradict the statement of the witness."

60. *Robinson v. James*, 29 W. Va. 224, 11 S. E. 920; *Seabright v. Seabright*, 28 W. Va. 412, 463; *Larison v. Polhemus*, 36 N. J. Eq. 506.

61. *Withers v. Sandlin*, 44 Fla.

in the cases; in some jurisdictions the rule is that if the witness was a party in interest to the transaction,⁶² or if his presence influenced

253, 32 So. 829; *Smith v. Ulman*, 26 Hun (N. Y.) 386; *Morgan v. Henry*, 115 Wis. 27, 90 N. W. 1012.

Where It Does Not Appear that the witness participated in the transaction testified to between decedent and a third party, his testimony is not incompetent. *Roe v. Harrison*, 9 S. C. 279.

Where the plaintiff, as a witness in her own behalf, testified that the deceased, her mother, in a conversation with a third person in the presence of the witness, said: "This is my only child (referring to plaintiff); this is the one I want the property held in trust for by the church," the testimony was held inadmissible. *Leary v. Corvin*, 63 App. Div. 151, 71 N. Y. Supp. 335.

In *Lane v. Lane*, 95 N. Y. 494, where the probate of a will was contested by the heirs-at-law, it appeared that through partial paralysis of the vocal organs, the testator at the time he executed his will was unable to utter words, but he made sounds intelligible to those familiar with him, and signs, which to some extent any one could interpret. His wife went with him to the house of the scrivener who drew the will and she was executrix and legatee under the same. *Held*, that she was incompetent under § 829 of the Code of Civil Procedure to testify to anything said by her to the testator, or to what he communicated to her or others, in reply.

Where a husband and wife, in consideration of an advancement to the wife from her parents, signed a release of the wife's claim to inheritance from her parents, in a suit for such inheritance after the death of the parents the testimony of the husband as to whether there was any talk at the time of the execution of the release about releasing the wife's claim to her father's estate forever, and whether anything was said by the wife or her father about not having time to read the release over, was held inadmissible as being of a "personal transaction" with deceased

persons to which the husband was a party, though no property right was there affected. Cases in which either the husband or wife is allowed to testify concerning a transaction had solely with the other are not applicable, inasmuch as the husband was a party to the transaction. *Stolenburg v. Diercks*, 117 Iowa 25, 90 N. W. 525.

62. Neither of two plaintiffs, in an action against the administrators and heirs, can testify to a conversation had in her presence with the other plaintiff by decedent in his lifetime, although the conversation was entirely between the deceased and such other of the two plaintiffs. "Where there are two persons on one side, having like interests, they should, for the purpose of giving force to the statutes, be considered one, and neither be permitted to give her version of the communications and statements of the deceased to the other in her presence." *Wills v. Wood*, 28 Kan. 400.

In *Holcomb v. Holcomb*, 95 N. Y. 316, the court while recognizing the rule laid down in *Cary v. White*, 59 N. Y. 336, to the effect that statements made by the deceased to a third person in the hearing of the witness are not within the statute, says: "It is obvious that a proper regard to the rights of suitors in the administration of justice requires the conditions upon which this conclusion depends to be strictly observed. The policy of the statute excludes the evidence of an interested witness concerning, 1st: Any transaction between himself and a deceased person, or in which the witness in any manner participated; 2d: All communications between the person deceased and the witness, including communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one of two or more persons, if all were interested. Each of these species of testimony is as much opposed to the spirit and intent of the statute as the other.

it in any way,⁶³ the fact that he took no active part therein by word or deed does not make him the less a party to the transaction within the meaning of the statute; though in other jurisdictions it seems that the witness is not disqualified merely because he is interested in a transaction or communication between the decedent and others in his presence.⁶⁴ It is not necessary, however, that the conversation or transaction should have been between the decedent and the witness alone; it is sufficient that the latter was one of the party

If the proposed witness has asked a question of the decedent, and it is answered, it is a conversation; if while the decedent is conversing with a third person, the witness by word or sign participates in it, or is referred to, his evidence of what occurred cannot be received."

In re Bernsee's Will, 141 N. Y. 389, 36 N. E. 314, where the witness took no actual part in the conversation between deceased and the attesting witness at the time the will was made he was held nevertheless incompetent as to such conversation. Andrews, C. J., says: "If active participation in the conversation was necessary to exclude an interested witness, and he should, as an observer, be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method in every case of evading the statute."

63. In an action to recover from the executor of plaintiff's husband certain sums, being the proceeds of property which belonged to plaintiff at the time of her marriage and which the decedent afterwards collected and retained, plaintiff testified that a note belonging to her was settled and payment made to her husband in her presence, but that she did not participate in the transaction. The admission of this testimony was held error because plaintiff was a party to the transaction within the meaning of the law. "The transaction testified to by plaintiff was the payment to the deceased of a note known by all parties to belong to the plaintiff, in her presence, in which transaction she testifies that she did not participate. It is, however, inconceivable that her presence did not affect and influence the

transaction. It doubtless served to authorize and justify her husband and the debtor in making the adjustment. No such settlement, to bind her, could have been made without either authority from her to her husband, which would have been a transaction between them, or such conduct on her part as to justify belief in such authority. A part of the transaction of the settling of that note between the deceased and Trevett was the implication of authority then and there given by her presence. It is plain that this transaction, to which she was permitted to testify, although between the deceased and a third person, was so influenced by her presence that she was in effect a party to it and should not have been permitted to testify thereto." *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681.

64. See cases cited in preceding section.

Where the witness, one of the defendants, had in his possession the decedent's money in question, but handed it to decedent, who afterwards handed it to the wife of the witness, the other defendant, it was held that what was there said by the decedent and the wife of the witness as to the money and the consideration for which it was given to her, was not a personal transaction between witness and the decedent. *Mayes v. Turley*, 60 Iowa 407, 14 N. W. 731.

In an action against an administrator to recover back money alleged to have been overpaid the administrator, on a note made to his decedent by a husband and wife, the wife may testify that she was present when her husband paid his money to decedent, and that decedent then directed him to indorse the payment. The prohibition of the statute applies to transactions only in which the

engaged in the general conversation or transaction.⁶⁵ One who joins in the execution of a conveyance is a party to the transaction.⁶⁶

(B.) TRANSACTION THROUGH INTERMEDIARY. — (a.) *Generally.* — The fact that the transaction between the witness and the decedent is conducted through an intermediary does not render the witness competent thereto.⁶⁷

(b.) *Transaction Through Agent of Witness.* — The statute applies not only to transactions directly with the decedent, but also to those conducted through the agent of the witness in his presence.⁶⁸ But

witness took part. *Erusha v. Tomash*, 98 Iowa 510, 67 N. W. 390.

65. *Muir v. Miller*, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032. This was an action by an administrator against certain heirs of his intestate to recover certain notes and securities received from the latter under a distribution made at a general gathering of the heirs with the decedent. The wife of one of the defendants was held incompetent as to what occurred at such distribution. It appeared that she "was present at the time of the division of the property, and aided in ascertaining the amounts by computing interest, and there was a general conversation between the father and those present, sometimes one talking to him and sometimes another, but the communications were not what should be called communications between him and any particular person. The parties were to confer with him in regard to the division of the property, and the communications were generally between him and all that were present, and in a sense that they were personal as to all. *Ettie Miller* was one of the number, and the court refused, on the objection of the plaintiff, to allow her to state some of the conversations, and we think correctly. Being the wife of the defendant, she was disqualified."

66. Thus where the heirs were claiming against the widow and the administratrix under an alleged agreement between themselves and the decedent, the husband of one of the heirs was held incompetent to prove such agreement, on the ground that he had joined with his wife in the execution thereof. *Samson v. Samson*, 67 Iowa 253, 25 N. W. 233.

But see *Witthaus v. Schack*, 24 Hun (N. Y.) 328.

67. *Dolan v. Leary*, 68 App. Div. 459, 74 N. Y. Supp. 981, holding that where the decedent intending to convey an interest in land to the witness did so by first conveying to a third party, who then conveyed to the witness, the latter was incompetent as to this transaction. See also *Morgan v. Henry*, 115 Wis. 27, 90 N. W. 1012.

Where defendant claimed that the decedent had written to a third person certain instructions to be given to defendant, and that he had acted in accordance with such instructions, his testimony that he saw the latter and recognized the decedent's signature was held incompetent. *Gillespie v. Murray*, 27 Tex. Civ. App. 580, 66 S. W. 252.

68. *Head v. Teeter*, 10 Hun (N. Y.) 548.

In an action on a bond executed by a husband and wife against the latter's estate, defendant claimed that a clause binding the deceased wife's separate estate had been added after the bond was signed. It was held error to permit plaintiff to testify in his own behalf that he was not present when the bond was signed; but that he saw the bond when it was in the hands of his attorney after it had been drawn and shortly before it was executed, and that it contained the clause in question. The court says: "The statement of the plaintiff that shortly before the bond was signed it contained the clause in question, went to the very marrow of the issue, and, if believed by the jury, left no room to doubt that the alteration was made before the testatrix signed the instrument. It was as pertinent and convincing as if he had testified that

a party may testify as to the instructions to and authority of the agent where this does not include anything said or done by the witness in decedent's presence.⁶⁹

(C.) KNOWLEDGE BY DECEDENT OF WITNESS' PRESENCE OR PARTICIPATION. The fact that the decedent was ignorant of the presence or participation of the witness in the transaction or communication does not remove the incompetency of the latter.⁷⁰

the clause in question was in the instrument when the testatrix signed it. Had she been living at the time of the trial she might have contradicted the plaintiff on that point, and the permitting him to testify concerning it, she being dead, gave him an advantage which the statute does not allow, unless the plaintiff's counsel is right in his contention that the testimony did not relate to a personal transaction or communication between the witness and the deceased. That contention is based upon the fact that the witness and the deceased did not meet personally, the plaintiff having been represented in the transaction by his attorney, Mr. Fuller, who superintended the drawing of the bond and its execution. But the attorney acted under the immediate direction of the plaintiff, who was cognizant at the time of all the steps taken in the transaction. In these circumstances, the giving of the bond was, we think, a personal transaction between the obligors and the obligee, within the meaning of the statute, so far as to prevent the obligee from giving testimony against the representative of the deceased obligor, tending to show what was the wording of the bond at the time of its execution. Suppose he had been called to prove the contents of a lost letter which he had dictated, and caused his clerk to write and deliver to the deceased, we do not think he would have been competent for that purpose; and yet in that case there would have been no transaction or communication between him and the deceased which could be called 'personal' in a literal sense." It was further held that plaintiff's testimony respecting conversations between himself and his attorney prior to the execution of a bond and tending to show that it contained the clause in question at the time of its execution was im-

properly received. *Pease v. Barnett*, 30 Hun (N. Y.) 525 (citing *Milligan*, *Admr. v. Robinson*, 16 N. Y. W. Dig. 96, and *distinguishing Hill v. Heermans*, 22 Hun (N. Y.) 455 (affirmed, *sub nom.* *Wadsworth v. Heermans*, 85 N. Y. 639). Compare *McRae v. Malloy*, 90 N. C. 521; *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275.

69. Testimony by a party that when a bond was executed and placed in the hands of an agent for negotiation, it was in blank as to the name of the obligee, and that the agent had no proper authority for filling such blank, is not—such obligee being dead at the time of the examination—evidence of a transaction with a deceased person. *Brower v. Hughes*, 64 N. C. 642.

70. *Holcomb v. Holcomb*, 95 N. Y. 316. This was an action by the administrator to set aside an assignment to the defendant by the decedent of a mortgage, on the ground of unsoundness of mind and undue influence. The testimony of an interested witness, namely, the decedent's son, was held incompetent against the defendant. The testimony was as follows: "Q.: State what you heard your father saying or doing, or what you heard your father say when it was not addressed to you. A.: I have often heard him talking to himself and carry on conversations the same as though he was talking to somebody, and there was nobody in the house, that was in the room he occupied. I listened to hear what he was saying. Q.: What was it?" Objection to this testimony was overruled. The court holding this ruling error, says: "In this instance the witness prepared himself to hear what his father might say. His testimony is not made admissible because his father did not solicit the interview, and was even ignorant of his presence. The words, when

O. TRANSACTIONS WITH, OR STATEMENTS BY, PERSON OTHER THAN DECEASED. — a. *Generally*. — Where the statute disqualifies the witness as to transactions between himself and the decedent, he is not incompetent as to transactions between himself and other persons,⁷¹ even though the purpose and result of such transactions is to create contractual or other legal relations between the witness and decedent,⁷² or though he was acting as decedent's agent at the time.⁷³

b. *Transactions With Decedent's Creditor Through Whom Witness Claims*. — A person seeking to enforce the decedent's liability to a third person who is indebted to the plaintiff is not incompetent to prove the legality of his claim against such third party.⁷⁴

c. *Transactions With Surviving Partner*. — Conversations or transactions with one partner although relating to firm business are

spoken, became a communication which he received. It was then a communication to him. He answered, 'I heard him talking in his bedroom. He would be talking to my mother, even asking her to come back.' (She was not then living.) 'I heard him a number of times.'⁷¹

71. *Dougherty v. Deeney*, 41 Iowa 19; *Goodwin v. Fox*, 129 U. S. 601; *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232; *Waddell v. Swann*, 91 N. C. 105; *McDonald v. Harris*, 131 Ala. 359, 31 So. 548; *Gamble v. Whitehead*, 94 Ala. 335, 11 So. 293; *Huckabee v. Nelson*, 54 Ala. 12; *Brann v. Brann*, 19 Ky. L. Rep. 1814, 44 S. W. 424.

Plaintiff in an action against the representative of a decedent is not incompetent to testify as to transactions between himself and the defendant prior to the decedent's death. *Guillaume v. Flannery* (S. D.), 108 N. W. 255.

72. In an action against the defendants to recover an amount due on a promissory note alleged to have been given by defendants to the plaintiff's testator, the court held that the fact that a representative party to a suit has not testified to a transaction or conversation with his testator or intestate does not preclude testimony by the other party or parties, concerning transactions and conversations at which the testator or intestate was not present and in which he did not participate, as the inhibition of the statutes, where the representative party to the suit does not testify to a transaction or conversation with the decedent, is against tes-

timony by the other party touching any transaction with, or statement by, the decedent, and neither the language nor the reason of the legislation extends the disability beyond transactions and conversations in which the decedent participated. In this case the testimony produced in behalf of the defendants related to circumstances which surrounded the execution of the note and which happened when the defendant's testator was not present, and therefore it was error to exclude it. *Woolverton v. Van Syckel*, 57 N. J. L. 393, 31 Atl. 603.

73. *Hinchman v. Parlin & Orendorff Co.*, 74 Fed. 698, 21 C. C. A. 273.

74. In an action by a creditor of the corporation to enforce against the estate of a deceased stockholder unpaid subscriptions on stock, the plaintiff is a competent witness as to the validity of his claim against the corporation, notwithstanding the statute disqualifying a person as a witness in his own behalf as to transactions with or statements by a decedent. The court distinguishes the case of *Storey v. First Nat. Bank*, 24 Ky. L. Rep. 1799, 72 S. W. 318, holding that the stockholder is an incompetent witness for the corporation as to conversations with the decedent in support of a claim of the corporation against the estate. "This rule, however, has no application to this case. Here the creditors did not testify as to any transaction or conversation with the deceased. They merely established the correctness of their claim against the

not deemed to be conversations or transactions with the other partner, since deceased, within the meaning of the statute.⁷⁵

d. *Transactions or Communications With Decedent's Agent.* (1.) *Generally.*—Testimony as to transactions or communications between the witness and the decedent's agent, who is still living,⁷⁶ or who is dead,⁷⁷ is not inhibited by the statute, which is confined either by its terms or by construction to transactions or communications with the decedent in person. Statutes sometimes contain express provisions regulating this matter.⁷⁸

(2.) *Transaction in Presence of Decedent.*—But a transaction or conversation between the witness and the agent or attorney of the decedent had in the decedent's presence is a transaction or communication with the latter within the meaning of the statute.⁷⁹

corporation, and in doing this were not directly giving evidence against the deceased. It was necessary that they should have valid claims against the corporation before they could recover from the decedent's estate, and their evidence was competent for the purpose of showing the justness of their claim against the corporation. If the deceased was affected by this testimony, it was because he was indebted to the corporation. A creditor who has a claim against A. and seeks to recover it in an action against the estate of B., a deceased debtor of A., may testify as to transactions with A. showing that his claim is just." *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

75. Thus in an action against a surviving partner and the representative of the deceased partner, the plaintiff is a competent witness to prove conversations with the survivor during the lifetime of the deceased though his testimony may result in establishing a contract with the firm. *Bennett v. Frary*, 55 Tex. 145, where the court says: "The disqualification to testify is only 'as to any transaction with or statement by,' the deceased, and neither literally, nor in its spirit or reason, does it preclude a party from testifying as to a statement by, or a transaction with, one who is still living, and who may therefore testify himself as to the same matters. The statutes of different states on this subject differ greatly; but the reason of the disqualification has not generally been held to apply in cases like the present."

76. *United States.*—*Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553. *District of Columbia.*—*Andrews v. Hunt*, 7 Mackey 311.

Kentucky.—*Crutcher's Admr. v. Stuart*, 26 Ky. L. Rep. 648, 82 S. W. 421.

Nebraska.—*Dodd v. Skelton*, 89 N. W. 297.

New York.—*Pratt v. Elkins*, 80 N. Y. 198.

North Carolina.—*Gilmer v. McNairy*, 69 N. C. 335.

South Carolina.—See *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 89, 54 S. E. 244.

South Dakota.—*Alexander v. Ransom*, 16 S. D. 302, 92 N. W. 418.

Tennessee.—*Cottrell v. Woodson*, 11 Heisk. 681.

Texas.—*Bennett v. Frary*, 55 Tex. 145.

Unless a transaction with an agent is of such a nature as to necessarily show that his principal was present or this fact is otherwise made to appear, it is not a transaction with the decedent. *Lockhart v. Bell*, 90 N. C. 499.

77. *Morgan v. Bunting*, 86 N. C. 66; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

78. See *infra*, X, 8, A, c. (4.), and *Booth v. McJilton*, 82 W. Va. 827, 1 S. E. 137.

79. *McRae v. Malloy*, 90 N. C. 521. Especially where the attorney has since died. *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275. The court says: "The result is that, where an attorney acts or speaks for his client, or an agent for his principal, in his presence, the one is by the law thor-

e. *Presence or Participation of Decedent.* — (1.) *Presence.* — The mere presence of the decedent at such a transaction does not make it a transaction between himself and the witness.⁸⁰

(2.) *Participation.* — Where the decedent participates in a transaction between other persons and the witness, the latter is of course incompetent,⁸¹ except in those jurisdictions where the presence or participation of third persons serves to take the matter out of the statute,⁸² but where the evidence leaves it doubtful whether decedent participated, the testimony of the witness will be admitted.⁸³

f. *Transactions With Others as Agent of Decedent.* — The testi-

oughly identified with his client and the other with his principal, as much so as if the attorney or agent had not been present at all and the client or principal had acted for himself, or the existence of the former had been merged into the latter. We thus preserve the saving principle of the law that the litigants must both be heard, each being given an equal chance, and equality of opportunity means that the one shall be silenced unless the other also is living and can speak." The court follows, *Halyburton v. Dobson*, 65 N. C. 88. In this case it appeared that the plaintiff's testator went with the defendant to the office of the testator's attorney, who advised him to take certain money from the defendant, and the latter proposed to show this by his own testimony, it being material to the controversy. He was held to be incompetent, though he took no part in the conversation which was confined to the attorney and the testator. The court further *distinguishes* *Peacock v. Stott*, 90 N. C. 518; *Johnson v. Townsend*, 117 N. C. 338, 23 S. E. 271. Compare *Pease v. Barnett*, 30 Hun (N. Y.) 525.

80. *Denny v. Denny*, 123 Ind. 240, 23 N. E. 519. See *Conger v. Bean*, 58 Iowa 321, 12 N. W. 284.

Dougherty v. Deeney, 41 Iowa 19. This was an action on a promissory note by the administrator of an alleged assignee of the note. Defendant claimed that he had paid the note to the payee with money furnished by the decedent, his father, who was living with him at the time, and that he brought it home and placed it among his papers. In corroboration he offered the deposition of his wife to the effect that on the occasion in

question in the presence of the decedent, defendant offered her the note, but that she told him to put it in the bureau drawer where he kept his papers, and that he did so; and that the decedent said nothing. The exclusion of this evidence was held error, the court saying that the facts that the note was in the possession of the defendant, "that he took it from his pocketbook and put it in a book in the bureau drawer, where he was accustomed to keep his papers, partake of none of the elements of a personal transaction between" himself "and his father, notwithstanding the fact that his father was present. That the father said anything or said nothing, it would not be competent to show."

81. See *supra*, VI, 2, M, and *Muir v. Miller*, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032.

82. See *supra*, VI, 2, m, b.

83. *Comins v. Hetfield*, 80 N. Y. 261. This was an action against two defendants to recover for work, etc., in building a bridge and trestle work under a contract; the defense being that the work was not done according to contract. During the examination of the plaintiff one of the defendants died. Thereafter plaintiff produced a diagram furnished by the defendants according to which he did the work. He could not recall from whom he received it, and was unable to say that he did not receive it from the deceased. He testified, however, that he used the diagram in the presence of defendant's engineer and the surviving defendant. It was held that the diagram and his testimony could not be excluded as a personal transaction with the deceased, since it was not shown

mony of an agent of the deceased as to his transactions with other persons as such agent does not violate the statute.⁸⁴

g. *Conversation Rehearsing Transaction or Conversation With Decedent.*—The witness is competent to testify to conversations with third persons in which a conversation or transaction with the decedent is rehearsed,⁸⁵ although the contrary has been held.⁸⁶ Nor does the fact that a conversation between decedent and another is repeated by the latter to the witness make it a conversation between the witness and decedent so as to disqualify him from testifying to the second conversation.⁸⁷

that the diagram came from the latter.

Presence or Participation of Decedent Must Appear.—The presence or participation of the decedent in the transaction must either appear from the facts or be shown by the objecting party, unless there is something to raise a presumption of his participation. *Lockhart v. Bell*, 90 N. C. 499.

84. In a proceeding contesting an executor's account, testimony of the executor in his own behalf that, while acting as the agent of his father, the testator, he took deeds to land sometimes in the name of his father and sometimes in the name of other members of the family, was not in the nature of a personal transaction with the deceased, under § 829 of the Code of Civil Procedure. *In re Woodward*, 69 App. Div. 286, 74 N. Y. Supp. 755.

85. *Gallagher v. Kiley*, 115 Ga. 420, 41 S. E. 613.

Where an opposing witness testified that the grantee told him he had inserted a description of property in a deed, the grantee (the grantor being dead) could testify that in the same conversation he told the witness that he bought the land of deceased, paid therefor in cash and notes, and that at the suggestion of deceased, to avoid preparing another deed, he inserted the description in one already executed, this not being a personal transaction with deceased, but relating to the conversation with the witness, a part of which having been shown, he could bring out the remainder. *Walkley v. Clarke*, 107 Iowa 451, 78 N. W. 70.

In a suit on a bond, alleged to be due the plaintiff's testator, who died in 1863, which bond was given in 1858, and was executed at the re-

quest of the testator, in renewal of an older bond of date some ten years previous, both of which bonds, it was claimed by defendant, were given as vouchers or receipts for money due her from the estate of her husband, of which plaintiff's testator was executor, it was held that although the defendant could not testify directly as to any conversation or understanding she had with the testator at the time of the execution of the first bond, concerning its use, it was competent for her to relate that conversation in her evidence as to what was said and what took place between herself and the agent of said testator at the time of the execution of the other, or second bond—the one in suit. Direct evidence of a conversation and understanding with the plaintiff's testator is incompetent, but a rehearsal of that conversation in a conversation with an agent of such testator, is competent as a part of the *res gestae*. *Gilmer v. McNairy*, 69 N. C. 335.

86. *Jones v. Jones*, 102 Ky. 450, 43 S. W. 412.

In an action by an administratrix on a promissory note payable to her intestate, the fact that the plaintiff had testified to the same conversation without objection, does not render competent testimony by defendant that, in a conversation between him and the plaintiff about the note which he demanded from her on the ground that it had been paid, he told her that he had paid it to a third person, by the direction of the intestate, and had made one payment in his presence. These declarations come within the exception of transactions with and statements by the testator or intestate. *Stallings v. Hinson*, 49 Ala. 92.

87. *Hill v. Woolsey*, 113 N. Y.

h. *Admissions by Protected Party Showing Transaction.* — Testimony as to admissions by the protected party which show a transaction or communication between the witness and the decedent is not competent.⁸⁸

3. Matters Equally Within Knowledge of Decedent. — A. GENERALLY. — The statutes of Michigan and Utah disqualify the witness as to matters which were equally within the knowledge of the decedent.⁸⁹ Facts not known to the decedent may be testified to by the witness.⁹⁰ Facts transpiring in the absence of decedent are not equally within his knowledge,⁹¹ even though they are transactions

391, 21 N. E. 127. See *Todd v. Vaughan*, 90 Hun 70, 35 N. Y. Supp. 457.

88. *Card v. Card*, 39 N. Y. 317 (dictum).

In an action to establish a trust in funds belonging to the estate, alleged to have been created by the deceased, plaintiff is a competent witness to the effect that in a conversation with the representative, plaintiff told the latter that deceased had told plaintiff that he, deceased, had instructed defendant to hold the property in question in trust for plaintiff, and that defendant had acknowledged the creation of a trust. Although involving a conversation between plaintiff and deceased, such testimony is competent as an admission by the defendant. *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397.

89. *Michigan.* — *Ayers v. Short*, 142 Mich. 501, 105 N. W. 1115; *Peirson v. McNeal*, 137 Mich. 158, 100 N. W. 458; *Shouldice v. McLeod's Estate*, 130 Mich. 444, 90 N. W. 288; *Letts v. Letts*, 91 Mich. 596, 52 N. W. 54; *Schuffert v. Grote*, 88 Mich. 650, 50 N. W. 657, 26 Am. St. Rep. 316; *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143 (*explaining* *Twiss v. George*, 33 Mich. 253); *Baumann v. Salt & Lumb. Co.*, 94 Mich. 363, 53 N. W. 1113; *Jackson v. Cole*, 81 Mich. 440, 45 N. W. 826; *Buffum v. Porter*, 70 Mich. 623, 38 N. W. 600; *Rayburn v. Lumber Co.*, 57 Mich. 273, 23 N. W. 811; *Kimball v. Kimball*, 16 Mich. 211; *Mundy v. Foster*, 31 Mich. 313.

Utah. — *Clawson v. Wallace*, 16 Utah 300, 52 Pac. 9; *Hennefer v. Hays*, 14 Utah 324, 47 Pac. 90.

A party to an action, or interested in the result thereof, is incompetent

to testify to conversations with a person since deceased, notwithstanding witness took no part in such conversation. *Comstock v. Comstock*, 76 Minn. 396, 79 N. W. 300.

90. A claimant against an estate may support his claim by his own testimony as to any matter which he shows was not within the knowledge of the decedent, for instance, the amount paid by the claimant for medical attendance, nursing and other things furnished during decedent's last sickness. *Wilcox v. Wilcox*, 139 Mich. 365, 102 N. W. 954.

Loss of Notes in Possession of Witness. — One seeking to enforce promissory notes executed by a person since deceased is a competent witness to the fact that while the notes were owned by her and in her possession she lost them and had been unable to find them after diligent search. This testimony does not violate the statute forbidding the claimant to testify to facts equally within the knowledge of the deceased. *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832.

91. *Wheeler v. Arnold*, 30 Mich. 304.

In an action against two tenants in common for the breach of a land contract, brought by the representatives of a deceased vendee, the statute does not prevent one of the defendants from testifying that he never had any dealings with the deceased, but that the contract was brought to him by his co-defendant, and signed at his request, and that the latter had no authority to deliver the same to the vendee without the payment of the sum therein specified. *Schmitz v. Beals*, 115 Mich. 112, 73 N. W. 109.

with his agent.⁹² Where the fact to be testified to shows on its face that it was equally within the knowledge of the decedent the witness is incompetent, as where it involves a personal transaction with him.⁹³ He is not competent to prove his intent at the time he contracted with decedent.⁹⁴ The witness may, however, deny alleged transactions between himself and decedent even though there is other testimony tending to prove such transaction;⁹⁵ so he may deny that a witness, who has testified to a particular transaction between him and decedent, was present at any such transaction;⁹⁶ and he may explain his letters to decedent offered against him.⁹⁷

B. SOURCE OF KNOWLEDGE. — The statute covers only those matters of which the deceased had such knowledge as to make him

92. *Ward v. Ward*, 37 Mich. 253.

93. *Knight v. Hartman*, 93 Mich. 69, 52 N. W. 1044 (payment to decedent); *Blodgett v. Vogel*, 130 Mich. 479, 90 N. W. 277 (memoranda or check delivered to decedent at time of delivery); *Hart v. Carpenter*, 36 Mich. 402 (statements and admissions of decedent); *Cook v. Stevenson*, 30 Mich. 242 (contract with decedent); *Harmon v. Dart*, 37 Mich. 53 (contract with decedent); *Pendill v. Neuberger*, 67 Mich. 562, 35 N. W. 249 (conversations with decedent); *Kimball v. Kimball*, 16 Mich. 211 (supplies furnished decedent).

Where the heirs of a deceased mortgagor are seeking to restrain a foreclosure of the mortgage, the mortgagee is not a competent witness to prove that within fifteen years he received a letter from the mortgagor containing a payment on the mortgage. *Carr v. Carr*, 138 Mich. 396, 101 N. W. 550.

94. **Intent of Witness.** — In an action of ejectment where the plaintiff claims by grant from a person since deceased and the defendant claims by adverse possession, the defendant is not a competent witness to testify as to whether at the time he placed a fence on the premises he intended ever to change it, or whether, at any time since, he had such intention, since it appeared that the fence was built under some arrangement between the defendant and the plaintiff's remote grantor, plaintiff claiming that that arrangement was to remove the fence to the true line when ascertained. "As defendant could not, concededly, under the statute . . . testify to the arrangement, I do not think he

could testify to his intent at the time. Such testimony would be an evasion of the statute. Neither do I think he could testify to his subsequent intent. If the subsequent intent is the same as the intent with which the fence was erected, it is subject to the same objection. . . . If it is a different intent, it has no bearing on the controversy, unless known to the plaintiff or to his grantors." *Miller v. Shumway*, 135 Mich. 654, 98 N. W. 385.

95. Where in an action by an administrator upon a promissory note belonging to the deceased, the execution of which is denied by the defendant, the plaintiff introduces testimony that the defendant signed the note in the presence of the deceased at a certain time and place, the defendant, notwithstanding the statute excluding his testimony as to matters equally within the knowledge of the deceased, may testify that he was not at such place at the time stated, but was at another place; that he never signed a note in the presence of the witness and the deceased, and that he did not sign the note in suit. *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45 (citing and quoting *Pinney v. Orth*, 88 N. Y. 447). Compare *supra*, VI, 2, J. h. (2.), and *Sutherland v. Ross*, 140 Pa. St. 379, 21 Atl. 354.

96. *Webster v. Sibley*, 72 Mich. 630, 40 N. W. 772. Compare VI, 2, J. h. (2.).

97. Where the defendant, in an action on a note to decedent purporting to have been signed by him, denies its execution, he is competent to testify that a letter written by him to decedent acknowledging an indebtedness to the latter, had no reference

competent to testify thereto; hence it has no application to matters of which decedent's knowledge was hearsay.⁸⁸

C. DEGREE OF KNOWLEDGE. — The expression "equally within the knowledge" does not refer to the degree of knowledge possessed by the parties, but means "also" or "alike" within the knowledge of decedent.⁸⁹

D. FACTS KNOWN TO OTHERS. — a. *Generally.* — Although the facts in question are known to other persons, the incompetency of the witness is not thereby removed;¹ though apparently the rule is the reverse when the facts are known to the adverse party himself.²

b. *Facts of Public Notoriety or Provable by Documentary Evidence.* — It has been held that such a statute was not intended to exclude testimony concerning facts capable of proof by documentary evidence accessible to both parties,³ nor does it extend to matters of public notoriety.⁴

4. *Matters Occurring Before Death or Incompetency.* — A. GENERALLY. — The statutes in several states limit the incompetency of the witness to matters occurring before the death or incompetency of the deceased or incompetent person, respectively.⁵

to the note in suit. *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45. *Compare Cady v. Burgess*, 144 Mich. 523, 108 N. W. 414; *Wilbur v. Grover*, 140 Mich. 187, 103 N. W. 583.

98. *Wheeler v. Arnold*, 30 Mich. 304. In *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143, the court said: "In applying this statute, care should be observed in distinguishing between matters equally within the knowledge of the deceased and matters within his information; that is, to distinguish what is knowledge and what is hearsay. It is only as to matters within the knowledge of the deceased that the opposite party is not permitted to testify."

99. *Kimball v. Kimball*, 16 Mich. 211.

1. *Chambers v. Hill*, 34 Mich. 523.

2. *Wright v. Wilson*, 17 Mich. 192.

3. See *Moulton v. Mason*, 21 Mich. 364.

As for instance, testimony as to the dates or contents of written instruments of a public character where such testimony is not otherwise inadmissible. *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143.

In support of a claim against the estate of a deceased person, the claimant testified that certain expenditures charged against the estate were fully explained to the deceased

by letter, and that his replies showed that he fully understood what was being done. The court held that the letters, if they could have been produced, would have been admissible, but their loss or destruction would not change the rule and permit the witness to testify to their contents, such evidence being as to matters which must have been "equally within the knowledge of the deceased" and clearly within the letter and spirit of the statute. *Schratz v. Schratz*, 35 Mich. 485.

4. In *Chambers v. Hill*, 34 Mich. 523, the court held that the statute would not preclude the surviving party testifying to matters of public notoriety, such as the occupation of land, notwithstanding the deceased party might have been equally cognizant of the facts.

5. See statutes of California, Colorado, Idaho, Illinois, Indiana, Montana, Nevada, New Hampshire, Ohio, Pennsylvania, Vermont and Wyoming, and the following cases:

Colorado. — *Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884; *Conner v. Root*, 11 Colo. 183, 17 Pac. 773; *Palmer v. Hanna*, 6 Colo. 55.

Georgia. — *Stanford v. Murphy*, 63 Ga. 410.

Illinois. — *Ebert v. Gerding*, 116

B. NEGATIVE TESTIMONY. — The fact that the witness proposes to deny an alleged transaction with decedent does not render him a competent witness.⁶ A denial that a certain occurrence took place after decedent's death is in effect affirming that it occurred prior thereto, and is therefore incompetent.⁷

C. MATTERS COVERED BY STATUTE. — a. *Generally.* — The disability here in question covers a wider range than is included under statutes disqualifying the witness as to transactions or communications with the decedent.⁸

The disability has been held to extend to such facts as the contents of letters,⁹ contracts with decedent,¹⁰ his declarations,¹¹ the manner in which title was acquired,¹² and transactions between the witness and a living agent of decedent,¹³ or with other persons.¹⁴ One claiming the value of services rendered the decedent cannot testify to the value of such services,¹⁵ though it has been held that

Ill. 216, 5 N. E. 591; *Hall v. Hall*, 118 Ill. App. 544.

Indiana. — *Taylor v. Dueterberg*, 109 Ind. 165, 9 N. E. 907.

Iowa. — *Hosmer v. Burke*, 26 Iowa 353 (former statute).

New Hampshire. — *Benton v. Hopkins*, 68 N. H. 606, 44 Atl. 391.

Pennsylvania. — *Duffield v. Hue*, 136 Pa. St. 602, 20 Atl. 526 (waiver by decedent of a forfeiture); *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289; *Diehl v. Eming*, 65 Pa. St. 320.

Where the statute provides that an adverse party in an action against the executor cannot testify to facts occurring in the lifetime of the deceased, unless it clearly appears that injustice may be done without such testimony, the plaintiff in an action against an executrix is properly excluded as a witness to all facts occurring in the lifetime of the deceased as to which the deceased could have testified if living; the witness cannot testify as to what decedent did or told him, nor to the contents of letters, if the decedent saw them and could have testified to their contents. *Giles v. Smith* (N. H.), 66 Atl. 1049.

6. Thus the alleged grantors in a deed are not competent in their own behalf to disprove the genuineness of their alleged signatures in an action of ejectment against an assignee of the grantee in the deed. *Sutherland v. Ross*, 140 Pa. St. 379, 21 Atl. 354.

7. Thus where the issue was

whether the witness became possessed of a bond before decedent's death, his denial that it came into his possession after decedent's death was held incompetent. *Schultz v. Boehme* (Pa. St.), 16 Atl. 89.

8. *Sutherland v. Ross*, 140 Pa. St. 379, 21 Atl. 354.

9. In *Sabre v. Smith*, 62 N. H. 663, an action against an administrator, the plaintiff was held incompetent to testify as to the contents of a letter claimed to have been mailed to the defendant's intestate by plaintiff.

10. *Reiter v. McJunkin*, 194 Pa. St. 301, 45 Atl. 46; *Jack v. Moyer*, 187 Pa. St. 87, 40 Atl. 1013; *Schwab v. Ginkinger*, 181 Pa. St. 8, 37 Atl. 125.

11. *Acklin v. McCalmont Oil Co.*, 201 Pa. St. 257, 50 Atl. 955; *Huntley v. Goodyear*, 182 Pa. St. 613, 38 Atl. 507.

12. *Wolf v. Wolf*, 158 Pa. St. 621, 28 Atl. 164.

13. *Sutherland v. Ross*, 140 Pa. St. 379, 21 Atl. 354, recognizing that while the course of previous decisions upon the point "was somewhat unsteady," this is the construction given to previous similar statutes in *Karns v. Tanner*, 66 Pa. St. 297, and subsequent cases, including *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. 566, and *Parry v. Parry*, 130 Pa. St. 94, 18 Atl. 628.

14. *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142.

15. *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

a claimant, physician, may state the character and extent of his practice.¹⁶

Non-Payment by the decedent of the debt in question cannot be proved by the claimant,¹⁷ though he may testify that nothing has been paid him since decedent's death.¹⁸

In Indiana the statute applies only to actions involving matters occurring before decedent's death, and the disability apparently extends only to matters so involved, the test of competency, therefore, being the nature of the matters in issue rather than the fact testified to.¹⁹

b. *Existing Fact Necessarily Involving Occurrence Prior to Decedent's Death.* — Testimony as to an existing fact is not competent under an exception as to matters occurring since the decedent's death, where such fact necessarily involves, and such testimony necessarily proves, a fact existing prior to the decedent's death.²⁰

C. OPINION BASED ON FACTS OCCURRING IN DECEDENT'S LIFETIME. — Under a statute disqualifying a witness as to facts occurring in the lifetime of the decedent, he cannot give an opinion which is necessarily based upon such facts,²¹ though the contrary seems to

16. Character and Extent of Physician's Practice. — In an action against the estate for professional services rendered deceased, testimony of the plaintiff relative to the character and extent of his practice is not in contravention of statute. The purpose of the statute is to prevent parties from testifying to establish an asserted claim or demand, and not to other matters incidentally arising. *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698.

17. *Robinson v. Dugan* (Cal.), 35 Pac. 902.

18. *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

19. *Zimmerman v. Beatson*, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

The test of the competency depends not so much upon the fact to which the adverse party is called upon to testify as upon the contract or matter involved in the issue in the case. Where the contract or matter involved in the suit or proceeding is such that one of the parties to the contract or transaction is by death denied the privilege of testifying in relation to such matter, the policy of the statute is to close the lips of the other also in respect

to such matter. *Nelson v. Master-ton*, 2 Ind. App. 524, 28 N. E. 731.

The defendants in an action by an administrator to recover money of the decedent, alleged to have been converted by defendants, are not competent witnesses to prove the habits, business methods and possessions of the decedent for the purpose of showing that the money claimed was never in existence. "Whether the decedent had any such personal property while he was living was 'a matter involved' in the litigation." But as to the issue of conversion alleged to have occurred after the decedent's death, the defendants were competent witnesses. *Zimmerman v. Beatson*, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165.

20. See *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907.

But see *infra*, VI, 5.

Relationship to Decedent. — Thus testimony as to the witness' relationship with the decedent is not competent, since such testimony, though showing an existing fact, necessarily proves a relationship existing and occurring prior to the decedent's death. *Adams v. Edwards*, 115 Pa. St. 211, 8 Atl. 425.

21. *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459. This was a pro-

have been held in a case where such testimony was admitted.²²

d. *Matters Open to General Observation.* — It has been held that such a statute does not apply to matters which were open to general observation.²³

5. Matters Occurring Subsequent to Death or Incompetency. — A. **GENERALLY.** — The purpose of the statute being to protect the estate of the deceased or incompetent person against the testimony of the adverse party or witness as to matters concerning which such deceased or incompetent could have testified if alive or competent, the statutes are usually so framed or construed as not to disqualify any

ceeding by an administrator to probate the decedent's will, contested on the ground of unsound mind and undue influence; it was held that the contestant could not properly testify that the testator "was a man who could be easily influenced," under the statute disqualifying the adverse party from testifying against an administrator as to "facts which occurred in the lifetime of the deceased." It was contended that the quality of the testator's mind was not a fact which occurred in the decedent's lifetime, within the meaning of the statute, but only an attribute of character. The court held, however, that the opinion called for could not exist independently of facts affording a basis therefor. "If the appellant had been permitted to testify that the testator was a man who could be easily influenced, it would have been the right of the administrator to have him tell the facts upon which he based his opinion; the testator, if alive, might have denied the facts altogether, or so explained them that they would have appeared entirely consistent with firmness of character; being dead and unable to either deny or explain, every reason for the statute would seem to forbid the appellant testifying as proposed; and, 'facts which occurred in the lifetime of the deceased' being necessarily involved in the testimony offered, it was prohibited by the letter as well as the spirit of the statute."

22. See *Studebaker v. Faylor* (Ind. App.), 80 N. E. 861 (this case, however, is apparently based upon the fact that such testimony involves only matters open to general observation, which in Indiana are held to form an exception to the statute).

23. See *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171, holding that testimony as to the mental capacity of the decedent was not incompetent under such a statute. The court said: "The question in such a case is essentially unlike a question that arises in cases where the issue is as to the execution of a contract, a deed, or the like; for in such cases the matter cannot be generally known, and, if the party should say what was not true, it would be impossible to contradict him, while, in such a case as this, the mental capacity of the testator may be proved or disproved by witnesses who knew him, whether parties or not, so that the subject is fully open to investigation. The purpose of the statute was to prevent undue advantage as against those whose interests would be unjustly prejudiced by permitting parties to testify as to matters which they assume were known only to them and the deceased, or as to matters which from their nature could only have been known to them and the dead. It was not intended to exclude parties from testifying in cases where the subject is one of which the knowledge that the parties profess to have is not hidden from all other living persons. There is nothing in the spirit of the statute, and certainly nothing in the letter, which excludes parties from testifying respecting matters open to the observation of all the friends and acquaintances of the deceased. Such a matter is the mental capacity of the testator, whose will is contested." Compare *infra*, VI, 7.

In an action by the heirs of the

witness as to matters transpiring after the death²⁴ or incompetency²⁵ of the person represented. What matters are regarded as occurring after or before deceased's death is discussed in another connection.²⁶

B. ACTS AND TRANSACTIONS WITH FORMER REPRESENTATIVE. The statutes do not exclude testimony as to acts of or transactions with a former representative, although he has since died.²⁷

C. SUBSEQUENT FACTS PROVING ANTE-MORTEM OCCURRENCES. A witness may testify to a fact existing, or an act occurring, after the decedent's death, although the evidence may in its effect tend to prove some fact or occurrence prior to his death or inferentially show a transaction with the deceased.²⁸ Thus it is competent to show that papers or chattels were found amongst the decedent's possessions after his death, though the purpose of such testimony

deceased grantor to set aside a deed, the plaintiffs are competent witnesses as to facts and circumstances in the life of the decedent on which they based their opinion as to the unsoundness of his mind, notwithstanding their disability under Burn's Ann. St. 1901, § 507. *Studebaker v. Faylor* (Ind. App.), 80 N. E. 861, citing *Belledin v. Gooley*, 157 Ind. 49, 60 N. E. 706; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

24. *Illinois*. — *Goddard v. Enzler*, 123 Ill. App. 108; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *National Woodenware & C. Co. v. Smith*, 108 Ill. App. 477; *Shea v. Doyle*, 65 Ill. App. 471; *Funk v. Eggleston*, 92 Ill. 515.

Indiana. — *Zimmerman v. Beatson*, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165.

Iowa. — *Romans v. Hay's Admr.*, 12 Iowa 270; *Terhune v. Henry*, 13 Iowa 99.

Kansas. — *Anthony v. Stinson*, 4 Kan. 180.

Kentucky. — *Huntsberry v. Smith's Admr.*, 28 Ky. L. Rep. 877, 90 S. W. 601.

Maine. — *Swasey v. Ames*, 79 Me. 483, 10 Atl. 461.

Pennsylvania. — *Taylor's Appeal*, 11 Atl. 307.

See *supra*, VI, 2.

In an action between a widow and the heirs of a decedent, she may testify as to her inability to find a deed from deceased to herself, because of an express provision of statute

making her competent as to matters occurring after his death. *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305.

25. See *McNicol v. Johnson*, 29 Ohio St. 85; *Stone v. Cook*, 79 Ill. 424.

26. See *supra*, VI, 4.

27. *Palmateer v. Tilton*, 40 N. J. Eq. 555, 5 Atl. 105, which was a suit to enforce the specific performance of a contract for the purchase of land entered into with one A. as executor of H. under power in the will of the latter. After the alleged contract was made, A., the executor, died, and the defendant was appointed administrator *cum testamento annexo* of H. and made defendant by reason thereof. It was held that the plaintiff was a competent witness to prove the alleged contract between himself and A., the original executor. But see *supra*, VI, 2, D.

28. Where an executor claims credit for notes of the decedent in the executor's possession, and in which he is the payee, the executor to prove that he has possession of the notes in his individual and not his representative capacity, may introduce his wife's testimony that at the decedent's death she had custody of the notes and immediately thereafter gave them to her husband, although such testimony tends to prove a condition or fact existing prior to the decedent's death. *Hoffer's Estate* 156 Pa. St. 473, 27 Atl. 11, following *Rothrock v. Gallaher*, 91 Pa. St. 108; *Stephens v. Cotterell*, 99 Pa. St. 188; *Foster v. Collner*, 107 Pa.

is to prove by inference or deduction the existence of the same state of facts prior to the decedent's death.²⁹

6. Matters Occurring Subsequent to Probate of Will or Appointment of Administrator.—Where the statute renders the adverse party to an action by or against the executor or administrator incompetent except as to matters occurring since the probate of the will or the appointment of the administrator, such party is incompetent for any purpose except those matters strictly within the exception.³⁰ Thus he is incompetent as to a conversation held by him with living persons subsequent to the death but prior to the appointment of the administrator, even though the other parties to the conversation

St. 305; *Adams v. Edwards*, 115 Pa. St. 211, 8 Atl. 425; *Porter v. Nelson*, 121 Pa. St. 628, 15 Atl. 852; *Patterson v. Dushane*, 137 Pa. St. 23, 20 Atl. 538.

A witness may prove the condition of a package immediately after the decedent's death, although this presumptively or inferentially shows its condition prior thereto. *Rothrock v. Gallaheer*, 91 Pa. St. 108; *Stephens v. Cotterell*, 99 Pa. St. 188.

In *Patterson v. Dushane*, 137 Pa. St. 23, 20 Atl. 538, a witness incompetent as to matters occurring during decedent's lifetime was held properly allowed to testify that after the decedent's death certain bonds, the ownership of which was in question, were found deposited in a bank in the name of the decedent, although such testimony would inferentially prove that they were so deposited in the decedent's lifetime.

Contra.—In an action where a claimant against an estate asserts title to personalty as a gift from the decedent, he cannot be permitted to testify that an envelope not produced was in his possession the moment after the donor's decease, that it bore an inscription in the decedent's handwriting, declaring it to be the property of the claimants, and that it contained certificates of stock and bank books, the ownership of which is the matter in dispute. The facts relating to the gifts of the property occurred, if at all, in the lifetime of the testator, and were within his knowledge; and the witnesses, by reason of the statute, were disqualified from testifying in regard to it. *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907.

²⁹. *Stephens v. Cotterell*, 99 Pa.

St. 188; *Rothrock v. Gallaheer*, 91 Pa. St. 108; *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. 782.

Testimony that thirty days after decedent's death the bond on which plaintiff bases his claim against the estate was found amongst the papers of decedent is competent, although it inferentially shows and is offered to show that the bond had been delivered to and paid by the decedent. *Porter v. Nelson*, 121 Pa. St. 628, 15 Atl. 852 (*distinguishing* *Foster v. Collner*, 107 Pa. St. 305, and *Adams v. Edwards*, 115 Pa. St. 211, 8 Atl. 425).

³⁰. *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *Teats v. Flanders*, 118 Mo. 660, 24 S. W. 126; *Ring v. Jamison*, 66 Mo. 424; *Wood v. Matthews*, 73 Mo. 477; *Patton v. Fox*, 169 Mo. 97, 69 S. W. 287; *Ellis v. Harris*, 32 Gratt. (Va.) 684; *Hulett v. Hulett*, 37 Vt. 581.

In trover for certain mortgage notes, brought by the administrator of the wife against the husband, the plaintiff's testimony tended to prove that the defendant at some time admitted that said notes belonged to the intestate. *Held*, that the defendant was not a competent witness to any matter that occurred prior to the appointment of the administrator. *Roberts v. Lund*, 45 Vt. 82.

As to matters occurring subsequent to the probate of the will or the appointment of the administrator, the witness is competent.

Massachusetts.—*Lincoln, Admx., v. Lincoln*, 12 Gray 45; *Palmer v. Kellogg*, 11 Gray 27; *Howe v. Merrick*, 11 Gray 129; *Lincoln v. Lincoln*, 12 Gray 45; *Cronan v. Cotting*, 99 Mass. 334.

have testified thereto.³¹ The term "administrator" as used in the exception refers to the administrator who is a party to the suit, and not to former representatives of the same estate.³²

7. Matters Known to or Open to Observation of Others. — A. GENERALLY. — In some cases a general limitation on the competency of the witness is made to the effect that if the fact to be testified to is one open to the observation or knowledge of people generally, the statutes do not apply for the reason that the adverse party is under no disadvantage.³³ Such a rule, however, is not generally recognized. The mere fact that other persons can testify to the same facts does not make the witness competent,³⁴ the rule on the contrary being that even the testimony of other disinterested witnesses to the same fact does not remove the disability of the statute.³⁵

B. TRANSACTION WITH PERSON LIVING AND COMPETENT. — A. Generally. — Where the transaction or contract in question was between the witness and a person still living and competent to testify, the statutes of some states expressly provide that the witness shall be competent.³⁶ In the absence of such a statute, however, the rule is the contrary in so far as the witness' testimony involves prohibited matters.³⁷ Although both parties to the original contract which forms the basis of the action are alive and competent, if the cause of action embraces other facts and transactions, one party to which is dead, the other party is nevertheless incompetent.³⁸

b. *Transaction With Living Agent of Decedent.* — Such a statute applies where the transaction or contract was between the witness and the decedent's agent who is living and competent to testify at the time of the trial,³⁹ unless such agent is interested adversely to

Missouri. — *Wade v. Hardy*, 75 Mo. 394 (*overruling* *Ring v. Jamison*, 66 Mo. 424, and *Wood v. Matthews*, 73 Mo. 477); *Eyermann v. Piron*, 151 Mo. 107, 52 S. W. 229; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936; *Ireland v. Spickard*, 95 Mo. App. 53, 68 S. W. 748.

Vermont. — *Merrill v. Pinney*, 43 Vt. 605; *Gifford v. Thomas' Estate*, 62 Vt. 34, 19 Atl. 1088; *Dawson v. Wait*, 41 Vt. 626.

^{31.} *Kersey v. O'Day*, 173 Mo. 560, 73 S. W. 481, *following* *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955, and *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990, though strongly disapproving the rule there laid down as contrary to the spirit and purpose of the statute and without reason. See also *Mason v. Wood*, 27 Gratt. (Va.) 783.

^{32.} *Palmer v. Kellogg*, 11 Gray (Mass.) 27, *holding* that in an action

by an administrator *de bonis non* the surviving party was not competent as to matters happening prior to such administrator's appointment, although they occurred subsequent to the appointment of the original administrator.

^{33.} See *supra*, VI, 3, VI, 4, and VI, 2, M.

^{34.} See *supra*, VI, 2, M, and *Taylor v. Bunker*, 68 Mich. 258, 36 N. W. 66; *Michels v. Western Underwriters' Assn.*, 129 Mich. 417, 89 N. W. 56.

^{35.} See *supra*, X, 8, A, c (3).

^{36.} See *supra*, statutes of Missouri, Pennsylvania and Vermont, and *Lewis v. Oliver*, 22 Mo. App. 203; *Hollister v. Young*, 42 Vt. 403.

^{37.} See *infra*, X, 8, A, c and f, and *Vesey v. Benton*, 13 Nev. 284.

^{38.} *Jones v. Burden*, 56 Mo. App. 199.

^{39.} *Miller v. Wilson*, 126 Mo. 48,

the decedent's estate.⁴⁰ It has been held, however, that the survivor's testimony must be confined to the transaction had personally with the agent.⁴¹

VII. PURPOSE AND EFFECT OF TESTIMONY.

1. In Own Behalf. — A. GENERALLY. — It is a general rule, frequently by statute, that the witness is disqualified only when his testimony is offered in his own behalf or interest,⁴² though under some statutes it is held that the fact that the witness is not beneficially interested in the action is immaterial,⁴³ and the statute in one state provides that a party shall not testify in favor of another

28 S. W. 640; *Orr v. Rode*, 101 Mo. 387, 13 S. W. 1066; *Reherd v. Clem*, 86 Va. 374, 10 S. E. 504; *Warth v. Brafman*, 85 Md. 674, 37 Atl. 792; *Roeder v. Shryock*, 61 Mo. App. 485.

⁴⁰. *Lynkar v. Shafer*, 125 Mo. App. 398, 102 S. W. 630.

⁴¹. *Reherd v. Clem*, 86 Va. 374, 10 S. E. 504.

In an action by an administrator on a note, plaintiff relied upon a partial payment, evidenced by a credit on the note made by decedent's agent, to remove the bar of the statute of limitations. Defendant in his answer alleged that if the credit was entered on the note it was done without his knowledge. It was held that under such circumstances the act of the agent was not a transaction with the defendant, and the latter was therefore incompetent to testify in the case. *McElvain v. Garrett*, 84 Mo. App. 300.

⁴². *Georgia*. — *Reed v. Baldwin*, 102 Ga. 80, 29 S. E. 140.

Illinois. — *Sconce v. Henderson*, 102 Ill. 376; *Reinann v. Buckmaster*, 85 Ill. 403.

Kentucky. — *Bromley's Admr. v. Washington Life Ins. Co.*, 28 Ky. L. Rep. 1300, 92 S. W. 17; *Schombacher's Admr. v. Mischell*, 28 Ky. L. Rep. 460, 89 S. W. 525; *Swinebroad v. Bright*, 25 Ky. L. Rep. 742, 76 S. W. 365; *Wilhite's Admr. v. Boulware*, 11 Ky. L. Rep. 59, 10 S. W. 629.

New York. — *Pringle v. Burroughs*, 185 N. Y. 375, 78 N. E. 150; *Carpenter v. Soule*, 88 N. Y. 251, 42 Am. Rep. 248; *In re Stewart*, 1 Con. Sur. 412, 5 N. Y. Supp. 32, 24 N. Y. St.

322; *Kelsey v. Cooley*, 58 Hun 601, 11 N. Y. Supp. 745; *Pursell v. Fry*, 19 Hun 595; *In re Hedges' Will*, 57 App. Div. 48, 67 N. Y. Supp. 1028.

Wisconsin. — *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437.

Under a statute forbidding a party to testify in his own behalf as to transactions with a decedent, the maker of a note is a competent witness in favor of the defendant in an action on the note to which such maker is not a party, to show that the defendant is in reality only a surety and that the payee had without defendant's consent extended the time of payment. "The rule . . . does not apply, for the reason that the witness, Huston, was not a party to the litigation, and his testimony was not offered in his own behalf. Not only was Huston not formally made a defendant in the case, his interests were not identical or involved with those of Koger (defendant). The evidence he gave had no tendency to establish a defense on his own part. Indeed, he explicitly admitted his liability on the note. Neither the spirit nor the letter of the statute rendered him an incompetent witness." *Koger v. Armstrong*, 72 Kan. 691, 83 Pac. 1029. See also *Converse v. Cook*, 31 Hun (N. Y.) 417.

⁴³. As where mere nominal parties are disqualified. See *supra*, IV, 2, A. So also in the case of a predecessor in interest who is disqualified for his successor or assignee (see *supra*, IV, 13), or of an agent who is disqualified for his principal (see *supra*, IV, 11).

party whose interest is adverse to the protected party.⁴⁴ The fact that he is testifying against a protected party⁴⁵ or has a disqualifying interest in the case⁴⁶ does not incapacitate him, unless his testimony is in his own behalf. Generally speaking a witness testifies in his own behalf when he is an interested witness within the meaning of the common law, and his testimony is in furtherance of that interest.⁴⁷ He testifies on his own motion and in his own behalf when called by either a co-party⁴⁸ or an adverse party⁴⁹ with whom his interests coincide. The court will look to his real interests in the case to determine whether his testimony is on his own behalf.⁵⁰

B. TESTIMONY AGAINST INTEREST. — a. *Generally.* — The testimony of a witness against his own interest was competent at common law and is therefore generally held to be admissible under the statutes.⁵¹ So where the witness, though not personally interested,

44. *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255 (*holding*, however, that where the witness' testimony is adverse to his own interest and that of the party whose interest is adverse to the decedent, he is competent).

45. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682. But see *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 31 N. E. 946.

46. *Beall v. Shaul*, 18 W. Va. 258.

47. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

Thus a mere liability for costs gives him such an interest as to make his testimony "in his own favor," within the meaning of the statute. *Tunstall's Admr. v. Withers*, 86 Va. 892, 11 S. E. 565.

If he is a merely nominal party his testimony is not "in his own behalf or interest." *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437 (*holding* the person named as executor in a will competent on a contested proceeding for the probate thereof).

As to what constitutes a disqualifying interest, see *supra*, IV, 3, B.

48. See *infra*, VII, 2, and *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957; *Whitmer v. Rucker*, 71 Ill. 410. But see *New Ebenezzer Assn. v. Gress Lumb. Co.*, 89 Ga. 125, 14 S. E. 892.

49. See *infra*, X, 7, A.

In an action against a surviving partner and the administratrix of a deceased partner on what purports to be a firm note, the surviving partner is not a competent witness on behalf of the plaintiff to prove the

partnership, or that the decedent consented to the borrowing of the money and the execution of the note. Such testimony, though given for the adverse party, is in his own behalf and interest within the meaning of the statute. *Lyon v. Pender*, 118 N. C. 147, 24 S. E. 744.

50. "Courts of equity will disregard mere matters of form and will look to the substance, and see on which side of the controversy the real interest of a party to a suit who is interested therein lies, and determine the competency of the witness from his interest in the case, regardless of the mere question of pleadings, when the question is as to his interest in the case. Were the rule otherwise, the effect and force of the statute could be evaded." *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124.

51. *Alabama.* — *Harper v. Hays Co.*, 43 So. 360.

Georgia. — *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243; *Harrison v. Perry*, 86 Ga. 813, 13 S. E. 88.

Illinois. — *McKay v. Riley*, 135 Ill. 586, 26 N. E. 525; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Neish v. Gannon*, 198 Ill. 219, 64 N. E. 1000.

Indiana. — *Sullivan v. Sullivan*, 6 Ind. App. 65, 32 N. E. 1132.

Iowa. — *Parcell v. McReynolds*, 71 Iowa 623, 33 N. W. 139.

Kansas. — *Koger v. Armstrong*, 72 Kan. 691, 83 Pac. 1029.

Minnesota. — *Bowers v. Schuler*, 54 Minn. 99, 55 N. W. 817.

is disqualified on behalf of some other person, his testimony against the interest of such person is competent.⁵²

b. *Testimony "Affecting" Interest.* — Where the statute disqualifies certain classes of witnesses when their testimony or the result of the action would in any manner affect their interest, the term "affect" is used in the sense of "promote" and does not apply to testimony against interest.⁵³

c. *Reducing Apparent Interest.* — The mere fact that the testimony of the witness tends to show that his interest is smaller than it otherwise appears to be does not make him competent if its purpose or effect is to establish such diminished interest.⁵⁴

d. *Against Representative of Decedent.* — Since the statutes were intended to remove and not to create disabilities and are construed to leave the common law competency of a witness unaffected, an interested witness is competent against the representative of the deceased where his testimony is against his interest,⁵⁵ or is not in

Missouri. — State v. Miller, 44 Mo. App. 118.

New York. — Converse v. Cook, 31 Hun 417; Brown v. Brown, 29 Hun 498; Savercool v. Wilsey, 5 App. Div. 562, 39 N. Y. Supp. 413; *In re Hedges' Will*, 57 App. Div. 48, 67 N. Y. Supp. 1028; Albany County Sav. Bank v. McCarty, 149 N. Y. 71, 43 N. E. 427; Carpenter v. Soule, 88 N. Y. 251.

North Carolina. — Roberts v. Preston, 100 N. C. 243, 6 S. E. 574; Tredwell v. Graham, 88 N. C. 208.

South Carolina. — Robinson v. Robinson, 20 S. C. 567; Shell v. Boyd, 32 S. C. 359, 11 S. E. 205; Devereux v. McCrady, 46 S. C. 133, 24 S. E. 77; Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764.

But see Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; Alexander's Exrs. v. Alford, 89 Ky. 105, 20 S. W. 164.

On the probate of a will contested on the ground of undue influence, beneficiaries under the will are competent witnesses for the contestant to prove the undue influence. *In re Potter's Will*, 161 N. Y. 84, 55 N. E. 387; *In re Worth's Will*, 129 N. C. 223, 39 S. E. 956, where the court says: "Under § 590 of the code there is nothing to prevent a witness in any civil action or proceeding to testify against his own interest, even if in doing so the interests of other parties to the suit are injuriously affected. The disqualification is when they testify in their own behalf."

In an action to enforce a vendor's lien, the testimony of a party as to transaction by him with a deceased person from whom the opposite party derives title, may, under the statute, properly be received so far as it is merely an admission against his interest of payments made by such deceased person. Crowe v. Colbeth, 63 Wis. 643, 24 N. W. 478.

Children of decedent, who are his distributees, are competent witnesses to prove a transfer by their father of personal estate, in favor of the transferee. Crothers v. Crothers, 40 W. Va. 169, 20 S. E. 927.

52. Foster v. Honan, 22 Ind. App. 252, 53 N. E. 667.

53. Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764; Moffatt v. Hardin, 22 S. C. 9; Robinson v. Robinson, 20 S. C. 567.

54. The complainant in a suit to foreclose, as a mortgage, a deed absolute on its face, is not competent against a representative of the decedent on the theory that his testimony is against his interest. Reed v. Kidder, 70 Ill. App. 498.

55. See *supra*, VII, 1, B, a, and Cunningham v. Whitford, 74 Hun 273, 26 N. Y. Supp. 575.

In an action against several joint debtors, one of whom is represented by an executor, where only the executor is served with process, the other parties defendant are competent witnesses for the plaintiff as to transactions with the decedent, since

furtherance of his own interest,⁵⁶ or is not adverse to the estate of the decedent.⁵⁷ It has been held, however, that under a statute disqualifying interested persons as witnesses against the representative of a decedent, the fact that the testimony of such a witness is against his interest,⁵⁸ or that his interest is adverse to the person calling him,⁵⁹ does not render him competent against such a representative.

e. Determination of Question of Interest.—In determining whether the testimony of a witness is against his interest and therefore competent, it must be taken as a whole.⁶⁰

2. On Behalf of Co-Party.—A. GENERALLY.—A party though incompetent in his own behalf may testify on behalf of his co-party

their interest, if any, is adverse to the plaintiffs. *Trymby v. Address*, 175 Pa. St. 6, 34 Atl. 347. But see *Weinstein v. Patrick*, 75 N. C. 344.

56. *Hageman v. Powell's Estate* (Neb.), 107 N. W. 749 (*distinguishing* *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771); *Parker v. Wells*, 68 Neb. 647, 94 N. W. 717; *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220.

57. In an action on a promissory note alleged to have been executed by a copartnership, brought by the payee against the surviving partner and the administrator of the deceased partner, where there is evidence tending to establish the alleged copartnership it was competent for the plaintiff to testify as to the statements of the deceased partner at the time he executed the note and obtained the money for which it was given, to the effect that the money was for the use of the firm. Such statement would add nothing to the obligation of the note against the decedent, and of course nothing to the obligation against his estate. *Dodds v. Rogers*, 68 Ind. 110.

58. *LeClare v. Stewart*, 8 Hun (N. Y.) 127, holding that one who was next of kin and interested in the event of the action, although not a party, was incompetent to testify against the decedent's representative as to transactions or conversations with the decedent even though the testimony was against the interest of the witness. The court says: "At common law this witness would have been competent, being called to testify against his interest. But the

section cited (§ 399 of the code) allows of no inquiry into the nature or extent of the interest. It says he shall not be examined. To admit the witness is to override the statute." But see *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427.

59. *Gifford v. Sackett*, 15 Hun (N. Y.) 79. See also *supra*, IV, 3, D, and *Browning v. Kelly*, 124 Ala. 645, 27 So. 391.

60. Whole Statement Must Be Taken Together.—In an action between co-heirs, involving the title to real property of their ancestor, the complainant testified that he became indebted to the deceased ancestor, but as part of same statement said that this indebtedness was paid off. It was urged that his testimony as to the fact of indebtedness was competent, but as to the fact of payment, incompetent. The court held, however, that the statement must be taken as a whole, rejected. "Conceding that his testimony against his interest, although testifying in his own behalf, might be competent to prove an existing indebtedness in favor of his father against himself, we do not think it can be seriously contended that his single statement in regard to the creation of the debt can be separated from the rest of his testimony so as to bind him by that which is against his interest and at the same time deprive him of that part of the connected statement which shows the payment of the indebtedness." *Hawley v. Hawley*, 187 Ill. 351, 58 N. E. 332.

where his testimony is against⁶¹ or not in furtherance of⁶² his own interest. But where his testimony would advance his own interest he is incompetent,⁶³ though, of course, his disability in any event extends only to the matters set out in the statute.⁶⁴ A party is not incompetent on behalf of a co-party as to an issue in which he has no interest,⁶⁵ though the contrary has been held.⁶⁶

61. *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427; *Nye v. Lowry*, 82 Ind. 316.

62. See *Hageman v. Powell's Estate* (Neb.), 107 N. W. 749; *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357; *Swan v. Morgan*, 88 Hun 378, 34 N. Y. Supp. 829.

In an action brought by the executrix of a payee of a joint and several note, it was held that one of the defendants was a competent witness in behalf of his co-defendant to prove a usurious agreement between the deceased and said defendant, when such evidence was to be used solely in behalf of the co-defendant and not in behalf of the witness or in his interest. *Ely v. Clute*, 19 Hun (N. Y.) 35.

The fact that two claims against an estate are referred to the same referee by the same order of reference does not serve to disqualify one claimant as a witness on behalf of the other, although both claims are for services rendered decedent in his last sickness. *Pandjiris v. McQueen*, 59 Hun 625, 13 N. Y. Supp. 705; *Blankman v. McQueen*, 59 Hun 625, 13 N. Y. Supp. 663.

63. *James v. James*, 81 Tex. 373, 16 S. W. 1087; *Sisters of Visitation v. Glass*, 45 Iowa 154; *Alexander v. Dutcher*, 70 N. Y. 385; *Hill v. Hotchkin*, 23 Hun (N. Y.) 414; *Stewart v. Fellows*, 128 Ill. 480, 20 N. E. 657; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957; *Hard v. Ashley*, 63 Hun 634, 18 N. Y. Supp. 413.

In an action to declare void a will, the plaintiff is not a competent witness in her own behalf or in behalf of her sisters, co-plaintiffs with her, and legatees, seeking to have the will declared invalid, as to personal transactions between the witness and the decedent. *Pringle v. Burroughs*, 185 N. Y. 375, 78 N. E. 150.

64. Thus under a statute excluding merely testimony as to transactions between the witness and the

decedent, he is competent for his co-party as to transactions between the latter and the decedent in which he did not participate, although the testimony tends to establish his own cause of action. *Powers v. Crandall* (Iowa), 111 N. W. 1010. See *supra*, VI, 2, N.

65. *Johnson v. Connable*, 41 Ohio St. 178; *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654, holding that under a statute disqualifying the surviving party to the contract or cause of action in issue and on trial, one plaintiff was competent on behalf of a co-plaintiff as to a transaction to which the witness was not a party and in which he had no interest. See also *Hageman v. Powell's Estate* (Neb.), 107 N. W. 749; *In re Woodward*, 69 App. Div. 286, 74 N. Y. Supp. 755; *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 58.

In an action by an executrix, individually and as executrix, the court held that the defendants' interests in the action not being joint, but several, each was competent to testify for the other in reference to conversations had with decedent in relation to the property in question, so long as such testimony was confined solely in behalf of the co-defendants and not in the witness' behalf. *Jones v. Thomas*, 76 App. Div. 596, 79 N. Y. Supp. 111.

But the fact that two defendants put in separate answers does not entitle them to testify for each other against the representative of a decedent where their interests are the same, as in the case of the maker and indorser sued together by the representative of the deceased holder of the note. *Alexander v. Dutcher*, 70 N. Y. 385, affirming 7 Hun (N. Y.) 439.

Co-Defendants in Equity — See *supra*, II, 2, D, b, (3.), (B.).

66. *James v. James*, 81 Tex. 373, 16 S. W. 1087.

Where the claims of the parties are separate and distinct the fact that all arose out of the same transaction with the decedent does not disqualify one party on behalf of his co-party.⁶⁷

The representative of the decedent cannot by making the witness a party to the action deprive the adverse party of his testimony where the witness has no interest in the controversy between the other parties, even though he would be incompetent in his own behalf.⁶⁸ Where, however, several parties join in a claim against

67. Where an executor has brought an action to settle the estate of his testator, the claims of several persons under a contract with deceased to provide for them by will are separate and distinct, notwithstanding the fact that all happen to be in the same action to settle the estate, and each may testify for the others as to the transactions had with the deceased. *Story v. Story*, 22 Ky. L. Rep. 1731, 61 S. W. 279.

In an action by two beneficiaries of a trust to enforce the same, against the deceased trustee's executor, each plaintiff was held competent for the other as to transactions with the decedent, although the trial court had compelled them to consolidate their actions on the theory that only one trust was involved which should be determined in one action. The court says: "It is urged there was such unity of interest, such a common source of claim, as rendered them incompetent as witnesses, the one for the other; and that to permit it would be in violation of both the letter and spirit of our statute, and an evasion of it . . . The lower court admitted the testimony, and correctly so, we are inclined to think, but not without some doubt. Clearly the testimony of one of the claimants as to the conduct and conversation of Dr. Cummins is not admissible for himself, and from the nature of the case it is difficult to confine it in effect to the other claimant. He should not, however, be deprived of the testimony; and, considering the modern tendency to enlarge the domain of competent evidence, and that our statute upon the subject was evidently enacted in this spirit, we think the claims are so far distinct that the circumstances at-

tending the testimony should bear upon its credibility, rather than bar its admission." *Beach v. Cummins' Exrs.*, 13 Ky. L. Rep. 881, 18 S. W. 360. But see *Barnett's Admr. v. Adams*, 26 Ky. L. Rep. 622; 82 S. W. 406, *infra*.

68. In an action by an administrator on the life insurance policy of his decedent, an assignee of the policy who has also been made a defendant may testify for the defendant insurance company as to transactions between the witness and the decedent, though he could not testify as to such matters on his own behalf. "The administrator by making Bates a defendant to the action cannot deprive the insurance company of the benefit of his testimony. As between the insurance company and the administrator Bates does not testify for himself." *Bromley's Admr. v. Washington Life Ins. Co.*, 28 Ky. L. Rep. 1300, 92 S. W. 17, *citing Dovey v. Lam*, 25 Ky. L. Rep. 1157, 77 S. W. 383.

Under a statute prohibiting a person from testifying in his own behalf as to statements or transactions with a deceased person, one defendant is a competent witness as to such transactions on behalf of a co-defendant in an action by the administrator, since by the statute a witness is only incompetent in his own behalf; and the fact that two persons are made co-defendants does not disqualify them in behalf of each other, since a judgment may be rendered in favor of one and against the other. It was contended that this is not the law where co-defendants are charged with a conspiracy, but as there was no evidence of such a conspiracy in the pending case the court refused to pass upon that question, *citing*, however, *Dovey v. Lam*, 25 Ky. L. Rep. 1157, 77 S. W. 383, to

an estate, all basing their claims upon the same transaction, the determination of the character of which settles the rights of all of them, one of such parties is not a competent witness on behalf of the others.⁶⁹ And where the statute makes both parties incompetent against each other, one party is not competent for his co-party,⁷⁰ and the same is true where the statute disqualifies both parties generally.⁷¹

3. On Behalf of Protected Persons. — The purpose of the statutes generally being to protect the estates of decedents or the persons succeeding to their interests, a witness who would be incompetent against them is competent when testifying in their behalf.⁷² Even

the effect that the wife of one of several co-defendants charged with assault and battery is competent on behalf of her husband's co-defendants, although the jury might unconsciously give her testimony effect as to her husband on the ground that the statute should be so construed as to render a witness competent wherever possible. *Schonbachler's Admr. v. Mischell*, 28 Ky. L. Rep. 460, 89 S. W. 525.

69. *Hard v. Ashley*, 63 Hun 634, 18 N. Y. Supp. 413.

Barnett's Admr. v. Adams, 26 Ky. L. Rep. 622, 82 S. W. 406, in which the claimants based their claims on an alleged trust, upon the establishment or disestablishment of which all of the claimants would succeed or fail. It was contended that each of the claimants was a competent witness for the others, although his testimony could not be considered in his own behalf. The court *distinguishes* *Beach v. Cummins' Exrx.*, 13 Ky. L. Rep. 881, 18 S. W. 360; *Story v. Story*, 22 Ky. L. Rep. 1731, 61 S. W. 279, and *Dovey v. Lam*, 25 Ky. L. Rep. 1157, 77 S. W. 383. "None of these cases are in point. Here the parties were jointly claiming the Piles tract of land. They were joined necessarily as parties plaintiff in the cross-petition. One could not succeed if the others fail on the merits of their claim. They all stood or fell together according as the trust was made out by the evidence. Their interest being joint, not several, one of them was not competent as a witness for the others."

In a suit for the partition of cer-

tain lands of which the deceased died seised, to which bill two of the sons of the deceased set up an answer claiming title themselves under a parol agreement with the deceased that if they would take charge of the farms and earn for him a given sum, he would then give the farms to them; and to establish such contract both sons were sworn and testified in behalf of each other as to the said agreement. *Held*, that under the provisions of the act of 1880 the said witnesses were incompetent to prove the alleged agreement, it being with both respecting the same subject-matter, in the result of which they were mutually and equally interested, and they cannot testify in behalf of each other as to transactions with, or statements by, the intestate. *Larison v. Polhemus*, 36 N. J. Eq. 506.

70. *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

Under such a statute, a defendant in an action by an administrator can not testify in favor of his codefendant, though he was not a party to any issue, having made no appearance, but allowed judgment to be taken against him by default. *Bunker v. Taylor*, 13 S. D. 433, 83 N. W. 555.

71. *Evans v. Scott* (Tex. Civ. App.), 97 S. W. 116; *James v. James*, 81 Tex. 373, 16 S. W. 1087; *Ellis v. Stewart* (Tex. Civ. App.), 24 S. W. 585.

72. See *infra*, X, 7. A, and the following: *Porter v. Nelson*, 121 Pa. St. 628, 15 Atl. 852; *Brose's Estate*, 155 Pa. St. 619, 26 Atl. 766;

in the absence of a provision in the statute authorizing it, a witness incompetent because of interest is nevertheless competent for the decedent's representative.⁷³

Where the statute provides that no party to any action or proceeding, nor any interested person, shall be examined as a witness as to any transaction or communication with the decedent against the latter's representative it applies to all actions both by and against such representative, but disqualifies the witness only as against the representative.⁷⁴ The same is true where the statute disqualifies parties to and persons interested in an action in which the "adverse party sues or defends as" the representative of a deceased or incompetent person.⁷⁵ Where, however, the statute disqualifies parties and interested persons, generally, as to certain matters, it applies as well against as in favor of the decedent's representative.⁷⁶

In re Crosetti's Estate, 211 Pa. St. 490, 60 Atl. 1081; *Lennartz v. Estate of Popp*, 118 Ill. App. 31; *Freeman v. Freeman*, 62 Ill. 189.

73. While an interested person cannot testify for himself against the estate of a decedent as to an act done or omitted to be done by the decedent, such a person may testify on behalf of the estate. Although the statute does not expressly so provide, that this is its meaning is shown by one of the exceptions to the effect that a party may testify for himself when any one interested in the estate shall have testified with reference to the same matter. *Moore v. Moore's Admr.*, 30 Ky. L. Rep. 1370, 101 S. W. 358, citing *McCall v. Burk*, 25 Ky. L. Rep. 643, 76 S. W. 177.

74. *Harrow v. Brown*, 76 Iowa 179, 40 N. W. 708; *Leasman v. Nicholson*, 59 Iowa 259, 12 N. W. 270, 13 N. W. 289; *Dean v. Carpenter*, 134 Iowa 275, 111 N. W. 815; *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498; *Bonner v. Statesbury*, 139 N. C. 3, 51 S. E. 781.

75. In an action against a widow as administrator of her husband's estate on a note endorsed by the decedent, the defendant though interested in the action is a competent witness in her own behalf as to transactions in her presence between plaintiff and the decedent, since the statute properly construed does not exclude testimony of interested witnesses on behalf of the repre-

sentative of the estate. It was contended by the plaintiff that the words "where the adverse party sues or defends as . . . administrator" mean "either party." The court after noting that this point had never before been presented to it for decision and that the authorities from other states were of little value because the statutes there were different, disapproves an apparently contrary dictum in *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812, and says that the meaning of the words "adverse party" is made clear by transposing the language of the statute and by bearing in mind the purpose intended to be accomplished by it, namely, to prevent interested parties from testifying to statements and transactions which no one but the deceased could rebut. *O'Connor v. Slatter* (Wash.), 89 Pac. 885.

76. § 5650, Minn. Gen. Stats. 1894, applies both in favor of and against the representatives of decedents; and on garnishee disclosure proceedings the judgment debtor is a party interested and is prohibited from testifying on behalf of the executor for the benefit of the estate concerning conversations had by the judgment debtor with the testator as to the application of the devise to extinguish a debt due the estate in case of the testator's decease prior to its payment. It was contended that the statute was enacted only for the benefit of the estate of the deceased party, and that such being its pur-

4. For Successor in Interest. — Statutes in some jurisdictions provide, in varying terms, that certain persons shall be incompetent for their successor in interest. The scope and effect of such statutes is discussed elsewhere in this article.⁷⁷

5. Against Certain Persons. — The statutes frequently provide in substance that the witness shall be incompetent against certain specified persons.⁷⁸ In determining the competency of the witness the court will consider the effect of the testimony and the real interests of the parties rather than their position on the record.⁷⁹ Such statutes do not disqualify the witness where his testimony is not adverse to the persons specified.⁸⁰

VIII. MANNER OF TESTIFYING.

1. Generally. — Where the statute disqualifies certain classes of persons from testifying as witnesses, it covers testimony of any kind by such witnesses, whether by deposition or otherwise.⁸¹

2. Affidavit of Incompetent Witness. — Where a witness is incompetent as to transactions with the decedent, his affidavit is equally incompetent,⁸² except in those cases where by statute a party's affidavit is made competent evidence of certain preliminary facts.⁸³

3. Books and Memoranda. — The books and memoranda of a person containing evidence of matters as to which he is incompetent to testify are also incompetent,⁸⁴ unless they are books of account.⁸⁵

pose the representative of the estate might waive its benefits. The court says: "The statute has always been strictly construed by this court, upon the theory that its main object was to prevent possible fraud when one of the parties had been removed by death. Its terms are broad, and contain nothing to restrict their application, and in view of the evolution of the subject evidenced by the growth of the statute from preceding enactments, . . . the intention was manifest to make no distinction in favor of the estates of deceased parties." *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673.

77. See *supra*, IV, 13, A.

78. See *supra*, III, 6, D.

79. See *infra*, X, 7, A, and *Seabright v. Seabright*, 28 W. Va. 412, 465; *Wilkins v. Baker*, 24 Hun (N. Y.) 32.

80. *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24.

81. *McCaughan v. Hardy*, 78 Miss. 598, 29 So. 397.

82. *Kenney Presby. Home v. Kenney* (Wash.), 88 Pac. 108.

83. Where by statute any party to a cause may testify orally or by affidavit to the facts which will enable such party to introduce in evidence the records of conveyances, the provision rendering parties incompetent against a conservator of a lunatic, will not prevent such party from making the necessary affidavit for the use as evidence of the record of a deed against such conservator. *Scott v. Bassett*, 194 Ill. 602, 62 N. E. 914.

84. In an action for a settlement and an adjustment of accounts between complainant and the estate of his deceased brother, complainant's diaries or memoranda showing the alleged transaction between him and deceased were incompetent, the same relating to transactions with the deceased under the statute. *Nance v. Callender* (Tenn. Ch. App.), 51 S. W. 1025.

85. See article "BOOKS OF ACCOUNT," and *infra*, X, 2, B.

4. Deposition. — A. EFFECT OF INCOMPETENCY SUBSEQUENT TO TAKING. — The effect which the subsequent incompetency of the witness has on his deposition already taken is elsewhere discussed.⁸⁶

B. EFFECT OF REMOVAL OF INCOMPETENCY. — Where the protected party is only one of several co-parties and the action has as to him been dismissed, depositions previously taken are competent notwithstanding the incompetency of the witness at the time of the taking.⁸⁷

IX. UNDER PARTICULAR STATUTES.

1. Claim or Demand Against Estate. — A. GENERALLY. — In some states the disqualification is confined to actions or proceedings upon a claim or demand against the estate of a deceased person.⁸⁸

B. WHAT IS CLAIM OR DEMAND AGAINST ESTATE. — The action or proceeding must be against the decedent's estate⁸⁹ and must be one which involves some claim or demand which might have been enforced against the decedent in his lifetime by a personal action for the recovery of money.⁹⁰

^{86.} See *supra*, III, 5, D, b.

^{87.} *Campbell v. Mayes*, 38 Iowa 9. As to the effect of a change in the competency of a deponent, see article "DEPOSITIONS," Vol. IV, p. 528.

^{88.} § 1880, Cal. Code Civ. Pro.; § 4405, Idaho Ann. Codes 1901; Montana Laws 1897, p. 245. Compare § 507 of Indiana statute, *supra*.

Assignment of Claim. — The plaintiff in an action against an administrator on a claim against the estate is not a competent witness to prove an assignment to himself of the claim. "Even a general objection to his testimony would have been sufficient to exclude it." *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884.

The Fact That an Administrator Is a Proper Though Not a Necessary Party to the action does not serve to disqualify the adverse party as a witness to matters occurring prior to the decedent's death, where the action does not involve a claim or demand against the estate. *Cunningham v. Stoner*, 10 Idaho 549, 79 Pac. 228.

^{89.} *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733. See *Flynn v. Seale*, 2 Cal. App. 665, 84 Pac. 263; *Horne v. Nugent*, 74 Miss. 102, 20 So. 159.

An action against a bank to recover the amount of a deposit made there by the decedent in plaintiff's

name and subsequently withdrawn by decedent, is not an action on a claim or demand against decedent's estate. *Greene v. Bank of Camas Prairie*, 7 Idaho 576, 64 Pac. 888.

90. Meaning of Claim or Demand. — The action or proceeding contemplated by the statute "is one which is adverse to the estate, by which some relief is sought, which will diminish or impair the estate. . . . The words 'claim or demand' against the estate of the deceased' ought to receive the same interpretation as they do when found in the several provisions of the Code of Civil Procedure respecting the settlement of the estates of deceased persons. In that connection the words 'claim' and 'demand' are used synonymously. (See secs. 1643, 1467, 1448, 1494, 1497, 1510.) In *Fallon v. Butler*, 21 Cal. 32, Mr. Chief Justice Field, in delivering the opinion of the court, said: 'Whatever signification there may be attached to the word "claim," standing by itself, it is evident that in the Probate Act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime, by personal actions, for the recovery of money, and upon which only a money judgment could have been

C. WHEN DETERMINATION OF QUESTION INVOLVES DETERMINATION OF ULTIMATE ISSUE. — It has been held that where the ultimate issue in the case is whether or not the action involves a claim or demand against the estate, the witness called to support the negative of this proposition cannot be held to be incompetent, because such a ruling would be a determination, in advance, of the very matter in issue.⁹¹ The general rule, however, is to the contrary.⁹²

D. ESTABLISHING TRUST. — It is generally held that the terms "claim" and "demand" include actions against the estate to establish a trust for the benefit of the claimant in property standing in the name of the decedent.⁹³ In one jurisdiction, however, it is held that such actions are not within the statute, which is aimed at only those actions in which a money judgment could be rendered, and because to hold that such an action was a claim against the estate

rendered.' " Estate of McCausland, 52 Cal. 568.

91. Myers v. Reinstein, 67 Cal. 89, 7 Pac. 192.

An action by a husband against his deceased wife's administrator to quiet title to land claimed to be community property is not an action upon a claim or demand against the estate of a deceased person as those terms are used in the statute disqualifying as witnesses in their own behalf parties or their assignees in such an action. "The controversy is not concerning a claim or demand against the estate of deceased, within the meaning of the section. It is concerning the property of plaintiff, and to quiet a claim or demand or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by deceased under the deed is the property of the estate or the property of plaintiff. If it is not property of the estate, then the action does not involve a claim or demand against the estate. To hold that the claim or demand in controversy here was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question at issue." Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108.

92. See *infra*, IX, 1, D.

The plaintiff, an administrator, brought an action of replevin against R. and wife to recover cattle and

horses. R., the defendant, demanded the right to testify, notwithstanding the suit was brought by an administrator in his representative capacity, upon the ground that the point in issue was whether the property did belong to the estate or the defendant, and that this question could be decided by the court *in limine*. Held, that the testimony of the defendant was inadmissible, and that he was properly excluded as a witness. Rushing v. Rushing, 52 Miss. 329. See also Rothschild v. Hatch, 54 Miss. 554.

93. Coats v. Harris, 9 Idaho 458, 75 Pac. 243; Delmoe v. Long, 35 Mont. 139, 88 Pac. 778 (in which the court after reviewing the decisions on this question refuses to follow the rule in California, although recognizing that the Montana statute was probably copied from the California statute after the decisions construing the statute in that state had been rendered); Rice v. Rigley, 7 Idaho 115, 61 Pac. 290 (*overruling* Nasholds v. McDonell, 6 Idaho 377, 55 Pac. 894, and reviewing the decisions); Whitney v. Fox, 166 U. S. 637 (*affirming* Wood v. Fox, 8 Utah 380, 32 Pac. 48, and *criticising* Myers v. Reinstein, 67 Cal. 89, 7 Pac. 192 as unsound and calculated to defeat the manifest purpose of the statute, and refusing to follow it although recognizing that it was decided prior to Utah's adoption of the California law).

would be to determine in advance the ultimate issue in the case.⁹⁴

E. APPLICATION FOR FAMILY ALLOWANCE. — An application by a widow for a family allowance out of the deceased husband's estate does not constitute a claim or demand against the estate.⁹⁵

F. FORECLOSURE OF MECHANIC'S LIEN. — The foreclosure of a mechanic's lien on land owned by the decedent is not an action on a claim or demand against his estate. Being a proceeding *in rem* no personal judgment can be rendered which will bind the estate.⁹⁶

G. ACTION TO DETERMINE VALIDITY OF DEED OR CONVEYANCE.

94. In *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192, which was an action against the personal representative of a deceased trustee to establish a resulting trust in land, the title to which had been taken by the deceased, the court held that the *cestui que trust* was a competent witness to establish the trust, on the ground that the action was not upon a claim for demand against the estate within the meaning of the statute. This case was cited with approval in *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196, holding that the plaintiff was a competent witness to establish and enforce a trust against the personal representative, even though it incidentally tended to establish a contract between the plaintiff and the deceased during the latter's lifetime. See also *Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73, an action against an administrator to quiet title, where it was held that the plaintiff was a competent witness to establish the delivery of the deed to herself by the decedent. The case of *Myers v. Reinstein*, is cited with approval. The court in these cases proceeds upon the theory that all persons are to be regarded as competent witnesses unless they fall clearly within the exception provided in the statute; and since actions to quiet title or establish a trust do not involve claims or demands against the estate, the parties or other assignors are competent witnesses to matters of fact occurring during the life of the deceased.

In *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93, it is held that in an action against an executrix to have certain absolute conveyances

declared to be mortgages, plaintiffs were competent witnesses as to the transaction with the decedent to establish the alleged agreement with him, on the ground that § 1880 C. C. P. applies only to actions upon such claims or demands against the decedent as might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which a money judgment could have been rendered. The court recognized that the reasons for the rule laid down in the section might be as applicable to the case before it as in the case of a money claim, but that the legislature had not seen fit to make the rule cover such cases. The court cites *Myers v. Reinstein*; *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140, and also refers to *Bernardis v. Allen*, 136 Cal. 7, 68 Pac. 110, as recognizing the same rule. But in *Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532, an action to recover upon a joint obligation of two defendants, one of whom died after suit brought, it was held that neither the plaintiff nor the other defendant was a competent witness. The court used language indicating that it regarded *Myers v. Reinstein*, as wrongly decided.

95. *Fallon v. Butler*, 21 Cal. 24, 32, 81 Am. Dec. 140. *Estate of McCausland*, 52 Cal. 568.

96. *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

Foreclosure of Lien. — Death of Owner Pending Action. — The death of the owner and the substitution of his administrator as a defendant, in an action by a sub-contractor to foreclose a lien, does not affect the com-

An action to establish the validity of a conveyance by the decedent,⁹⁷ or an action to set aside a conveyance to the decedent,⁹⁸ is not an action on a claim or demand against the decedent's estate, within the meaning of the statute.

H. EXTENT OF DISABILITY. — The statute disqualifies the witness as to matters occurring prior to the decedent's death,⁹⁹ but does not cover testimony as to merely incidental matters,¹ such as proving the facts preliminary to the introduction of the books of account of the witness² or the decedent.³

• I. CLAIM OR DEFENSE ORIGINATING DURING DECEDENT'S LIFETIME. — a. *Generally.* — In Mississippi the witness is incompetent to establish his own claim or defense against the estate of a deceased person which originated during the latter's lifetime.⁴ So also he

petency of the plaintiff as a witness. *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 896.

97. Action to Establish Conveyance By Decedent. — In an action by a widow against the administrator of her deceased husband's estate seeking to establish a conveyance of certain lands from her husband and to quiet the title, not being one to enforce a claim against the estate, but to declare that the estate has no interest in the property, the testimony of the widow is not excluded under § 1880 subd. 2 Civ. Proc. *Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

98. Action To Set Aside Deed. An action by a principal against the administratrix of the deceased agent to set aside a deed from a third party to the agent on the ground that the decedent fraudulently took title in his own name instead of in the name of his principal is not an action upon a claim or demand against a decedent's estate as those terms are used in C. C. P., § 1880, subd. 3. *Calmon v. Sarraile*, 142 Cal. 638, 76 Pac. 486, citing *Myers v. Reinsteint*, 67 Cal. 89, 7 Pac. 192; *Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

99. See *supra*, I, 2, B, note, and VI, 4.

1. *Roche v. Ware*, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539; *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

2. In an action against an admin-

istrator to recover for work and labor performed by plaintiff for decedent, the plaintiff may testify as to the correctness of books of accounts which were entirely kept by him. The statute referring to the matters in issue and not to incidental matters auxiliary to the trial of the cause upon the testimony is addressed solely to the court. *Roche v. Ware*, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539.

3. In an action to recover an account against deceased brought against the administrator, books of accounts or memorandum kept by the deceased or under his direction, in his lifetime, may be looked to for evidence of the negative fact of non-payment by the deceased during his lifetime, and a foundation for the introduction of the account books may be laid through the testimony of plaintiff himself who actually kept the books. *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

4. Miss. Ann. Code, § 1740; *Moore v. Crump*, 84 Miss. 612, 37 So. 109; *Jones v. Jones* (Miss.), 37 So. 499; *Stanton v. Helm*, 87 Miss. 287, 39 So. 457; *McCaughan v. Hardy*, 78 Miss. 598, 29 So. 397; *Covington v. Frank* (Miss.), 28 So. 20; *Rushing v. Rushing*, 52 Miss. 329; *Wood v. Stafford*, 50 Miss. 370; *Horne v. Nugent*, 74 Miss. 102, 20 So. 159.

Where it appeared that the land involved in a suit for partition was claimed by the complainants as heirs of the deceased son of the deceased owner and by the defendants as re-

is incompetent to establish such a claim, on behalf of one to whom he has assigned it.⁵

b. *Nature of Claim or Defense.* — (1.) **Generally.** — This rule applies to both personal demands and claims to property, whether real or personal.⁶

(2.) **Claim or Defense Arising Out of Transaction With Agent.** — Although the claim or defense arises out of a transaction between the witness and an agent of the decedent who is still living and has testified in the case, the witness is nevertheless incompetent.⁷

(3.) **Against Decedent's Estate.** — (A.) **GENERALLY.** — The claim or defense must be against the decedent's estate; the statute has no application to an action in which the estate is not a party or interested.⁸ The fact that the result of an action may be to render the estate liable in some subsequent proceeding does not render the

mote grantees of such owner, the defendants were held not competent witnesses to establish their title as remote grantees of the owner, since the statute forbids a claim against the estate of a decedent, originating in the lifetime of the latter, being established by the testimony of the claimant. *Liverman v. Lee*, 86 Miss. 370, 38 So. 658.

Antenuptial Contract. — In an action by a husband against his wife's estate to recover the portion coming to him under the law, which he has elected to take, he is incompetent to disprove the genuineness of an antenuptial contract. *Watson v. Duncan*, 84 Miss. 763, 37 So. 125.

Lack of Consideration. — In *Wetherbee v. Roots*, 72 Miss. 355, 16 So. 902, an action on a note by the administrator of the assignee thereof, the defendant maker was held incompetent to testify that the note was without consideration and obtained by the fraud of the original payee.

Executor Incompetent to Establish His Defense where it is sought to charge him with the amount of a note given by his deceased wife to the testator for the land of which he is tenant by the curtesy. *Troup v. Rice*, 55 Miss. 278.

5. **Assigned Claim.** — By express provision of the statute (Ann. Code § 1740) the witness is incompetent to establish the claim, although he has transferred or assigned it. Formerly, however, the statute contained

no such provision and was held not to disqualify the assignor of a claimant as a witness on behalf of his assignee. *Rothschild v. Hatch*, 54 Miss. 554.

6. *Snell v. Fewell*, 64 Miss. 655, 1 So. 908.

A statute which makes it incompetent for any person to testify to establish his own claim against the estate of a deceased person applies "to a money demand, or to the claim for the recovery of property," in a suit instituted or participated in by such witness. *Covington v. Frank* (Miss.), 28 So. 20.

Action To Set Aside Conveyance to Decedent. — *Ellis v. Alford*, 64 Miss. 8, 1 So. 155, citing *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 So. 140.

Gift of Property by Decedent to Claimant. — *Cockrell v. Mitchell*, (Miss.), 15 So. 41.

Meaning of Claim. — The term "claim" means "any demand or right asserted and relied on as against the estate of a deceased person." *Rothschild v. Hatch*, 54 Miss. 554; *Lamar v. Williams*, 39 Miss. 342.

7. *McCaughan v. Hardy*, 78 Miss. 508, 29 So. 397.

8. Notwithstanding the death of the grantor in a deed, the testimony of the grantee is competent to prove the delivery of the instrument as against one claiming under the same grantor by subsequent special warranty deed, there being no liability

witness incompetent.⁹ And this is the rule even though the decedent's estate is a party to and interested in the action, if there is no controversy between the witness and such estate.¹⁰ The disqualification, however, applies in all actions which directly affect the estate left by the decedent,¹¹ whether the party opposing the witness is the personal representative of the decedent or merely his heir or distributee,¹² and has been held to protect his grantee,¹³ but not his

imposed on the decedent's estate by a failure of the latter title. *Horne v. Nugent*, 74 Miss. 102, 20 So. 159.

9. "To work a disqualification of an interested witness the estate of the decedent must be directly affected by the pending suit. That it may be ultimately affected in some other way is immaterial." *Fennell v. McGowan*, 58 Miss. 261.

"To exclude a party as a witness to prove his own claim or right, it must be against the estate of a deceased person in the suit in which he proposes to testify." *Love v. Stone*, 56 Miss. 449.

10. S. was the owner of the legal title to a certain tract of land; the heirs of L. filed a bill in equity against S. setting up an equitable claim to the land; L. had bought the land of W., who gave him a warranty deed therefor and W. being dead, his administrator was made a co-defendant. The deposition of S. as to transactions between himself and W. was offered in evidence to establish his right to the land as against W. and his vendee L. It was held that the motion to strike out his deposition on the ground that it was testimony against the estate of W., a deceased person, was properly overruled, there being no controversy between S. and the estate of W., and the fact that the estate might, as result of the contest, be sued on the warranty in W.'s deed did not render S. incompetent as a witness in the suit since a party can only be excluded on such ground where he is a witness against the estate of a deceased person in the suit in which he proposes to testify. *Love v. Stone*, 56 Miss. 449.

11. "The Test . . . is whether the estate of the deceased person is the subject-matter of the litigation then pending." *Combs v. Black*, 62

Miss. 831 (*holding* that this is the test laid down in *Love v. Stone*, 56 Miss. 499). To the same effect, *Jackson v. Smith*, 68 Miss. 53, 8 So. 258.

12. *Rothschild v. Hatch*, 54 Miss. 554.

In *Jacks v. Bridewell*, 51 Miss. 881, the heirs of the decedent were held entitled to the protection of the statute. The court says: "The term 'estate of a deceased person' is used, in its broad and popular sense, to signify all the property of every kind which one leaves at his death. Therefore, any 'right' asserted against real or personal property left by a deceased person, as accrued to the party by virtue of a dealing between him and such person since deceased, renders the person asserting it incompetent as a witness to maintain in his own behalf such assertion of right. The exclusion is not confined to cases in which the controversy is between him who would testify to his 'claim' or 'right,' and the administrator or executor of the deceased person, but it extends to every assertion of such right by a party to any part of the estate left by a deceased person, and claimed by such party, or to be subject to his demand, by reason of an alleged transaction between such party and the deceased person. To deny the competency of a person to support as a witness his right or demand, as he asserts it as plaintiff or defendant against the administrator or executor, and to allow such person in a controversy with a distributee, or an heir, or other person, to testify to his claim or right or demand, as to the personal or real estate left by the deceased person, and 'which originated during the lifetime of such person,' would be to disregard the language of the statute, and the manifest purpose in passing it."

13. In *Jackson v. Smith*, 68 Miss.

endorsee in an action by such endorsee against the maker.¹⁴

(B.) ACTION BY OR AGAINST SURVIVING PARTNER. — An action by or against a surviving partner although based upon a partnership right or liability is not an action by or against the estate of the deceased partner within the meaning of the statute.¹⁵

c. *Persons Disqualified.* — (1.) *Generally.* — Persons not parties nor interested in the action and not interested in the claim prior to decedent's death, are not disqualified.¹⁶ But where an assignment of the claim has been made subsequent to the decedent's death, the assignor is incompetent for his assignee.¹⁷

(2.) *Character of Testimony Immaterial.* — The competency of the witness is not determined by the character or subject-matter of his testimony, but depends upon the character of the action.¹⁸

(3.) *The Spouse of the Claimant* is not as such incompetent.¹⁹

(4.) *Nominal Party.* — The statute does not disqualify nominal parties to the action who have no legal interest therein.²⁰

(5.) *Claimant Acting in Merely Representative Capacity.* — Where the claimant is acting merely in his representative capacity in the establishment of a claim for the benefit of the estate or interest which

53, 8 So. 258, a party claiming title to the property in controversy under a trust deed given by the decedent as against one claiming the property under an alleged prior conveyance from the decedent was held entitled to the protection of the statute.

14. In an action on a note brought by the indorsee of a deceased payee, the defendant maker is competent to testify, in his own behalf, that he had paid the same to the deceased. *Cole v. Gardner*, 67 Miss. 670, 7 So. 500.

15. *McCutchen v. Rice*, 56 Miss. 455; *Faler v. Jordan*, 44 Miss. 283.

In an action brought by the surviving member of a firm on a partnership claim, the defendant is a competent witness in reference to matters relating to the contract sued on, notwithstanding the fact that they occurred between himself and the deceased, such suit not being by or against the estate of a deceased person. *Combs v. Black*, 62 Miss. 831.

16. *Jones v. Bank of Carrollton*, 71 Miss. 1023, 16 So. 344; *Snell v. Fewell*, 64 Miss. 655, 1 So. 908.

17. *Jones v. Sherman*, 56 Miss. 559. See *Reinhardt v. Evans*, 48 Miss. 230.

18. In an action in Chancery assailing a judgment on the ground that a summons was not served, the

defendant, after answering and denying the averment of want of a summons, died, and the case was revived. The plaintiff sought to prove by her own testimony that she was never served with a summons in the original action. The court held that the plaintiff was incompetent to testify that no service was ever made upon her; that it is not what the witness testifies to that makes him incompetent or competent, but it is the fact that the controversy is between the living and the dead. *Duncan v. Gerdine*, 59 Miss. 550. But see *supra*, VII, 1, B.

19. *Ellis v. Alford*, 64 Miss. 8, 1 So. 155; *Saffold v. Horne*, 72 Miss. 470, 18 So. 433.

20. *Hedges v. Aydelott*, 46 Miss. 99 (action by one to the use of another).

Thus in an action by a husband and wife to set aside a conveyance by the wife to the decedent in which the husband had joined, the husband being a nominal and disinterested party was held competent. *Ellis v. Alford*, 64 Miss. 8, 1 So. 155. So in an action against a husband and wife by an administrator where the husband disclaimed all interest in the property in controversy, his testimony

he represents, he is not incompetent since he is not prosecuting his own individual claim.²¹

d. *Exceptions and Waiver*. — (1.) **Generally**. — Such a statute is a mere survival of the common law disqualification and is not intended to create new disabilities; hence a claimant is not incompetent to prove the facts preliminary to the introduction of secondary evidence.²²

(2.) **Introduction of Decedent's Testimony**. — Although the statute contains no express provision making the witness competent when the testimony of the decedent has been introduced, this exception has been made by the courts as in harmony with the spirit of the statute.²³

J. CLAIMS ARISING SUBSEQUENT TO DEATH. — Where the claim or defense arises subsequent to the decedent's death, the witness is competent by the express provisions of the statute.²⁴

2. **Surviving Party to Contract or Cause of Action**. — A. GENERAL. — In some states the statute disqualifies the surviving party to the contract or cause of action in issue and on trial.²⁵

was held competent. *Rushing v. Rushing*, 52 Miss. 329.

21. An administrator of a deceased person, who is also one of the distributees of the estate, is a competent witness on behalf of his intestate to establish a claim against the estate of another decedent. He is not incompetent under the statute under the clause in reference to testifying as regards his own claim, inasmuch as he was not testifying to establish his own claim, but the claim of the estate. *Cook v. Abernathy*, 77 Miss. 872, 28 So. 18.

22. *Harper v. Lacey*, 62 Miss. 5; *Cole v. Gardner*, 67 Miss. 670, 7 So. 500.

23. *Dewry v. Hopper*, 77 Miss. 744, 27 So. 597.

24. Ann. Code Mississippi, § 1740.

On the trial of exceptions to an administrator's account, the administrator is a competent witness in his own behalf to prove the correctness of his accounts where his testimony involves only matters occurring subsequent to his intestate's death. *McDonald v. McDonald*, 68 Miss. 689, 9 So. 896.

A widow acting as executrix of her deceased husband's estate while incompetent to prove her claim arising from dealings with the decedent, is competent to prove her transactions as executrix of his estate, al-

though the creditors of her husband, with whose representative she is litigating, are dead. *Buckingham v. Wesson*, 54 Miss. 526.

In *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140, it appeared that a husband and wife, each having children by a former marriage, had made an antenuptial contract to the effect that in the case of the death of either, the survivor should hold the share of the estate of the deceased spouse lawfully coming to him, for life only, and that at the death of the survivor it should revert to the estate of the first decedent. The husband died first, and upon the subsequent death of the wife the husband's children claimed a portion of the estate under this agreement; it was held that one of the claimants was a competent witness in his own behalf because the claim in controversy was between the two sets of children and did not "originate during the lifetime of the decedent," the deceased wife.

25. *Georgia*. — *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111; *Byars v. Curry*, 75 Ga. 515; *Bigham v. Coleman*, 71 Ga. 176; *Oatis v. Harrison*, 60 Ga. 535; *Nesbitt v. Parrott*, 84 Ga. 142, 10 S. E. 589.

Maryland. — *Love v. Dille*, 64 Md. 238, 1 Atl. 59, 4 Atl. 290; *Robertson v. Mowell*, 66 Md. 565, 10 Atl. 671; *Chapman v. Smoot*, 66 Md. 8,

B. MEANING OF "PARTY TO THE CONTRACT." — a. *Generally.* A "party to the contract" as used in the statute means the person who negotiated the contract rather than the person in whose interest it was made.²⁶ It refers to the party in whose name the contract was made rather than the real party in interest,²⁷ unless the latter also actually participated in the transaction.²⁸

5 Atl. 462; *Cundorff v. Utz*, 48 Md. 298; *Webster v. LeCompte*, 74 Md. 249, 22 Atl. 232; *Bowie v. Bowie*, Admx., 77 Md. 311, 26 Atl. 405.

Missouri. — *Edwards v. Warner*, 84 Mo. App. 200; *Powell v. Board*, 79 Mo. App. 627; *Anderson v. Hance*, 49 Mo. 159.

Pennsylvania. — *Jackson v. Payne*, 114 Pa. St. 67, 6 Atl. 340; *Shroyer v. Smith*, 204 Pa. St. 310, 54 Atl. 24; *Schwab v. Ginkinger*, 181 Pa. St. 8, 37 Atl. 125.

Virginia. — *Tate v. Tate*, 75 Va. 522; *Morris v. Grubb*, 30 Gratt. 286; *Saunders v. Greever*, 85 Va. 252, 7 S. E. 391.

This rule excludes an entry made by the survivor on an obligation of his to the deceased, after the death of the latter, by which the former was released from a portion of such liability. *Gray v. O'Bear*, 54 Ga. 231.

The Right To Call the Adverse Party is not abridged by the statute disqualifying the surviving party. *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818.

Surviving Party to Judgment. Where a plaintiff in a judgment is dead and her title to the judgment has passed to her husband, the defendant in the execution is incompetent to testify in a proceeding to open the judgment as to matters occurring during the lifetime of the plaintiff. *Cake v. Cake*, 162 Pa. St. 584, 29 Atl. 797.

Applicable Only to Choses in Action. — The rule that where one of the parties to a contract in litigation is dead and unable to testify in relation thereto the policy of the law will close the mouth of the other, applies to suits upon choses in action only; "although it would be difficult perhaps to assign a reason for the distinction, a long line of cases show that the rule has never been held to apply to actions involving the title to real estate." This was the

rule prior to the act of 1869, and that act has not rendered any witness incompetent who was not so before its passage. *Warren v. Steer*, 112 Pa. St. 634, 5 Atl. 4.

Conflict in Cases. — There is hopeless conflict in the Missouri cases interpreting the statute of that state, both in the supreme court and the courts of appeal. See dissenting opinion of Thompson, J., in *Ashbrook v. Letcher*, 41 Mo. App. 374, and also *Weiermueller v. Scullin*, 203 Mo. 466, 101 S. W. 1088. Compare *Walling v. Newton*, 59 Vt. 684, 10 Atl. 827.

In **Maryland** the law has been recently changed so that the disqualification by reason of being an original party to the contract or cause of action in issue no longer obtains. See *Smith v. Humphreys*, 104 Md. 285, 65 Atl. 57; *Justis v. Justis*, 99 Md. 69, 57 Atl. 23; *St. Mark's Evangelical Church v. Miller*, 99 Md. 23, 57 Atl. 644; *Duckworth v. Duckworth*, 98 Md. 92, 56 Atl. 490.

26. *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Brim v. Fleming*, 135 Mo. 597, 37 S. W. 501. But see *Poquet v. North Hero*, 44 Vt. 91.

27. *Brim v. Fleming*, 135 Mo. 597, 37 S. W. 501, holding that where the contract was made in the name of another, the real party in interest who was present at and acted as such other person's agent in the transaction was competent to testify thereto. See also *Standford v. Horwitz*, 49 Md. 525. But see *Lowrys v. Candler*, 64 Ga. 236 (*distinguished* in *National Bank v. Bones*, 75 Ga. 246); and *contra*, *Gabbett v. Sparks*, 60 Ga. 582.

28. The main issue in an action of ejectment brought by the heirs of the grantee named in a certain deed, being whether or not the deed was delivered to such grantee, the defendant, who though not by name a party to the deed, was at the time it

b. *Acknowledging Officer*. — The officer taking the acknowledgment to a contract is not a party thereto nor to the transaction, nor is he an agent of the parties.²⁹

c. *Next Friend*. — A next friend of the survivor is neither a party to the contract nor to the action within the meaning of the statute.³⁰

d. *Predecessor in Interest or Title*. — A party's predecessor in interest or title is not a party to the contract or cause of action in an action involving such title or interest.³¹

e. *Agent*. — Whether an agent is a party to the contract or cause of action is discussed elsewhere in this article.³²

C. TO WHAT ACTIONS AND TRANSACTIONS APPLICABLE. — a. *Death or Incompetency of Party to Transaction*. — (1.) **Generally**. The action must involve some contract or cause of action, one party to which is dead.³³ The mere fact that the other party to the transaction testified to is dead does not disqualify the witness where such transaction does not constitute a contract or cause of action.³⁴

was signed the owner of a perfect equity in the land covered thereby, and participated in the negotiations relating to its being signed by one who held the legal title, and to the disposition made of it after it was signed, was not a competent witness to prove in his own favor facts tending to show its non-delivery. *Harrison v. Perry*, 86 Ga. 813, 13 S. E. 88.

29. An officer before whom a grantor acknowledged a deed is not an agent of the grantee, nor a party to the transaction, so as to allow the grantor to testify, the grantee being dead. *Booth v. McJilton*, 82 Va. 827, 1 S. E. 137.

30. *Trahern v. Colburn*, 63 Md. 99; *Neale v. Hermanns*, 65 Md. 474, 5 Atl. 424; *Kilpatrick v. Strozier*, 67 Ga. 247.

31. *Shrader v. United States Glass Co.*, 179 Pa. St. 623, 36 Atl. 330.

Grantor in Chain of Title. — In the case of *Sowles v. Butler*, 71 Vt. 271, 44 Atl. 355, it was held that a grantor in the defendant's chain of title was not "a party to the contract or cause in issue and on trial within the meaning of § 1237, R. S., which excludes such parties from testifying when the other party is dead."

32. See *infra*, IX, 2, C, c, (3.); IX, 2, G, p.

33. See *Anderson v. Wilson*, 45 Ga. 25; *Payne v. Elyea*, 50 Ga. 395, and *infra*, IX, 2, C, b, (4.).

The Demandant in a Writ of

Dower is competent to testify to prove her husband's death. There is no party to the contract or cause of action who is dead, within the meaning of the statute, so as to preclude her from testifying. It is only upon the death of her husband that her right of action, for withholding from her an estate in land to which she claims title, accrues. *Flynn v. Coffee*, 12 Allen (Mass.) 133.

An action against an administrator for embezzling and failing to inventory notes given by him to the deceased does not involve a contract or cause of action to which the latter was a party, and the administrator is therefore competent in his own behalf. *Stewart v. Glenn*, 58 Mo. 481.

Where a person has assigned his expectancy, he and his assignee are both competent witnesses, in an action by an attaching creditor, to prove the *bona fides* of the assignment, although such creditor has died pending the action and his legal representative been substituted. The contract in question is not one between the witness and the decedent, but between two witnesses who were both living. *In re Kuhn's Estate*, 163 Pa. St. 438, 30 Atl. 215.

34. Thus where a note was given to a husband and wife jointly as part payment for property belonging to her alone, her testimony that her husband had handed her the note the same day was held competent for the

(2.) **The Death of the Assignee** of the contract does not disqualify an original party thereto,³⁵ unless the action involves some cause of action to which such assignee was a party.³⁶

(3.) **Death or Incompetency.**—(A.) **GENERALLY.**—The statutes generally provide merely that the death or insanity of one party to the contract or cause of action shall disqualify the other.³⁷ Incompetency of one party to testify is, however, in one state an additional ground for disqualifying the other.³⁸

(B.) **NATURAL DEATH.**—A statute disqualifying the surviving party to a contract when the other party is dead refers only to natural death.³⁹

(C.) **INSANITY.**—These statutes disqualify one party to the contract or cause of action where the other party is insane at the time of trial.⁴⁰ Mere inability to attend the trial and testify on account

defendant in an action of ejectment by the husband's administrator against the purchaser where the plaintiff's claim was based upon the alleged ownership of the note and the foreclosure of a trust deed given as security therefor on the property in question. "The objection is based upon the theory that she was one party to a contract and he the other; and, as he is dead, she cannot testify. . . . We do not understand the witness to speak of any contract between her and her husband, or even of a gift from him to her. She does say he gave the note to her; but what she means is that he handed it to her, not as a gift, but because it represented her land and belonged to her. This is quite clear from other portions of her evidence." *Magee v. Burch*, 108 Mo. 336, 18 S. W. 1078.

35. A mortgage was made by E. N. S. and his wife of the separate estate of the wife. The mortgagee assigned the mortgage to M., who afterwards died. After the death of M., A. as trustee of her estate advertised the mortgaged property for sale under a power of sale contained in the mortgage. On a bill filed by the mortgagors against the trustee to have certain claims of E. N. S., the husband, against the estate of M., set off against the mortgage debt, it was held that M. not being a party to the original mortgage contract, her death did not render the husband incompetent as a witness to prove that the mortgage debt, while

purporting on its face to be a loan to the wife, was in fact a loan for the use and benefit of the husband. *Spencer v. Almorey*, 56 Md. 551. See also *Payne v. Elyea*, 50 Ga. 395.

Contra.—In an action against the administrator of the vendee's assignee by the vendor to enforce his lien for the purchase price, plaintiff was held incompetent in his own behalf. *Steele v. Brown*, 54 Ga. 498.

36. In an action against the obligor in a bond, by the obligees therein and the representative of their deceased assignee, the defendant is not a competent witness to prove the acts and declarations of the plaintiff obligees occurring prior to the assignee's death, on the theory that the decedent took the bond subject to the equities between the original parties thereto, since the decedent, if alive, might testify to facts showing that he was a *bona fide* holder. *Gamble v. Hepburn*, 90 Pa. St. 439, in which it was contended that the witness was competent because the obligees were both living and competent to testify.

37. Missouri Stat. 1906, § 4652; 2 Purdon's Dig. 1905, p. 1495, § 34(e); Vermont Stat. 1894, § 1237.

38. See Virginia Statute, *supra*, I, 2, B.

39. The statute does not apply to the dissolution of a corporation which is a party to the contract. *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429.

40. See statutes, *supra*, I, 2, B. and *Wagner v. Robinson*, 56 Ga. 47.

of sickness is not insanity where it is not made to appear that the witness is too ill for his deposition to be taken.⁴¹

(D.) INCOMPETENCY FROM "ANY OTHER LEGAL CAUSE." — A statute disqualifying one party to the contract when the other is incompetent to testify by reason of infancy or "any other legal cause," includes the incompetency created by the statute itself.⁴²

b. *Nature of Action.* — (1.) *Generally.* — The statute is not confined in its application to actions in which some representative of the decedent is a party or interested,⁴³ but applies to all actions in which the contract or cause of action is called in question.⁴⁴ The contrary, however, has been held,⁴⁵ and the statute in one state confines the disability to actions against the decedent's representative or successor in interest.⁴⁶

(2.) *Action on Contract With Representative.* — Although the contract

41. *McCormick v. Hickey*, 24 Mo. App. 362.

42. *Mason v. Wood*, 27 Gratt. (Va.) 783, which was an action on a bond by the obligee therein against the surviving obligors. It was held that the death of one of the obligors rendered the obligee incompetent, and the latter's incompetency rendered the other parties to the contract, the surviving obligors, incompetent also. See *Ginter v. Breeden*, 90 Va. 565, 19 S. E. 656.

43. *Hardman v. Nowell*, 81 Ga. 748, 8 S. E. 188 (*distinguishing*, in this respect, that portion of the statute pertaining to actions to which the executor or administrator of the decedent is a party). But see *Brantly v. Mayo*, 80 Ga. 678, 7 S. E. 137; *White v. Cook*, 73 Ga. 164; *Woodruff v. Wilkinson*, 73 Ga. 115; *Turner v. Jordan*, 67 Ga. 605; *Hayden v. McKnight*, 45 Ga. 147. *Compare* *Muller v. Rhuman*, 62 Ga. 332.

Where a county proceeded against its tax collector by issuing executions against him and his sureties for a balance of money alleged to have been collected and not paid, and the collector defended by affidavit of illegality, alleging payment, he was not a competent witness to prove that he made such payment to the county treasurer, who had since died. *Langford v. Commissioners*, 75 Ga. 502.

44. *Saetelle v. Metropolitan Life Ins. Co.*, 81 Mo. App. 509. See *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111; *Miles v. Groover*, 73 Ga. 808.

Statute Not Confined to Actions to Which Representative of Decedent Is Party.

— "The disability of one of the parties to the contract or cause of action in issue and on trial, where the other party is dead and the survivor is a party to the suit, is co-extensive with every occasion where such instrument or cause of action may be called in question." *Chapman v. Dougherty*, 87 Mo. 617 (*overruling* *Bradley v. West*, 68 Mo. 69); *Johnson v. Burks*, 103 Mo. App. 221, 77 S. W. 133; *Baker v. Reed*, 162 Mo. 341, 62 S. W. 1001.

When one party to a contract is dead, and contract has been assigned, so that the estate, or heirs, have no interest in it, the assignee is protected by the statute. In all cases where the contract is the cause of action in issue and on trial, the survivor cannot testify in his own behalf. *Insurance Co. v. Wells*, 53 Vt. 14 (*distinguishing* *Taylor v. Finley*, 48 Vt. 78, and *reaffirming* *Hollister v. Young*, 41 Vt. 156).

45. See *Downs v. Belden*, 46 Vt. 674.

In an action between one claiming under an assignment of insurance and other persons claiming under the same assignment, he is competent to testify in his own behalf as to the original transaction between himself and deceased, the deceased's estate being only incidentally interested. *Diffenbach v. New York Life Ins. Co.*, 61 Md. 370.

46. 2 *Purdon's Dig.* 1905, § 1495,

on which the action is based was made with the representative, if the adverse party relies upon a contract or transaction with the decedent he is not competent in his own behalf to prove it.⁴⁷

(3.) **Probate Proceedings.** — (A.) **GENERALLY.** — The statute applies to probate proceedings in so far as they involve a contract or cause of action to which the decedent was a party.⁴⁸

(B.) **PROBATE OF WILL.** — A proceeding to probate a will does not involve a contract or cause of action to which the decedent was a party,⁴⁹ nor one to which the executor and beneficiaries were necessarily parties.⁵⁰ The cause of action is between living parties,⁵¹

§ 34 (e), and see *Davis v. Hawkins*, 163 Pa. St. 228, 29 Atl. 746.

47. In a suit upon a note, made payable to an executor, the defendant is incompetent to testify in his own behalf that such note was given for usurious interest reserved of defendant by the payee's testator, even though such fact was within the knowledge of the payee at the time such transaction took place. *Bacon v. Robinson*, 61 Mass. 579.

48. *Ela v. Edwards*, 97 Mass. 318.

The caveator is not a competent witness to prove a contract with the deceased, and his own compliance therewith, where such contract is the basis of his objection to the year's support of the widow as assigned by the appraisers. *Robson v. Harris*, 82 Ga. 153, 7 S. E. 926.

49. *Martz's Exrs. v. Martz's Heirs*, 25 Gratt. (Va.) 361; *Shailer v. Bumstead*, 99 Mass. 112. See *Hamilton v. Hamilton*, 10 R. I. 538; *Schull v. Murray*, 32 Md. 9. But see *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522, apparently contrary.

50. *Harris v. Harris*, 53 Ga. 678.

In the case of *Martz's Exrs. v. Martz's Heirs*, 25 Gratt. (Va.) 361, it was held that a will is not a contract, and an executor or legatee thereunder is not a party to it in the sense of the statute. See *Harris v. Pue*, 39 Md. 535; *Schull v. Murray*, 32 Md. 9.

51. In an action contesting the probate of a will, one of the legatees under the will was admitted as a witness, on behalf of the proponent, and was allowed to testify upon the matter in issue in the case; the evidence of the contestant tended to show that the witness was one of the parties who exercised the alleged

undue influence over the testatrix, if any were exercised, and they insisted that she was a party to the issue, as she was a beneficiary under the will, and that the deceased was the other party thereto, and that the witness was not competent by reason of the provisions of the statute. In holding that the witness was competent, the court said: "This is not a case 'where one of the original parties to the contract or cause of action in issue and on trial is dead.' There was no cause of action until the death of the testatrix. The testatrix by her legal representatives is not a party to these proceedings or in any way interested therein, directly or indirectly. The controversy is between living parties, who, on the one side, are the legatees under the will, represented by the proponents, and on the other side are the heirs at law of the testatrix. The former claim to take the estate under the will, represented by the proponents, and on the other side are the heirs at law of the testatrix. The former claim to take the estate under the will, and the latter under the statute regulating the descent of estates, insisting that the alleged will is a nullity. The act of the testatrix in making the alleged will is only the subject matter of the investigation. The proceedings to have the will admitted to probate are in the nature of proceedings in rem and establish the relation of all parties to the corpus of the estate. The gist of the action is not changed by the fact that the trial may indirectly involve a determination of the relations of the witness to the testatrix." *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

and the proceeding itself is in the nature of a proceeding *in rem*.⁵²

(C.) PROCEEDINGS TO DISTRIBUTE ESTATE. — On a petition for distribution of a decedent's estate, the decedent is not an original party to the cause of action.⁵³ Where, however, the alleged right to share in the estate depends upon a contract with the decedent, the claimant is incompetent.⁵⁴

(4.) Third Party Claim Case. — In a third party claim case the estate of the deceased judgment debtor is not interested in or a party to the issues between the judgment creditor and the claimant,⁵⁵ and as against each other both the latter parties are competent as to transactions with the decedent.⁵⁶ In such a case, however, where the judgment creditor is dead the surviving judgment debtor is not competent for the claimant to prove a collusive agreement between himself and the decedent,⁵⁷ though in Pennsylvania the rule is to the contrary since the interest of the witness is not adverse to the right of the decedent as required by the statute.⁵⁸ The surviving

In re Buckman's Will, 64 Vt. 313, 24 Atl. 252.

52. A will contest is in the nature of a proceeding *in rem* and *ex parte*, and although the heirs and devisees are made nominal parties, the statute does not apply, all persons being competent witnesses. *Garvin's Admr. v. Williams*, 50 Mo. 206, following *Shailer v. Bumstead*, 99 Mass. 112. But see *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522, apparently contrary.

53. *Hoyt v. Davis*, 30 Mo. App. 309, a petition by the decedent's widow for her distributive share of the estate. *Thompson, J.*, in approving the overruling of an objection to her competency, says: "No cause of action such as that upon which the objection proceeds existed while her husband was alive. The cause of action being a right to a distributive portion of his estate after his death and after the satisfaction of the demands of creditors, did not arise until the happening of these two events. Her deceased husband is in no sense one of the original parties to the cause of action within the meaning of the statute; but, instead of claiming against him, she is claiming under him. In this respect her position is entirely different from that of a creditor suing to establish a contested demand against the estate of a deceased person."

54. *Denison v. Denison*, 35 Md.

361, where person claiming as the decedent's widow was held incompetent to prove her alleged marriage. Compare *In re Crosetti's Estate*, 211 Pa. St. 490, 60 Atl. 1081.

55. The defendant in *fi. fa.* is not a party to the issue between the claimant and the plaintiff, and on the trial of the claim case his death does not prevent certain third parties from testifying that they made a trade with him concerning the property in controversy. *Woodruff v. Wilkinson*, 73 Ga. 1015.

56. *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1063; *Powell v. Watts*, 72 Ga. 770.

57. One who purchases property from a defendant in *fi. fa.* with knowledge of the judgment, cannot long after the death of the plaintiff and in a claim case to which his administrator is a party, use the defendant in *fi. fa.* as a witness to prove there was no real debt on which the judgment was founded, but that the judgment was a collusive arrangement between the plaintiff and the defendant to cover the defendant's property with a pretended lien. If, under the circumstances, the purchaser can attack the judgment at all, the defendant in *fi. fa.* is not a competent witness in his behalf for that purpose. *Prendergast v. Wiseman*, 80 Ga. 419, 7 S. E. 223.

58. *Smith v. Rishel*, 164 Pa. St. 181, 30 Atl. 239.

claimant is not competent against the representative of such deceased judgment creditor.⁵⁹

(5.) **Action To Set Aside Decedent's Deed.** — It has been held that the statute does not apply to an action to set aside a deed brought after the death of the grantor therein, since no contract or cause of action to which the deceased was a party is in issue and on trial, the cause of action being wholly between living parties.⁶⁰ The general rule, however, appears to be to the contrary.⁶¹

(6.) **Action for Specific Performance.** — In an action for specific performance of a contract with the decedent, the survivor is not competent in his own behalf.⁶²

(7.) **Tort Actions.** — (A.) **GENERALLY.** — The disqualifying statute applies not only to actions on contracts, but also to tort actions.⁶³

(B.) **ACTION FOR WRONGFUL DEATH.** — The statute has no application to an action for wrongful death since the cause of action is one to

59. *Smith v. Rishel*, 164 Pa. St. 181, 30 Atl. 239.

60. In an action by creditors of a decedent to set aside a deed executed by the decedent on the ground of fraud, the grantees in such deed are not rendered incompetent as witnesses in their own behalf under § 4652 Rev. Stat. 1899, providing that "where one of the original parties to the contract or cause of action in issue or on trial is dead," etc., the other party to the contract or cause of action is incompetent in his own favor. It was held that there was no controversy between the decedent or his representatives and the grantees, nor was the latter's testimony as to any matter which the deceased or his representatives could controvert, since they would be estopped from setting up the fraud; nor was the plaintiff claiming as assignee of any rights procured by the decedent under the deed or the consideration agreed to be paid thereby. The suit was not upon the contract evidenced by the deed, and hence that contract, in the meaning of the statute, was not "in issue and on trial." But the contract or cause of action in issue or on trial was whether the deed was made to defraud creditors, and in this controversy both parties, the creditors and the grantee, are living. The court after *distinguishing* *Chapman v. Daugherty*, 87 Mo. 617, 56 Am. Rep. 469, and *overruling* *Bradley v. West*, 68 Mo. 69, says the grantee "is not

denying the deed, or any obligation it imposes, neither is her evidence necessary to prove its execution or delivery. She simply denies the fraud with which plaintiff charges her, and, as to that issue, both the plaintiff and defendant are alive. The proof of the payment of the consideration involves no question of veracity between her and her father (the decedent)." The court *cites* and *quotes* from *Downs v. Belden*, 46 Vt. 674 (followed in *Bannister v. Ovitt*, 64 Vt. 580, 24 Atl. 1117) the statute in that state being similar to the one in Missouri, and finally concludes: "The cause of action being, then, in favor of living plaintiffs, and against a living defendant, we think it must be held that no 'opposite party' to Mrs. Smith (the grantee) is dead, and that she was a competent witness." *Stam v. Smith*, 183 Mo. 464, 81 S. W. 1217.

61. *Parker v. Ballard*, 123 Ga. 441, 51 S. E. 465; *Crothers v. Crothers*, 149 Pa. St. 201, 24 Atl. 190; *King v. Humphreys*, 138 Pa. St. 310, 22 Atl. 19.

62. *Polk v. Clark*, 92 Md. 372, 48 Atl. 67; *Cross v. Iler*, 103 Md. 592, 64 Atl. 33.

Contract To Make a Will in favor of claimant to pay for services rendered. *Copeland v. Copeland*, Admsrs. (Va.), 24 S. E. 218.

63. *Irwin v. Nolde*, 164 Pa. St. 205, 30 Atl. 246, *holding* that it applied to an action of trespass.

which the decedent was not a party; hence the defendant whose act caused the death is a competent witness in his own behalf.⁶⁴

(8.) **Title Claimed Through Decedent.** — Where title or ownership claimed through the decedent is directly in issue, the person so claiming is not competent in his own behalf as to a transaction with the decedent;⁶⁵ otherwise, however, where such title or ownership is only incidentally or collaterally involved in the case.⁶⁶

c. *Contract and Cause of Action.* — (1.) **In Issue and on Trial.**

(A.) **GENERALLY.** — The statute applies only to a contract or cause of action which is in issue and on trial, even though it does not expressly so state,⁶⁷ and hence does not disqualify a party to a contract or transaction with a decedent which is not in issue⁶⁸ or which is

64. *McEwen v. Springfield*, 64 Ga. 159.

65. *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111.

In an action of ejectment, where the plaintiff claimed title under one who had a deed from the defendant, but who was dead at the time of the trial, the defendant was incompetent to show that such deed was not delivered to the deceased. *Niles v. Groover*, 73 Ga. 808.

66. See *infra*, IX, 2, C, c, (1.), (A.), and *Scott v. Mathis*, 72 Ga. 119; *White v. White*, 71 Ga. 670; *White v. Cook*, 73 Ga. 164.

67. *Robertson v. Mowell*, 66 Md. 565, 10 Atl. 671; *Cooke v. Cooke*, 29 Md. 538; *Granger v. Bassett*, 98 Mass. 462.

Where a surety of a promissory note has paid it, in an action by him against the estate of a deceased surety on the same note to recover the amount so paid, the maker is a competent witness to prove that the plaintiff was not a co-surety, but only a surety for the deceased. The contract in issue is between the co-sureties, and to this contract the maker of the note is not a party. *Canfield v. Bentley's Estate*, 60 Vt. 655, 12 Atl. 655.

68. *Golden v. Tyer*, 180 Mo. 196, 79 S. W. 143; *Gunn v. Thurston*, 130 Mo. 339, 32 S. W. 654; *White v. White*, 71 Ga. 670 (*distinguished* in *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111); *Scott v. Mathis*, 72 Ga. 119 (*distinguished* in *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111). Compare *Davis v. McLester*, 65 Ga.

132; *Lowrys v. Candler*, 64 Ga. 236.

The fact that one party claims under a deed from the decedent does not serve to disqualify the other, where such contract is not in issue. *Golden v. Tyer*, 180 Mo. 196, 79 S. W. 143.

In an action of ejectment by a widow against heirs of decedent who are children of a subsequent void marriage, but not illegitimate under the statute, the plaintiff is competent to prove her marriage with decedent, this not being a contract in issue and on trial. *Green v. Green*, 126 Mo. 17, 28 S. W. 752, 1008.

In trover for a wagon it appeared that defendant bought it of the administrator of the estate of the original owner. Plaintiff offered to testify that he bought it of the original owner in the latter's lifetime. It was held that although conversion was the gist of the action, yet, as the fact of conversion depended on the fact of purchase by plaintiff, and as the administrator was bound to defend title in defendant, and so was interested in the event of the suit, the alleged contract of sale from the original owner to the plaintiff was "in issue and on trial" within the meaning of the statute, and that plaintiff was therefore an incompetent witness. *Hall v. Hambet*, 51 Vt. 589. But see *Walling v. Newton*, 59 Vt. 684, 10 Atl. 827.

Where a plaintiff makes an affidavit for the purpose of obtaining an attachment against an administrator, on the ground that he is removing, or about to remove, the

only incidentally or collaterally involved in the proceeding.⁶⁹

goods of his intestate without the county, and the administrator files a traverse to the affidavit, the plaintiff is a competent witness upon the trial of the issue thus formed, even though the contract, which is the foundation of the plaintiff's claim, was made with the intestate. *Ouzts v. Seabrook*, 47 Ga. 359.

69. *Smith v. Wood*, 31 Md. 293; *Horne v. Frazier*, 65 Md. 1, 4 Atl. 133; *Downs v. Belden*, 46 Vt. 674; *Bank of Schofield*, 39 Vt. 590; *Morse v. Low*, 44 Vt. 561; *Insurance Co. v. Wells*, 53 Vt. 14; *Stevens v. Joyal*, 48 Vt. 291.

Testimony as to Collateral Matters Not Excluded.—“The exception should not be given effect beyond the fair scope of its language. This confines the retained disqualification to testimony bearing directly upon the contract or cause of action in issue and on trial. It does not extend to matters collateral to such contracts or cause of action.” *Farrington v. Jennison*, 67 Vt. 509, 32 Atl. 641.

While a party to the contract in issue and on trial would be disqualified by the statute by reason of the other party being dead, from testifying to such contract, he might be a witness to testify to another contract or transaction, between himself and the deceased person, which comes into the case collaterally, and as a fact bearing collaterally upon the contract or cause of action in issue and on trial, and which has the effect of establishing that the contract in issue and on trial never existed. *Morse v. Lowe*, 44 Vt. 561.

Meaning of Contract or Cause of Action.—“By the words ‘contract or cause of action in issue and on trial’ . . . the legislature evidently intended such contract or cause of action as was to be enforced by the proceeding; that in regard to which an issue was to be formed, and a trial had, where the rights of the parties to the contract or cause of action would be determined by the result.” *Bank v. Scofield*, 39 Vt. 590; *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654.

In *Cole v. Shurtleff*, 41 Vt. 311, an

action of book account, it appeared that the plaintiff had married the defendant's daughter, and the defendant claimed that, after their marriage, the plaintiff agreed to pay him for some articles of clothing which he had bought for his daughter before her marriage, with the understanding that she was to pay for them. The action was brought after the death of plaintiff's wife. It was held that defendant was a competent witness, the issue being upon the plaintiff's agreement with the defendant, not upon the deceased wife's agreement. The court says: “It is true the agreement between the defendant and the plaintiff's wife, found by the auditor, by which she was under obligation to pay the defendant, was material, but the issue in the action and on trial was not upon that agreement. That was whether or not the plaintiff undertook, and promised the defendant, to pay him for the articles of clothing in controversy. Without such promise or undertaking no liability whatever, upon the facts, was resting upon the plaintiff, by which he was under a legal obligation to pay the defendant his claim. The contract of Mrs. Cole, the defendant's daughter, with her father, the defendant, was, then, simply a fact bearing upon the plaintiff's liability and the defendant's right of recovery, but collateral to the plaintiff's contract or promise, upon which the defendant's right of recovery necessarily depended. If this is so, the contract of the plaintiff's wife was in question before the auditor only as every collateral or incidental fact is which may have a bearing upon the ultimate question to be determined in the cause, but it does not directly involve the party's liability, or right of recovery. As the promise relied upon by the defendant, was made as between these parties to the action, and neither being dead, the disqualification contemplated by the statute, does not apply.” *Compare Hollister v. Young*, 41 Vt. 156.

Action of Trover.—In an action of trover for the conversion of personal property, where the defendant

The "contract in issue and on trial" means the one which is in dispute and relates as well to the substantial issue made by the evidence as to the formal issue made by the pleadings.⁷⁰ It does not, however, include matters about which there is dispute in the testimony but which are not on trial.⁷¹

(B.) BREACH OCCURRING AFTER DEATH. — Although the breach constituting the cause of action occurs after the decedent's death, the surviving party is incompetent in his own behalf.⁷²

(C.) IMPLIED CONTRACT. — The statute covers implied as well as express contracts.⁷³

claimed to derive title to it as legatee under his father's will, the plaintiff, claiming to have bought it of another and left it with the testator merely for his own use, is a competent witness in his own behalf. In trover where the parties claim title from different sources, the plaintiff's title can in no sense be the cause of action in issue. The plaintiff claims under no contract with the decedent. Any arrangement he might have made with the latter as to the use or possession of the property would be collateral to the cause of action in issue. *Walling v. Newton*, 59 Vt. 684, 10 Atl. 827 (*recognizing* an irreconcilable conflict in previous cases interpreting the statute). But see *Hall v. Hambet*, 51 Vt. 589.

70. *Pember v. Condon*, 55 Vt. 58; *Merrill v. Pinney*, 43 Vt. 605; *Holister v. Young*, 42 Vt. 403.

71. In a hearing on a probate appeal from a decree accepting the account of an executor, he is a competent witness to prove delivery to the deceased of money held by him for her in her lifetime as executor of another decedent. The court said: "The test of competency is 'the contract or cause of action in issue and on trial,' not the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction, being also a party to the suit, is not admitted as a witness at all; and cannot testify to any fact in the case. Otherwise he is admitted as a witness; and being so admitted, the statute contains no restriction nor limitation as to the facts to which his testimony may or may not be di-

rected. His competency must be determined in advance by the nature of the controversy and the questions in issue. If, upon that test, he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which proved to be involved in or to affect the matter in dispute. In the trial of an issue upon the personal claim of an executor or administrator against the estate under Gen. Sts. c. 9, §§ 26, 27, the proviso would undoubtedly exclude him from testifying. See *Ela v. Edwards*, 97 Mass. 318. The claim of a debt due from the executor to his testatrix was not put in issue by these proceedings, and did not appear to be on trial. It became a disputed fact in the course of the testimony of the executor who had been properly admitted as a witness generally in the case." *Granger v. Bassett*, 98 Mass. 462.

72. Where the statute provides that, when an original party to a contract or cause of action is dead, or when an executor or administrator is a party to the proceeding, neither party shall be admitted to testify on his own offer, in an action by the lessee against the administrator of the lessor to recover damages for a breach of the lease, the plaintiff is not competent to testify on his own offer, although the breach occurred after the death of the lessor. *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466.

73. *Wagner v. Robinson*, 56 Ga. 47.

In an action to recover money alleged to have been received for and on behalf of a deceased person where

(D.) **TRIPARTITE AGREEMENT.** — Where two of the parties to a tripartite agreement which is in issue and on trial are dead, the survivor is not competent to prove such agreement.⁷⁴

(2.) **Cause of Action.** — (A.) **GENERALLY.** — An original party to the cause of action in issue and on trial is incompetent in his own behalf.⁷⁵ The substantial and not the technical cause of action determines the competency of the witness.⁷⁶

(B.) **INCLUDES DEFENSE.** — "Cause of action" as used in the statute includes a defense.⁷⁷

(C.) **APPLIES TO ALL ISSUES.** — Where the cause of action embraces several contracts or issues, the statute applies to each issue, but some of the issues or contracts may fall within exceptions to the disqualification of the statute.⁷⁸

(3.) **Transaction With Living Agent of Decedent.** — (A.) **GENERALLY.** Where the transaction in question was between the witness and the decedent's agent, still living and competent to testify, the statute is held not to apply because the case is not within its reason and spirit.⁷⁹

the plaintiff had proved the delivery of the money to the defendant pursuant to an order from the decedent, and introduced a receipt executed by the defendant, it was held that the latter was not a competent witness in his own behalf to contradict or explain away these circumstances raising an implied contract on his part to account for the money. *Walker v. Taylor*, 43 Vt. 612.

74. *Randall's Admr. v. Randall*, 664 Vt. 419, 24 Atl. 1011.

75. *Johnson v. Quarles*, 46 Mo. 423; *Harrison v. Perry*, 86 Ga. 813, 13 S. E. 88.

76. Thus it is held, upon a foreclosure proceeding, that the original payee of a mortgage note was a competent witness to prove that the deceased payor and the assignee of the mortgage substituted a new note for an old one. *Richardson v. Wright*, 58 Vt. 367, 5 Atl. 287.

77. *Nugent v. Curran*, 77 Mo. 323. See also *Bacon v. Robinson*, 61 Miss. 579.

78. Thus, although the payee is still living and competent to testify, the maker of a note is not competent, in an action thereon by the endorsee's executor, to prove the decedent's alleged admission that he purchased after maturity, purchase for value and before maturity being an essen-

tial fact in the cause of action. *Jones v. Burden*, 56 Mo. App. 199.

79. *Freeman v. Bigelow*, 65 Ga. 580; *Weary v. Wittmer*, 77 Mo. App. 546; *Reed v. Crissey*, 63 Mo. App. 184. But see *Lewis v. Weisenham*, 1 Mo. App. 222.

The Statutes do not expressly make this exception in that portion of them dealing with the competency of the surviving party to the contract or cause of action; that portion however, which disqualifies the adverse party in actions in which the other party is an executor or administrator makes an exception in case the contract in issue was originally made with a person still living and competent to testify (as to which, see *supra*, VI, 7, B), and this exception has been treated as applying to both classes of cases. *Roeder v. Shyrook*, 61 Mo. App. 485.

Statements Made by Agent. — It has been held that while a party may testify to a contract made with the agent of deceased, he cannot testify to what the agent told him as to the decedent's instructions to the agent in relation to another contract between the witness and decedent. *Freeman v. Biglow*, 65 Ga. 580, where the witness was held improperly allowed to testify what the agent told him as to his instructions, such al-

(B.) AGENT'S INTEREST ADVERSE TO DECEDENT. — Where, however, the agent is interested adversely to the decedent and his estate and his testimony on behalf of the latter therefore not fully reliable, the reason for the rule making the other party to the transaction competent fails and the rule ceases.⁸⁰

(4.) Transaction With Agent Since Deceased. — Whether the death of the agent who acted for one party to the contract or transaction in issue disqualifies the other party, the courts are not agreed; some holding that even in such a case the agent is not to be regarded as a party to the contract;⁸¹ while others hold to the contrary on the ground that the decedent alone can contradict the other party's testimony.⁸² Thus it has been held that the death of the officer or agent who acted for a public⁸³ or private⁸⁴ corporation, or for a partnership⁸⁵ in the contract or transaction in question does not

leged statement by the agent containing an admission of the decedent as to another contract between witness and decedent which witness was endeavoring to establish. But see *Clark v. Bell*, 61 Ga. 147.

80. In an action on a note against the maker it appeared that a third person not a party to the suit was both a surety for the defendant maker and also acted as the deceased payee's agent in the transaction. The defendant offered himself as a witness in his own behalf and was excluded upon the ground that the payee was dead. It was contended by the defendant that he was rendered competent by the exception to Rev. Stat. 1899, § 4652, providing that if the transaction was had with an agent of the deceased party and the agent is still living the other party may testify. The court held, however, that the reason underlying the exception did not apply in the present case, owing to the fact that the agent being also an obligor on the note was interested adversely to the plaintiff and would therefore be an incompetent witness, thus making the defendant incompetent also. The reason for the exception to the disqualifying rule is that the agent being alive the parties to the transaction are on terms of equality the same as if they were both alive. "So it must follow that where from some cause the agent is not competent, the exception permitting the surviving party to testify cannot be allowed simply

for the reason that the reason for allowing him to do so does not exist." *Lyngar v. Shafer* (Mo. App.), 102 S. W. 630; citing *Leech v. McFadden*, 110 Mo. 584, 19 S. W. 947.

81. *South Baltimore Co. v. Muhlbach*, 69 Md. 395, 16 Atl. 117; *Spencer v. Trafford*, 42 Md. 1; *Poquet v. North Hero*, 44 Vt. 91; *Kelly v. Board*, 75 Va. 263; *Sargeant v. National Life Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351.

82. *Robertson v. Reed*, 38 Mo. App. 32; *Hollmann v. Lange*, 143 Mo. 100, 44 S. W. 752; *Wilden v. McAllister*, 91 Mo. App. 446; *Vandergrif v. Swinney*, 158 Mo. 527, 59 S. W. 71; *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Parish v. Weed S. M. Co.*, 79 Ga. 682, 7 S. E. 138; *Archer v. Greer*, 36 Ga. 107.

83. *Poquet v. North Hero*, 44 Vt. 91 (*holding* that a town selectman, since deceased, was not a party to a contract made by him on behalf of the town); *Kelly v. Board*, 75 Va. 263.

84. *South Baltimore Co. v. Muhlbach*, 69 Md. 395, 16 Atl. 117; *Sargeant v. National Life Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351 (*citing American Life Ins. & Tr. Co. v. Shultz*, 82 Pa. St. 46). This was an action upon a life insurance policy. At the trial the agent who effected the policy was dead. The plaintiff was held to be a competent witness in his own behalf as to a verbal contract between himself and the deceased agent.

85. *Spencer v. Trafford*, 42 Md. 1.

disqualify the other party thereto. On the other hand it has been held that the death of such corporate⁸⁶ or partnership⁸⁷ agent does disqualify the person with whom he contracted. And the same rule has been applied to contracts or transactions with an attorney since deceased.⁸⁸ The disqualification, however, in any event extends only to matters occurring between the witness and decedent.⁸⁹ The statute sometimes provides that the death of the agent disqualifies the other party to the contract.⁹⁰

(5.) **Part Performance Under Contract.** — The disability extends to testimony as to acts constituting part performance under the contract.⁹¹

(6.) **Payment.** — Where payment to the deceased of an obligation sued upon is the matter in issue, the person who made the alleged payment is not competent to prove it,⁹² though it is also held to

86. *Georgia.* — *Parish v. Weed S. M. Co.*, 79 Ga. 682, 7 S. E. 138.

Missouri. — *Central Bank v. Thayer*, 184 Mo. 61, 82 S. W. 142; *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Nelson v. Kansas City, F. S. & S. R. Co.*, 66 Mo. App. 647; *McCormick Harv. Mach. Co. v. Heath*, 65 Mo. App. 461; *Aultman, Miller & Co. v. Adams*, 35 Mo. App. 503; *Nichols, Shepherd & Co. v. Jones*, 32 Mo. App. 657; *Sidway v. Missouri Land & L. Co.*, 163 Mo. 342, 63 S. W. 705.

87. *Stanton v. Ryan*, 41 Mo. 510; *Butts v. Phelps*, 79 Mo. 302.

88. *Odom v. Gill*, 59 Ga. 180.

Where an affidavit of illegality was interposed to the levy of a *fi. fa.* on the ground that it had been paid, the defendant in *fi. fa.* was not a competent witness to prove that such payment was made by him to the counsel for plaintiff in *fi. fa.*, such counsel having since died. *Doerflinger v. Nelson*, 76 Ga. 101. *Compare Turner v. Jordan*, 67 Ga. 605.

One of the makers of a note is not a competent witness to prove that when it was delivered to the attorney (since deceased) of the payees, neither of the payees being present, there was a parol understanding with the attorney that unless the payees did certain things the note was not to pass from the attorney to his clients, the payees, but was to be returned to the makers. *Johnson v. Hart*, 82 Ga. 767, 9 S. E. 1110.

89. While a party is not compe-

tent to prove an express contract with an agent, since deceased, of a corporation, he is competent to prove the service rendered, the reasonable value thereof, the acceptance of the same, the demand and non-payment, with other facts and circumstances raising an implied contract. *Nelson v. Kansas City, F. S. & S. R. Co.*, 66 Mo. App. 647.

90. The treasurer of a corporation with whom the contract in question was made is an agent under such a statute. *Rothstein v. Siegel, Cooper & Co.*, 102 Ill. App. 600.

91. *Sitton v. Shipp*, 65 Mo. 297.

A party claiming land under an alleged parol contract to convey by one since deceased cannot, in support of his claim of part performance, testify as to alleged improvements made by him after the alleged parol purchase. *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209; *Huggins v. Huggins*, 71 Ga. 66. But see *Clark v. Bell*, 61 Ga. 147.

92. *Chancey v. Carrigan*, 53 Ga. 84; *Mell v. Barner*, 135 Pa. St. 151, 19 Atl. 940. See also *Goddard v. Williamson's Admr.*, 72 Mo. 132; *Farmers' Mut. F. Ins. Co. v. Wells*, 53 Vt. 14.

Where one partner sold his interest in a note, payable to the firm, to the other partner, and afterwards died, in a suit by the transferee the makers were not competent witnesses to show payment to the deceased partner. *McWhorter v. Sell*, 66 Ga. 139.

the contrary.⁹³ In an action for money paid to the plaintiff's use, the person making the alleged payment to the decedent cannot testify to such payment.⁹⁴ A disinterested witness, however, is not disqualified.⁹⁵

Non-Payment by the decedent cannot be proved by the surviving party to the contract.⁹⁶

D. PERSONS DISQUALIFIED. — a. *Generally.* — The only person disqualified under this sort of a statute is the surviving party to the contract or cause of action in issue.⁹⁷ But it has been held in Virginia, however, that under the statute the disability of the surviving party also disqualifies the adverse parties to the action.⁹⁸

b. *Meaning of "Other Party."* — The "other party," as used in a statute providing that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, the "other party" shall not testify in his own favor, etc., means the other party to the contract or cause of action and not the other party to the record.⁹⁹

93. In an action on a bond, the obligee being dead, a witness, before the action was brought received from one of the obligors in the bond the money necessary to pay it, and bound himself to do so. "At the trial he was offered as a witness for the defendants to prove the fact of payment by him in accordance with his agreement. The plaintiff moved to exclude his testimony, on the ground that the obligee in the bond was dead, and because the witness was interested in the result, inasmuch as if payment was not established, the witness would have to pay the debt himself, the plaintiff insisting that the transaction under investigation was, under the plea of payment, the fact of payment. But it was held that the subject of investigation was the bond upon which the action was founded, and not the fact of payment, and that the witness, not having been a party to the original transaction was competent to testify under the statute, notwithstanding the death of the obligee in the bond and his own interest in the result of the action." *Wager v. Barbour*, 84 Va. 419, 4 S. E. 842.

94. *Daniel v. Brown*, 72 Ga. 143. See also *Shepherd, H. & Co. v. Crawford*, 71 Ga. 458; *Doerflinger v. Nelson*, 76 Ga. 101.

95. In a suit on a promissory

note, the wife of the maker was not rendered incompetent to testify that she had paid it for her husband, by reason of the death of the payee. *Rush v. Ross*, 65 Ga. 144.

96. *Hays v. Callaway*, 58 Ga. 288.

97. See following sections, and *Chisholm v. Turner*, 36 Ga. 565.

The fact that one party to the action is disqualified by the statute does not make the other incompetent where he is otherwise competent. *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562.

98. *Ginter v. Breeden*, 90 Va. 565, 19 S. E. 656, in which this broad rule is based on *Mason v. Wood*, 27 Gratt. (Va.) 783. The latter case, however, merely held that in an action on a bond the death of one obligor disqualified the plaintiff obligee as a witness against the surviving obligors, defendants, under that portion of the statute providing that where one of the parties to the contract is incompetent to testify for *any legal cause* the other party is incompetent. The plaintiff being incompetent by reason of the statute, the defendants, being the other parties to the contract, were also disqualified.

99. *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Chisholm v. Turner*, 36 Ga. 565; *Kenyon v. Peirce*, 17 R. I. 794, 24 Atl. 825;

It seems, however, that the witness must also be a party to¹ or interested in² the action, except where the statute disqualifies him in behalf of those claiming under him.³ The fact, however, that a surviving party to the contract or cause of action, who is a necessary party to the action, has been omitted from the record does not render him competent.⁴

c. *Persons Not Parties to the Contract* or cause of action are competent,⁵ even though parties to and interested in the event of the action,⁶ unless the statute disqualifies them because they are

Carey v. Fairchild (Pa.), 9 Atl. 328. See Robertson v. Mowell, 66 Md. 530, 8 Atl. 273; Schull v. Murray, 32 Md. 9; Carler v. Hale, 32 Gratt. (Va.) 115; Barnes v. Dow, 59 Vt. 530, 10 Atl. 258.

"What is meant, in this clause, by the words 'the other party?' I think it is very clear that they refer, and can only refer, to the other party to the original contract or cause of action. This is certainly required by the grammatical construction of the sentence, and certainly such a construction would be most natural and obvious. . . . The statute contains no intimation that the 'other party' referred to is necessarily a party to the record. The language of the statute is 'the other party,' i.e., the other original party to the contract or cause of action shall not be admitted to testify in his own favor where death has precluded the other original party from an equal opportunity. Whether party to the record or not makes no difference as to the statutory incompetency of the witness. He is prohibited from testifying in his own favor, in any case whatsoever, where the other original party to the contract or cause of action in issue and on trial is dead. The letter of the statute makes no distinction as to the status of the witness on the record. The rule of his exclusion is as broad as the contract or cause of action in issue and on trial, and his testimony in his own favor; and the reason, policy, and spirit of the rule keeps pace with its letter." Meier v. Thiemann, 90 Mo. 433, 2 S. W. 435. This case, however, apparently holds that an interested witness, though not a party to the contract or cause of

action, is incompetent, and has been so interpreted (McCormick v. Hickey, 24 Mo. App. 362), but in this respect is contrary to the later cases. See *infra*, IX, 2, D, e, (1.).

A bill in equity by a widow against the grantee in a voluntary conveyance by her husband, since deceased, to set aside the deed, does not involve a contract or cause of action to which the complainant is a party, and she is therefore competent in her own behalf. Sanborn v. Lang, 41 Md. 107.

1. See Granger v. Bassett, 98 Mass. 462; Robertson v. Mowell, 66 Md. 530, 8 Atl. 273; Ela v. Edwards, 97 Mass. 318; Looker v. Davis, 47 Mo. 140. *Contra*. — Carey v. Fairchild (Pa.), 9 Atl. 328.

2. See *infra*, IX, 2, D, e, (2.).

3. See *infra*, IX, 2, E, g, (2.).

4. In a proceeding to obtain an account of partnership affairs, all the partners are necessary parties, and a partner though not a party of record, cannot testify in reference to the partnership transactions against his deceased co-partner's representatives. McKaig v. Hebb, 42 Md. 227. See Flournoy v. Wooten, 71 Ga. 168.

5. Hall v. Rixey, 84 Va. 790, 6 S. E. 215; Virgin v. Wingfield, 54 Ga. 451; Looker v. Davis, 47 Mo. 140. See Klopfer v. Levi, 33 Mo. App. 322.

6. Robertson v. Mowell, 66 Md. 530, 8 Atl. 273. But see Meier v. Thiemann, 90 Mo. 433, 2 S. W. 435; Muller v. Rhuman, 62 Ga. 332.

A party in interest and on the record is not incompetent to testify in relation to a contract to which he is not a party, though one of the parties to the contract is dead. Knick v. Knick, 75 Va. 12.

claiming under one who would himself be an incompetent witness.⁷

d. *Third Persons Present*. — It has been held that a person present at but not a party to nor interested in the transaction is incompetent if he subsequently becomes interested therein.⁸ One who is present, however, merely in an advisory capacity is not a party.⁹

e. *Interest*. — (1.) *Generally*. — A statute disqualifying a surviving party to the contract or cause of action in issue and on trial is not a survival of the common law disability of interest, in spite of dicta in some cases to this effect. It is based on the fact that the witness is a party to the contract, the other party to which is dead and unable to testify.¹⁰

In *Willingham v. Smith*, 48 Ga. 580, it appeared that Smith executed a deed to H. to the property in controversy. H. conveyed the property after Smith's death to the latter's widow. The property was levied on as Smith's property, after his death, and sold under an execution issued against Smith in his lifetime, and bought by Willingham, who went into possession. Mrs. Smith brought suit for ejectment. The issue was made by the defendant, Willingham, that Smith's deed to H., who was his father-in-law, was fraudulent and void. It was held that Mrs. Smith not being a party to a cause of action the other party to which was dead, and the administrator or executor of Smith not being a party to the suit pending, she was a competent witness for herself on the trial of the ejectment.

7. Missouri Stat. 1906, § 4652; *Warfield v. Hume*, 91 Mo. App. 541.

8. *Muller v. Rhuman*, 62 Ga. 332.

9. *Allen v. Morgan*, 61 Ga. 107 (an attorney present as the adviser of the surviving party).

10. *Georgia*. — *Oatis v. Harrison*, 60 Ga. 535; *Crenshaw v. Robinson*, 37 Ga. 118; *Chisholm v. Turner*, 36 Ga. 565.

Maryland. — *Schull v. Murray*, 32 Md. 9; *Graves v. Spedden*, 46 Md. 527.

Missouri. — *Mott v. Bernard*, 97 Mo. App. 265, 70 S. W. 1093; *McMorrow v. Dowdell*, 116 Mo. App. 289, 90 S. W. 728; *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816.

Virginia. — *Knick v. Knick*, 75 Va. 12; *Simmons v. Simmons*, 33 Gratt. 461.

But see *Meier v. Thieman*, 90 Mo. 433, 2 S. W. 435; *Nesbitt v. Parrott* 84 Ga. 142, 10 S. E. 589; *Daniels v. Brown*, 72 Ga. 143. And see *infra*, IX, 2, E, g, (2.), (b), note, for a review of Missouri cases.

A cashier of a bank who is also a stockholder is not incompetent to testify to a contract between one since deceased and the bank, merely because he is interested, although he was present in a merely clerical capacity when the contract was made by the bank's discount committee. "Under our statute the interest of a witness alone does not exclude him, where the other party is dead. That happens only because he and the deceased are both parties to the contract or cause of action. In other words, the body of the statute removes the common law disability arising out of interest, while the proviso confines the exclusion, in case of the death of one party, to a party to the contract or cause of action, so that a 'party to the contract,' as the term is used in the statute, is considered to mean the person who negotiated the contract, rather than the one in whose name and interest it was made." *Southern Com. Sav. Bank v. Slattery's Admr.*, 166 Mo. 620, 66 S. W. 1066.

The Fact That a Witness Is Interested in the litigation does not render him incompetent; hence in a will contest the fact that the witness is the sole legatee under the will does not disqualify him as a witness except as to the formal execution of the will. *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103; *Miltenberger v. Miltenberger*, 78 Mo. 27.

(2.) **Interested Persons.** — (A.) **GENERALLY.** — It has been held that although a witness has a direct interest in the result of the proceeding, if he is not a party thereto he is not incompetent in his own behalf even though he is a party to the contract in question.¹¹ The contrary rule, however, prevails generally.¹²

(B.) **INTEREST ADVERSE TO DECEDENT.** — (a.) *Generally.* — Under the Pennsylvania statute to render the surviving party incompetent, his interest must be adverse to the right of the decedent represented in the action.¹³

A husband suing an executor as his wife's next friend on a contract between her and the decedent is not incompetent under the statute, and the fact that he is directly interested in fixing a liability upon the estate of the deceased, because of his liability over to his wife in respect of the transactions as her agent, does not exclude him from testifying. *Trahern v. Colburn*, 63 Md. 99.

11. On a petition by an administrator for leave to sell real estate which is opposed by the heirs in whom the legal title to the land is vested, a creditor of the decedent whose claim is the basis of the petition is a competent witness to prove such claim notwithstanding his direct pecuniary interest in the result of the proceeding. The statute applies only to those cases where one of the parties to a contract or cause of action has died and the other party to it is living and is also a party to the record. *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

12. *Georgia.* — *Flournoy v. Wooten*, 71 Ga. 168.

Missouri. — *McMorrow v. Dowdell*, 116 Mo. App. 289, 90 S. W. 728; *Bagnell v. Chemical Bank*, 76 Mo. App. 121; *Meier v. Thieman*, 25 Mo. App. 306; *Meier v. Thieman*, 90 Mo. 433, 2 S. W. 435; *Miller v. Slupsky*, 158 Mo. 643, 59 S. W. 990; *Cleveland v. Coulson*, 99 Mo. App. 468, 73 S. W. 1105.

Vermont. — *Westcott v. Westcott's Estate*, 69 Vt. 234, 39 Atl. 199. See also *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258.

In an action against the sureties of an executor to recover a legacy, he is not competent to prove that he paid the legacy to one, since de-

ceased, whom plaintiffs had authorized to receive it. *Leach v. McFadden*, 110 Mo. 584, 19 S. W. 947 (*distinguishing* *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120). But see *Looker v. Davis*, 47 Mo. 145; *Reed v. Painter*, 145 Mo. 341, 46 S. W. 1089; *Pritchett v. Reynolds*, 21 Mo. App. 674.

In an action brought by a client to recover from his deceased attorney's estate money had and received by such attorney for plaintiff, a defendant in the execution which the attorney had held for collection would not have been competent at common law to testify that he paid the money to the deceased attorney, "because, he being liable on the judgment, was interested in placing the liability" on the deceased attorney, and "thus relieving himself," and he is therefore incompetent under the exception to the enabling act. *Daniel v. Brown*, 72 Ga. 143.

13. *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043. See also *Toomey's Estate*, 150 Pa. St. 535, 24 Atl. 697; *Griggs v. Vermilya*, 151 Pa. St. 429, 25 Atl. 61.

In an action against a city to recover damages for land taken in widening a street, the plaintiff is a competent witness to prove his title to the land, although it appears that he derived his claim from his father since deceased. He does not claim adversely to his deceased father. The decedent's interest, whatever it might be, did not pass to, nor was it in any way represented by the city. "The statute does not make a claimant an incompetent witness merely because a former owner of the thing or contract in action is dead, but only when 'his right

(b.) *In Defense of Acts and Interests of Decedent.* — The statute does not serve to disqualify the survivor or interested person from testifying in support of the decedent's acts and interests.¹⁴

(c.) *Where Both Parties Claim Under Deceased.* — Where both parties to the action claim property in controversy under the decedent, each, as respects the other, is claiming adversely to the decedent within the meaning of the statute and both are therefore incompetent.¹⁵

thereto has passed to a party on the record who represents his interest." *Royer v. Ephrata*, 171 Pa. St. 429, 33 Atl. 361.

In an action against a surviving partner on a firm obligation, the defendant is a competent witness in his own behalf to prove that the obligation was not a partnership obligation, not only because the plaintiff does not represent the interests of the decedent, but because the surviving partner's interest is not adverse to that of the decedent. The fact that the decedent's interest might be incidentally affected by the testimony, not as a partner, but by virtue of an individual act in another capacity, would not render the witness incompetent, since the "interest of the deceased would be in the question, not in the immediate result of the suit." *Lancaster County Nat. Bank v. Henning*, 171 Pa. St. 399, 33 Atl. 335.

In ejectment where the plaintiff claims under a sheriff's deed for the land in dispute sold as the property of the defendant's father, then deceased, and the defendant claims under a deed from her father, the defendant is a competent witness, notwithstanding the death of her grantor, to prove the real consideration for her deed, namely, personal services rendered under a contract with the decedent. "It is true she was the defendant in ejectment, and her father from whom she derived title was dead. She was not called to testify against his title, but in support of it; or to speak with greater accuracy, to prove the consideration she paid for the land. Neither party to the record is acting in a representative capacity." *Van Horne v. Clark*, 126 Pa. St. 411, 17 Atl. 642. But see *Duffield v. Hue*, 136 Pa. St. 602, 20 Atl. 526.

In an action for the revocation of a deed of trust after the death of the

grantor, the interest of the trustee is not hostile so as to make him incompetent to give testimony to sustain it. *Kraft v. Neuffer*, 202 Pa. St. 558, 52 Atl. 100.

In an action of ejectment against a widow brought by a purchaser at a sheriff's sale under a judgment against defendant's deceased husband, the defendant is a competent witness to testify in support of her title that the land was purchased with her own money and out of her separate estate since she is testifying in support of her own title and not against her husband. *Poundstone v. Jones*, 187 Pa. St. 289, 41 Atl. 21, citing *Rowley v. McHugh*, 66 Pa. St. 269.

14. In an action of ejectment involving the title of a sheriff's vendee of land sold by process upon a judgment entered upon a bond alleged to be fraudulent and void, the assignee of the bond for whose use the judgment thereon was entered is a competent witness to sustain the validity of the bond and judgment under the act of 1869, although the assignor of the bond is dead. "Here the acts of the deceased assignor were attacked and Gerner (the witness) was called to sustain them. The plaintiff was alleging that the bond and its transfer . . . were fraudulent; the witness was called to show that both were fair and honest. He was not within the mischief which the rule was intended to prevent, and he was therefore not excluded by it." *Adams v. Bleakley*, 117 Pa. St. 283, 10 Atl. 884.

15. Where deceased has transferred the same property to two persons, and ejectment is brought by one against the other, both parties are incompetent witnesses on the ground that their interests are adverse to the right of the deceased. *Rudolph v. Rudolph*, 207 Pa. St. 339, 56 Atl. 933.

(3.) **Disinterested Persons.** — Where the statutes disqualify the witness from testifying only in his own behalf,¹⁶ if he is not interested in the action he is not incompetent even though a party to the contract or cause of action.¹⁷

f. **Parties.** — (1.) **Generally.** — The mere fact that the witness is a party to the action does not disqualify him if he is not the surviving party to a contract or cause of action.¹⁸

(2.) **Nominal Parties.** — A nominal party to the action, if not interested therein, is not disqualified.¹⁹

g. **Persons Not Parties Nor Interested.** — A person who is not a party to nor interested in the action is not incompetent,²⁰ unless expressly disqualified on behalf of one claiming under him.²¹

h. **Person Claiming Under Original Party.** — One who is claiming under an original party to the contract or cause of action is not an incompetent witness in his own behalf²² except where the statute

16. See *infra*, IX, 2, E, g.

17. *Hayden v. McKnight*, 45 Ga. 147. *Contra.* — *Crenshaw v. Robinson*, 37 Ga. 118, and see *Tunstall's Admrs. v. Withers*, 86 Va. 892, 11 S. E. 565.

A Person or Party Who Has No Interest in the event of the action is not disqualified under the Pennsylvania statute. *Tarr v. Robinson*, 158 Pa. St. 60, 27 Atl. 859; *citing* *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043, "which practically overruled *Duffield v. Hue*, 129 Pa. 94, has since been followed by *Gerz v. Weber*, 151 Pa. 396, and *Smith v. Hay*, 152 Pa. 377, and has settled the construction of the act of 1887 in accordance with this view."

18. *Chisholm v. Turner*, 36 Ga. 565, and see *supra*, IX, 2, B.

19. *Hooper v. Howell*, 52 Ga. 315. But see *Crenshaw v. Robinson*, 37 Ga. 118; *Tunstall's Admrs. v. Withers*, 86 Va. 892, 11 S. E. 565.

20. *Wood v. Crawford*, 75 Ga. 733; *Shepherd v. Crawford*, 71 Ga. 458; *Rush v. Ross*, 65 Ga. 144; *Johnson v. McComb*, 49 Ga. 120; *Hayden v. McKnight*, 45 Ga. 147; *MacDonald v. Tittmann*, 96 Mo. App. 536, 70 S. W. 502. See *Fuchs v. Fuchs*, 48 Mo. App. 18; *Bigham v. Coleman*, 71 Ga. 176. *Contra.* — *Oatis v. Harrison*, 60 Ga. 535. See also *Virgin v. Wingfield*, 56 Ga. 474.

A witness though a party to the contract, when he is neither a party to the record nor interested and does not testify in his own favor, is

competent. *Ford v. O'Donnell*, 40 Mo. 51.

In an action of ejectment where the predecessor in title of one party is dead, the predecessor of the other party is a competent witness since he is not a party nor interested in the action. *Shrader v. United States Glass Co.*, 179 Pa. St. 623, 36 Atl. 330.

In a Controversy Between Mortgagees as to their right of priority, the mortgagor is neither a party nor interested, and is a competent witness for one against the representative of the other. *Swartz v. Chickering*, 58 Md. 290.

21. See *infra*, IX, 2, E, g, (2.).

22. *Martin v. Jones*, 72 Mo. 24; *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225, *holding* a widow claiming dower in land alleged to have been orally given to her husband by his father, both of whom were dead, competent to prove such oral conveyance because not a party thereto.

The Assignee of the Decedent is not incompetent as to a contract or transaction between his assignor and the adverse party. *Taylor v. Finley*, 48 Vt. 78 (see *Farmers' Mut. F. Ins. Co. v. Wells*, 53 Vt. 14, discussing this case).

Contra. — In *Tomlinson v. Dower*, 53 Ga. 9, where the question in issue was whether the defendant's deceased husband, through whom she claimed, was a tenant of plaintiff's ancestor, the defendant was held incompetent in her own behalf on this question

disqualifies him as well as the original party under whom he claims.²³

E. EXTENT OF DISABILITY. — a. *Generally*. — In some jurisdictions this sort of a statute has been held to totally disqualify the witness from testifying in his own behalf as at common law, except as to the matters expressly excepted in the statute.²⁴ The statute itself sometimes provides that the disqualification shall extend to all matters occurring during the lifetime of the decedent.²⁵ In other jurisdictions the disability is limited.²⁶ A statute disqualifying the survivor from testifying as to the contract covers all that took place between the parties when the contract was made.²⁷

because she was as much the other party to the issue on trial as her husband, if alive, would have been.

23. Missouri Stat. 1906, § 4652; *Warfield v. Hume*, 91 Mo. App. 541 (an heir of one of the original parties is not competent against the successor of the other, who is dead, as to matters constituting the contract or cause of action).

In an action of ejectment by an heir where the defendants, heirs of another decedent, and their tenants, claim title under an alleged deed from the plaintiff's intestate to defendants' intestate, defendants are not competent to prove such contract. *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

The assignee of a debt is incompetent against the representative of a deceased debtor. *Ferguson v. Davidson*, 147 Mo. 664, 49 S. W. 859.

24. *Angell v. Hester*, 64 Mo. 142; *Byron v. McDonald*, 1 Allen (Mass.) 293; *Hubbard v. Chapin*, 2 Allen (Mass.) 328; *Manufacturers' Bank v. Schofield*, 39 Vt. 593; *Carter v. Hale*, 32 Gratt. (Va.) 115; *Grigsby v. Simpson*, 28 Gratt. (Va.) 348; *Mason v. Wood*, 27 Gratt. (Va.) 783. See *Nesbitt v. Parrott*, 84 Ga. 142, 10 S. E. 589; *Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641.

In *Granger v. Bassett*, 98 Mass. 462, the court says: "The test of competency is the contract or cause of action in issue and on trial, not the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who was deceased, the other party to that transaction being also a party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case. Otherwise he is admitted as a witness, and being so admitted, the statute contains no re-

strictions nor limitations as to the facts to which his testimony may or may not be directed. His competency must be determined in advance by the nature of the controversy and the question in issue. If upon that test he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which prove to be involved in or to affect the matter in dispute." See also *Ring v. Jamison*, 66 Mo. 429; *Grigsby v. Simpson*, 28 Gratt. (Va.) 348; *Wager v. Barbour*, 84 Va. 419, 4 S. E. 842.

In an action against an executor to recover damages for injury to plaintiff's land by the overflow of a stream on which defendant's testator had built a dam, the plaintiff was held incompetent on his own behalf to prove what had been the effect of the dam in backing up the stream upon his lands lying immediately along the banks. The testator who erected said dam, being dead, the plaintiff was incompetent to testify as to any matters connected with the dam, except such as arose since the qualification of the defendant as executor. "The plain purpose of the legislature was to declare that where the lips of one party to the original contract or transaction, which is the subject of investigation, are closed in death, the adverse party shall not speak at all." *Ellis v. Harris*, 32 Gratt. (Va.) 684. But see *Field v. Brown*, 24 Gratt. (Va.) 74.

25. *Arthurs v. King*, 84 Pa. St. 525; *Cake v. Cake*, 162 Pa. St. 584, 29 Atl. 797.

26. See following sections, and *Harper v. Parks*, 63 Ga. 705.

27. *Johnson v. Coles*, 21 Minn. 108.

b. *Rebuttal of Other Witnesses.* — Where the disability is total the surviving party is not competent even in rebuttal of other witnesses, except as provided by statute.²⁸

c. *Matters Not Involved in Contract or Cause of Action.* — The statute disqualifying the surviving party to the contract or cause of action in issue and on trial relates only to matters attending such contract or cause of action and does not disqualify the witness as to independent matters.²⁹

d. *Transactions With Others Than Deceased.* — (1.) **Generally.** A surviving party to the contract or one claiming under him is not

28. *Robinson v. Talmadge*, 97 Mass. 171; *Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641.

29. *Fulcher v. Mandell*, 83 Ga. 715, 10 S. E. 582; *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816. See also *Morse v. Lowe*, 44 Vt. 561; *Nelson v. Kansas City, F. S. & S. R. Co.*, 66 Mo. App. 647; *Graham v. Howell*, 50 Ga. 203; *Shanklin v. McCracken*, 140 Mo. 348, 41 S. W. 898; *Dawdy v. Dawdy's Estate*, 118 Mo. App. 336, 94 S. W. 767.

First Nat. Bank v. Payne, 111 Mo. 291, 20 S. W. 41, was an action on a note against certain endorsers as makers. Plaintiff claimed that the maker's endorsement was subsequent to defendant's and made after delivery of the note to plaintiff's cashier, and offered its bookkeeper to prove this fact. Defendants were held competent to show that the maker's endorsement was on the note before their own, although the maker and the cashier were both dead. "They were permitted to testify merely to a physical fact, the existence of which was independent of any and all contracts between the parties, a fact not peculiarly within the knowledge of the defendants and any agent of the bank, arising from a transaction between them and such agent, but of which they obtained cognizance by their sense of sight, and which was open to the cognizance of any other witness to whom an opportunity was afforded, at the time, of inspecting the note in suit, and concerning which one of the plaintiff's officers, who had such opportunity, testified, and but for whose evidence as to such fact the plaintiff would have made out no case against the defendants. How can the plaintiff then claim that the defendants

should be excluded from testifying in rebuttal of a case made out alone by the evidence of its living agent, on the ground that it had another agent dead, by whom it could have made out the same case, and nothing more. . . . To exclude the evidence of the defendants in rebuttal of the evidence of this living and testifying agent of the plaintiff as to a fact coming to their knowledge in exactly the same way as it did to him, by their sense of sight, is not within the letter or spirit of the statute, nor within any of the rulings of this court on the subject."

"It has been held by this court in several cases, that it was not intended by the statute to exclude one party where the other was dead, where the evidence related to transactions had with others and to which the deceased party was no party, and with which he had no knowledge of or connection, or consisted of facts and transactions which had taken place since the death of the deceased party (*Stanton v. Ryan*, 41 Mo. 510; *Looker v. Davis*, 47 Mo. 140; *Poe v. Domic*, 54 Mo. 119)." *Martin v. Jones*, 59 Mo. 181.

When the question is whether the acts of a deceased person, in building a dam across a stream, injured the land of the plaintiff, the plaintiff is competent to prove the condition of his land, the character of the stream doing the injury, the effect of the dam on the stream and on the adjacent lands of the plaintiff and other independent facts, as to which his testimony, if untrue, could be rebutted by others, as readily as by the deceased. *Field v. Brown*, 24 Gratt. 74. But see *Ellis v. Harris*, 32 Gratt. (Va.) 684.

incompetent as to his transactions with persons other than the deceased and to which the latter was not a party.³⁰

(2.) **Series of Contracts and Transactions.** — Where the action involves a series of contracts or transactions to some of which the deceased was not a party, the survivor is not incompetent as to those with which decedent had no connection.³¹

e. *Matters Occurring After Death.* — (1.) **Generally.** — It has been held that as to matters occurring after the decedent's death the witness is competent,³² and it is so provided by statute in some states.³³

(2.) **Conversations With Representative Reciting Contract With Dece-**

30. *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38; *Hardman v. Nowell*, 81 Ga. 748, 8 S. E. 188; *Sheibley v. Hill*, 57 Ga. 232. See *Harper v. Dillon*, 60 Ga. 498; *Williams v. McDowell*, 54 Ga. 222.

One claiming property under a trust deed executed by decedent to such person's ancestor to secure decedent's note is competent to prove that as administrator of his ancestor's estate he indorsed the note to himself as distributee, such act occurring after the maker's death. "It is not true that a party to a contract cannot testify at all when the other original party to the contract is dead. It has long been ruled by this court that it was not the intention of the statute to exclude the living party when the other was dead where the evidence related to transactions had with others, and to which the deceased party was no party, and with which he had no connection, and of which he had no knowledge. *Martin v. Jones*, 59 Mo. loc. cit. 187; *Stanton v. Ryan*, 41 Mo. 510. Now, the facts to which plaintiff was called to testify confessedly happened after the death of Mrs. Schaefer, and as a matter of course she could have known nothing of them. Moreover, it was simply the proof by the plaintiff of his own act of indorsement on the note and of the receipt of the same by him as a distributee of his father's estate. Neither of these facts could have affected the defendant unless the other facts showed an ownership of the note and mortgage by plaintiff's father." *Eyer mann v. Piron*, 151 Mo. 107, 52 S. W. 229.

31. *Poe v. Domic*, 54 Mo. 119. "It was not intended by the statute that in cases consisting of a series of contracts and transactions, each

of which were put in issue by the pleadings, some of which transactions had been had with a party who had since died, and others of the transactions had been had with others or consisted of facts which had taken place since his death, the living party should be excluded from testifying to facts occurring since the death of the party to the first transaction. The object of the law was to prevent one party from testifying to a contract in issue, where the lips of the other party were closed, so that his version of the contract could not be given; but it could answer no valuable purpose to exclude a party from testifying to facts about which the dead party knew nothing in his lifetime, and which was wholly transacted with others."

32. *Weiermueller v. Scullin*, 101 Mo. 466, 101 S. W. 1088 (overruling former decisions); *Jackson v. Jackson*, 40 Ga. 150; *Moore v. Dutson*, 79 Ga. 456, 4 S. E. 169. See also *Sterling v. Arnold*, 54 Ga. 690. But see *Gray v. O'Bear*, 54 Ga. 231.

In *Stanford v. Murphy*, 64 Ga. 410, the questions in issue were whether a note of the decedent held by the administrator was a forgery and whether it had been paid. The administrator was held incompetent in his own behalf as to all matters occurring prior to the decedent's death, but competent as to matters occurring subsequent thereto.

Where one party to a contract is dead, the other is a competent witness to show that the consideration thereof inured to the benefit of the estate of the deceased after his death. *Hines v. Poole*, 56 Ga. 638.

33. *Diehl v. Emig*, 65 Pa. St. 320; *Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641.

dent. — The surviving party is competent as to conversations between himself and the decedent's personal representative, although in such conversation the contract between himself and decedent was recited.³⁴

f. Acts of Witness. — The statute covers the acts of the witness toward the decedent as well as his statements.³⁵

g. For Whom Offered. — (1.) **In Own Behalf.** — The witness is disqualified from testifying only in his own behalf,³⁶ or on behalf of certain other classes of persons.³⁷

If the survivor is a party to the action and liable for costs, he is incompetent although he may have no further interest in the contract or action.³⁸

(2.) **For Person Claiming Under Original Party.** — (A.) **GENERALLY.** The statute in Missouri disqualifies an original party to the contract or cause of action on behalf of a person claiming under him.³⁹

(B.) **RELEASE OF INTEREST.** — The fact that such witnesses have released their interest in the action will not remove their disqualification.⁴⁰

34. *Clark v. Bell*, 61 Ga. 147. But see *Freeman v. Bigham*, 65 Ga. 580. Compare VI, 2, O, g.

35. *Sidway v. Missouri Land & L. S. Co.*, 163 Mo. 342, 63 S. W. 705; *Goddard v. Williamson's Admr.*, 72 Mo. 133.

36. *Burkholder v. Ludlam*, 30 Gratt. (Va.) 225; *Hayden v. McKnight*, 45 Ga. 147; *Ainsworth v. Stone*, 73 Vt. 101, 50 Atl. 805. See also *Ford v. O'Donnell*, 40 Mo. App. 51.

37. See following sections.

38. Where one party to the contract is dead, the other, being a party to the suit and liable for costs, though a discharged bankrupt, is not competent to testify. *Tunstall's Admrs. v. Withers*, 86 Va. 892, 11 S. E. 565.

39. *Davis v. Wood*, 161 Mo. 17, 61 S. W. 695 (grantor).

The Withdrawal from the case of the real party in interest does not render him a competent witness for those claiming under him, since he is still as much a party in fact as ever. *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

40. In an action against an estate for services rendered the decedent, plaintiff's mother, who made the contract for the services, is not competent to testify thereto on plaintiff's behalf under § 4652, Rev. Stat. 1899,

which disqualifies a party not only in his own behalf but in behalf of those claiming under him. The fact that the witness might have relinquished all claim to the plaintiff's services and therefore have had no interest in the action would not affect her competency. The court says: "But as we read the later cases the facts controlling her competency would be that she was a party to the agreement in issue and on trial, and that her testimony was sought in favor of one claiming under her. The statute is plain as it reads, but judicial glosses have made it obscurer than any other on our books. An examination of the contradictory interpretations of the statute may be found in *Ashbrook v. Fletcher*, 41 Mo. App. 369, 378. It has been complicated by decisions that it does not affect the competency of a witness who would be competent at common law. *Angell v. Hester*, 64 Mo. 142; *Southern, etc., Bank v. Slattery*, 166 Mo. 620, 66 S. W. 1066. This test of competency certainly will not suffice in all instances to realize the purpose of the enactment, as was pointed out by the Supreme Court in the latter case of *Banking House v. Rood*, 132 Mo. 256, 262, 33 S. W. 816. Other decisions are to the effect that a surviving party to an agreement is not

(3.) **Against Interest.** — (A.) **GENERALLY.** — If the survivor's testimony is against his own interest and that of the other persons in whose favor he is incompetent, the statute does not apply.⁴¹

(B.) **FOR ADVERSE PARTY.** — The survivor is competent for an adverse party even as against the decedent's representative.⁴²

(C.) **CONFLICTING INTERESTS.** — Where the witness has conflicting interests which are balanced, he is competent;⁴³ or where his interest on one side outweighs that on the other side, he is competent against the stronger interest.⁴⁴

(4.) **Competency for Co-Party.** — A party is not incompetent on be-

disqualified as a witness unless he is a party to the action on trial, as well as to the contract. *Looker v. Davis*, 47 Mo. 140; *Meier v. Thiemann*, 15 Mo. App. 307; *Pritchett v. Reynolds*, 21 Mo. App. 674. The latter rule has been modified by holding that the living party to a contract cannot testify, if his testimony would result in his own favor as the person ultimately liable in the controversy, even if he is no party to the record. *Meier v. Thiemann*, 90 Mo. 433, 2 S. W. 435; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17. And as the statute reads since the amendment of 1887, it would appear that, even when the surviving party to the agreement is not a party to the suit, he cannot testify in his own favor or in favor of one claiming under him. And this we understand to be the rule of decision adopted by the recent cases, for, though the opinions do not say so in direct words, the statute is applied in accordance with that rule. *Davis v. Wood*, and *Asbury v. Hicklin*, *supra*. The legislature removed the common-law disability of witnesses because of interest, and thus far the statute is an enabling one. But it is a disabling statute, too, and we think that in providing for the disability of the survivor of two parties to an agreement the legislature was not greatly concerned about whether or not he would have been competent to testify at common law." *McMorrow v. Dowdell*, 116 Mo. App. 289, 90 S. W. 728.

41. *Harrison v. Perry*, 86 Ga. 813, 13 S. E. 88; *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243. See *Foley v. Bitter*, 34 Md. 646. Compare VII, 1, B, *supra*.

Where a party to a suit is exam-

ined as a witness and testified about transactions to which the other party is dead, if he does not testify "in his own favor, or in favor of any other party having an adverse interest" to the party who is dead, or those claiming under him, but against his own interest and against the interest of those having an interest adverse to the dead party, he is not incompetent. *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255.

42. To sustain a bill filed by creditors to set aside an assignment to Cummiskey, as trustee, by Behr and Johnson, the testimony of Behr was offered as a witness for complainants, to which objection was filed by Foley, administrator of Cummiskey, on the ground that the latter was dead and that Foley being a party to the suit as his administrator it was not competent for Behr to fix by his testimony a liability upon the estate of the deceased, and that he was rendered incompetent by the provisions of the acts of 1864, c. 109, and 1868, c. 116. *Held*, that the witness Behr does not come within the provisions of the acts referred to; he is not an opposing party to C. in this suit, testifying upon his own offer; but is called by complainants, parties opposed to both C. and himself; that it has always been competent for a party in a chancery suit, by leave of court for that purpose, to call upon the opposing party to testify, and that, therefore, the witness was competent. *Foley, Admr. v. Bitter*, 34 Md. 646.

43. *Allen v. Davis*, 65 Ga. 179; *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243. See *supra*, IV, 3, B, g.

44. *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243. See *supra*, VII, 1, B.

half of a co-party as to an issue in which he is not interested,⁴⁵ but as to issues which are common he is disqualified.⁴⁶

F. PERSONS PROTECTED. — a. *Generally*. — Except in Pennsylvania,⁴⁷ the protection of the statute is limited to no particular class of persons, such as the representatives of the decedent, but extends to all persons against whom the survivor's testimony is offered in his own behalf.⁴⁸

b. *The Grantee or Assignee* of the decedent's rights in the contract or cause of action is protected against the surviving party's testimony thereto.⁴⁹

c. *Must Represent Decedent*. — (1.) *Generally*. — In Pennsylvania the party claiming the protection of the statute must represent the decedent's interest in the thing or contract in action.⁵⁰

45. Thus in an action by heirs for partition of the intestate's real estate where the defendants claimed that advancements were made to each of the plaintiffs, who in turn claimed that the moneys received from the intestate were gifts to them, one plaintiff is competent on behalf of a co-plaintiff as to the transaction between the latter and the decedent. The court says: "The cause of action in issue and on trial in this case was clearly a transaction between the plaintiffs and their deceased father, and each of the plaintiffs is, under the express terms of the statute, disqualified as a witness to testify in her own behalf. But we do not think it follows that one of the plaintiffs is rendered incompetent to testify as a witness in behalf of the others. In suits for partition, issues between the co-tenants in regard to their respective rights may be made and determined. One may be charged with rents or advancements, and another credited by improvements and payment of taxes. These questions become separate issues, and are to be tried independently of the general questions involved. *Holloway v. Holloway*, 97 Mo. 629, 11 S. W. 233; *Spitts v. Wells*, 18 Mo. 468; *Green v. Walker*, 99 Mo. 72, 12 S. W. 353. Each of these plaintiffs claims rights independent of those claimed by the others. Each claim, therefore, forms a separate issue, and each claimant is entitled to have the rights determined independently of the others. No one of them is a party to the transaction or cause of action under

which another received money from her intestate father, and does not come within the terms of the statute excluding as a witness one who is a party." *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654. See *Hayden v. McKnight*, 45 Ga. 147.

46. In an action on a note by the payee's representative, one defendant maker is not competent for a co-defendant maker to prove failure of consideration. *Hisaw v. Sigler*, 68 Mo. 449.

47. See *infra*, IX, 2, F, c.

48. See *supra*, IX, 2, C, b, (1.).
49. *Grigsby v. Simpson*, 28 Gratt. (Va.) 348; *LaFayette Bldg. Assn. v. Kleinhoffer*, 40 Mo. App. 388. See also *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111; *Niles v. Groover*, 73 Ga. 808.

The grantee or assignee of the decedent or his representatives are protected by the statute. The death of one party to the question in issue is the ground of excluding the survivor from testifying, and not the fact that the estate of the deceased party has an interest in the result of the suit. *Hollister v. Young*, 41 Vt. 156. Compare *Cole v. Shurtleff*, 41 Vt. 311; *Taylor v. Finley*, 48 Vt. 78, which cases are distinguished in *Insurance Co. v. Wells*, 53 Vt. 14.

50. See *supra*, V, 5, H.

Surviving Partner Not Incompetent. — In an action against the surviving party of a partnership on a partnership obligation, such survivor is a competent witness in his own behalf since the plaintiff does not represent the interests of the decedent, but claims adversely to him.

(2.) **Person Setting Up Title in Deceased.**—**Generally.**—In an action against a former executor for the conversion of property which defendant claims to be the property of the estate and for which he has accounted as such, the plaintiff is not competent as to matters occurring in the lifetime of the decedent, from whom he claims by assignment, since the same rule must be applied as though the action were against the executor in his representative capacity.⁵¹

G. PARTICULAR PERSONS AND RELATIONS. — a. *Joint Parties With Decedent.* — (1.) **Competency.** — (A.) **GENERALLY.** — The death of one of two or more joint parties to the contract or transaction in issue does not disqualify the other, since the statute contemplates parties on different sides of the contract or cause of action,⁵² though the

The statute disqualifies the surviving party to the contract in action only where the decedent's right has passed to a party on the record who represents his interests. Lancaster County Nat. Bank v. Henning, 171 Pa. St. 399, 33 Atl. 335.

Action Against Agent of Deceased Principal.—In an action of deceit against an agent for conveying property of his principal and taking money therefor when he had no authority, the defendant is a competent witness in his own behalf notwithstanding his principal's death, since the decedent and his heirs or representatives, whatever might be their rights against the defendant for moneys received by him, are not parties to nor interested in the action. Davis v. Hawkins, 163 Pa. St. 228, 29 Atl. 746.

Bailee of Decedent Protected. Dicken v. Winters, 169 Pa. St. 126, 32 Atl. 289.

51. Patterson v. Dushane, 115 Pa. St. 334, 8 Atl. 440. This was an action for converting bonds which plaintiff alleged had been given her by one since deceased and deposited by her with the defendant for safe keeping. The defendant denied the gift and showed that he had accounted to the estate of the decedent for the bonds, and that the same had been distributed upon a settlement of the estate. The court says: "This is not a suit by or against the estate, nor does the estate appear to have any interest in this controversy. I do not see, however, that the latter fact can properly affect the question. If the executor has turned over the bonds to the estate in the perform-

ance of his duty and in the belief that they belonged to said estate, it seems clear that when sued for the bonds personally, he would be entitled to raise any question by way of defense, that could have been raised by or for the estate, had the suit been against the executor or administrator of" the deceased.

52. Perry v. Hodnett, 38 Ga. 103; Citizens' Ins. Co. v. Broyles, 78 Mo. App. 360; Palmer v. Farrell, 129 Pa. St. 162, 18 Atl. 761, 15 Am. St. Rep. 708; Orr v. Clark, 62 Vt. 136, 19 Atl. 929. See Spencer v. Trafford, 42 Md. 1; Hardy v. Chesapeake Bank, 51 Md. 662. But see Lewis v. Oliver, 22 Mo. App. 203.

In an action on a note by the endorsee against the three makers, one of the latter died pending the suit and no legal representative was substituted for him. The defendants in support of a plea of *non est factum* were held competent to prove that the decedent had no authority to sign their names to the note either as partners or otherwise, though it might have been held otherwise had the decedent's representative been before the court so as to be bound by the judgment. Field v. Walker, 36 Ga. 520.

On a bill filed against husband and wife, who were non-residents, for the sale of real estate under a deed of trust or mortgage, a decree was passed *pro confesso* on the 11th of October, 1873, after an order of publication, for the sale of the land, unless the defendants should pay the debt, interest and costs on or before November 12, 1873. The decree not being executed, the wife on Novem-

contrary has been held.⁵³ The statute, however, does serve to disqualify such survivor in an action where his interests are opposed to those of the deceased joint party to the transaction.⁵⁴ In an action between one of such joint contractors and the representative of the other involving the relation between them the survivor is incompetent,⁵⁵ and the same rule applies, although they are co-parties, if their interests are adverse.⁵⁶

ber 26, 1874, and after the death of her husband, filed her petition in the cause, praying that the enrolment of the decree might be vacated, and she be allowed to answer the bill, for the reasons (among others) that the deed was void as against her, because she was forced to sign and acknowledge it by the threats, menaces and ill treatment of her husband, which she, in her then enfeebled condition of health, was unable to resist; and that the existence of the suit in which the decree was passed, was studiously concealed from her by the devices of her husband. The wife having under the commission testified on her own offer and in her own behalf, it was objected that she was not a competent witness after the death of her husband to testify that her signature to the deed was procured by his fraud and violence. It was held by a divided court that the witness was competent; that such evidence was not excluded by the provision of the statute; that "when an original party to a contract or cause of action is dead, either party may be called by his opponent, but shall not be admitted to testify on his own offer." (See dissenting opinion.) *First Nat. Bank v. Eccleston*, 48 Md. 145.

53. *Carter v. Hale*, 32 Gratt. (Va.) 115.

54. A widow claiming land by virtue of an alleged destroyed deed to herself and her husband is not a competent witness to prove her claim against one claiming the land as heir of the deceased husband, since she is a surviving party to the transaction out of which her claims arose. *Gardner v. McLallen*, 79 Pa. St. 398; citing *Karns v. Tanner*, 66 Pa. St. 297. But see *First Nat. Bank v. Eccleston*, 48 Md. 145, next preceding note but one.

55. *Perry v. Hodnett*, 38 Ga. 103.

56. **Surviving Joint Maker.**—A surviving joint maker of a note is not a competent witness against his co-defendant, the executor of his deceased joint maker, to prove that the deceased signed the note. *Alcorn's Exr. v. Cook*, 101 Pa. St. 209.

In an action to reform and enforce a promissory note brought against an executor of the deceased maker and against plaintiff's husband who appeared in the note both as the payee and as a joint maker, plaintiff claimed that her husband's name had been inserted as payee by mistake; that the plaintiff was the real payee and that her defendant husband was not co-maker but merely surety for the decedent. The testimony of the defendant husband as to the nature of the transaction was held incompetent on behalf of the wife under § 4652, Rev. Stat. 1899, providing that where an executor or administrator is a party to the suit the other party cannot testify in his own favor unless the contract in issue was originally made by one who is still living and competent to testify. The witness' real interest was hostile to that of the estate, in view of the fact that the plaintiff was seeking to have him adjudged merely a surety. The court says that the statute should be liberally construed to effectuate its main purpose, namely, to prevent a living party to a contract from obtaining an unfair advantage over the estate of the deceased opposite party. The court says: "Following the logic of this reasoning, the conclusion is inevitable that, when the sole co-contractor with the decedent is, in fact, interested with the opposite party to the contract in fixing a liability upon the estate of the decedent, the parties to the action do not stand upon an equality and the prohibition of the statute should be enforced, for, in

(B.) PARTNERS. — Where a partnership constitutes one party to the contract or cause of action, the death of one partner does not disqualify the surviving partner,⁵⁷ except as against the decedent's representatives.⁵⁸

(2.) Effect of Survival of Joint Party. — (A.) GENERALLY. — Where there were other co-parties with the decedent to the contract or transaction in question who are still living and competent to testify, the adverse surviving party is competent in his own behalf.⁵⁹ The reason for this rule is that there are living persons to contradict the witness,⁶⁰ or because the "other party" to the contract within the contemplation of the statute is the collection of individuals jointly contracting.⁶¹

Where the cause of action to which the testimony relates is wholly

such situation, the defendant estate has no living party to the contract to whom to turn with any degree of confidence for evidence 'in opposition to the testimony of the witness objected to.' It labors under the same or even greater disadvantage than would have confronted it had the decedent been the sole contractor with the opposite party, and to compel it, either to go without the testimony of the decedent's co-contractor, or to rely upon his fairness as a witness when his interest is hostile to that of the estate, would certainly be placing the estate at a practical, if not theoretical, disadvantage. Therefore, in such case, the 'reason of the rule' — the real touchstone — is all in favor of the prohibition and, applying it here, we must sustain the ruling of the learned trial judge." *Scott v. Burfiend*, 116 Mo. App. 71, 92 S. W. 175.

^{57.} *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Spencer v. Trafford*, 42 Md. 1; *Lancaster County Nat. Bank v. Henning*, 171 Pa. St. 399, 33 Atl. 335.

When the partner who signed the firm name to the note sued on is dead, his co-partner, pleading *non est factum*, is a competent witness as against the plaintiff, to prove the signature unauthorized and for what the note was given, though he would have been incompetent as against the representatives of the deceased. *Bryan v. Tookey*, 60 Ga. 437.

^{58.} *Hogboom v. Gibbs*, 88 Pa. St. 325. See *infra*, IX, 2, G, q.

^{59.} *Georgia*. — *Sterling v. Arnold*, 54 Ga. 690; *Rawson v. Cherry*, 44

Ga. 73; *The North Georgia Min. Co. v. Latimer*, 51 Ga. 47.

Maryland. — *Simmons v. Haas*, 56 Md. 153.

Massachusetts. — *Goss v. Austin*, 11 Allen. 525; *Haywood v. French*, 12 Gray. 459; *Doody v. Pierce*, 9 Allen 144.

Missouri. — *Vandergrif v. Swinney*, 158 Mo. 527, 59 S. W. 71; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17; *Fulkerson v. Thornton*, 68 Mo. 323; *Nugent v. Curran*, 77 Mo. 323; *Henry v. Buddecke*, 81 Mo. App. 509; *Wallace v. Jecko*, 25 Mo. App. 313.

Contra. — Where one of the obligors in a bond is dead, in an action thereon the obligee is incompetent in his own behalf against the surviving obligors. *Mason v. Wood*, 27 Gratt. (Va.) 783.

^{60.} *Vandergrif v. Swinney*, 158 Mo. 527, 59 S. W. 71.

^{61.} In *Goss v. Austin*, 11 Allen (Mass.) 525, and *Hayward v. French*, 12 Gray. (Mass.) 453, it was held that the phrase "one of the original parties" means the legal party to the contract, and that in case of a contract by joint contractors or partners the statute does not apply until all of such partners or contractors are dead. See also *Clapp v. Hull*, 18 R. I. 652, 29 Atl. 687.

Principal and Surety. — Where the maker of a note is dead, the payee or indorsee is not thereby rendered incompetent in an action against the surety who is able to testify. *Mayer v. Old*, 57 Mo. App. 639.

between⁶² or in the presence of ⁶³ the living co-contractor and the other party to the contract, the statute does not apply.

The living co-party to the contract with the decedent must be competent to testify in order to remove the disability of the opposite party to the contract, or those claiming under him.⁶⁴ He must also have knowledge of the matters about which the other party seeks to testify.⁶⁵

Where the testimony of the witness would leave it doubtful whether the transaction was between himself and the decedent or with the surviving co-contractor, the testimony should be excluded until it is shown that the transaction was not with the deceased.⁶⁶

(B.) TRANSACTIONS WITH DECEASED CO-CONTRACTOR. — Where the transaction in question was wholly between the witness and the deceased co-contractor, he is not competent.⁶⁷

(C.) CONTRACT FOR BENEFIT OF THIRD PERSON. — Where a contract is made for the benefit of a third person he is regarded as a joint party thereto with the person acting for his benefit.⁶⁸

(D.) PARTNERSHIP CONTRACTS OR TRANSACTIONS. — In some jurisdictions the separate partners are not regarded as the "other party" to a partnership contract within the meaning of a statute disqualifying the surviving party to the contract when the "other party" thereto is dead. Hence the death of one partner does not disqualify

62. *McGehee v. Jones*, 41 Ga. 123; *Leaprot v. Robertson*, 37 Ga. 586; *Simmons v. Haas*, 56 Md. 153; *Nugent v. Curran*, 77 Mo. 323. This was an action against a surety sued after the death of the principal debtor. A defense of estoppel was interposed which did not concern and could not have been pleaded by the principal. The plaintiff was therefore held competent in his own behalf, since this defense or "cause of action" was one exclusively between the living parties. See also *Hardy v. Chesapeake Bank*, 51 Md. 662.

63. *McGehee v. Jones*, 41 Ga. 123; *Leaprot v. Robertson*, 37 Ga. 586; *Simmons v. Haas*, 56 Md. 153; *Henry v. Buddecke*, 81 Mo. App. 509.

64. Thus where such opposite party is also dead, the persons claiming under him are not competent since the living co-party with the decedent is himself incompetent. *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

65. *State v. Thompson*, 81 Mo. App. 549 (so holding in an action against the surviving co-obligors on

a bond). See also *Henry v. Buddecke*, 81 Mo. App. 360.

66. Thus in an action against the surviving obligors on a note, the plaintiff obligee cannot testify to a transaction where he is uncertain whether it occurred between himself and the survivor, or between himself and the deceased obligor. *Dean v. Warnock*, 98 Pa. St. 565.

67. *Henry v. Buddecke*, 81 Mo. App. 360.

In an action on a joint and several note against one of the makers thereof, the other maker being dead, it is not competent for the plaintiff, he being an original party to the contract, to testify on his own offer for the purpose of removing the bar of the statute of limitations, that the deceased maker made a payment on the note and at the time of such payment endorsed the same on the note in his own handwriting. *Miller v. Motter*, 35 Md. 428; *Crow v. Crow*, 124 Mo. App. 120, 100 S. W. 1123.

68. *Amonett v. Montague*, 75 Mo. 43, holding that in an action on the contract by a third person for whose benefit it was made, the adverse

the person contracting with the firm.⁶⁹ The general rule, however, is to the contrary,⁷⁰ especially where the transaction was wholly with the deceased partner.⁷¹ But where the contract was made by the survivor or by both partners, the disqualification does not apply.⁷²

b. *Assignor and Assignee*. — The surviving party to an assignment is not competent in his own behalf to prove it.⁷³

c. *Bailor and Bailee*. — One claiming property adversely to the right of a deceased person cannot testify to an alleged contract of bailment with the latter to account for such decedent's possession of the property.⁷⁴ It has been held, however, that in an action of trover, one claiming that the decedent was merely his bailee is not incompetent to establish such claim as against the decedent's grantee or successor in interest, on the ground that such contract is merely collateral to the main issue.⁷⁵

d. *Parties to Bills and Notes*. — The statute applies to actions based upon bills and notes and disqualifies the surviving parties

party was not disqualified because of the death of the other original party to the contract. *Compare* Gabbett v. Sparks, 60 Ga. 582.

69. Haywood v. French, 12 Gray (Mass.) 459.

Where a surviving partner sues on a contract made with his firm, one member of which is dead, the parties to the contract are the partnership on the one hand and the defendant on the other, and "the other party" as opposed to the defendant is not the deceased partner, but the partnership, and unless the partnership is to be regarded as dead within the meaning of the statute, the defendant is a competent witness. *Clapp v. Hull*, 18 R. I. 652, 29 Atl. 687.

See *Fulkerson v. Thornton*, 68 Mo. 468, where the contract was a joint one, and the court says "the legal party to the contract did not consist of a single individual but of two persons."

70. Where one of the partners dies, the other party to the transaction cannot testify as to any transactions with decedent not in the presence or hearing of the living partner. *Butts v. Phelps*, 79 Mo. 302 (*distinguishing* *Fulkerson v. Thornton*, 68 Mo. 468, and *disapproving* *Goss v. Austin*, 11 Allen (Mass.) 525; *Hayward v. French*, 12 Gray (Mass.) 453). See also *Jack v. Moyer*, 187 Pa. St. 87, 40 Atl. 1013; *Huntley v.*

Goodyear, 182 Pa. St. 613, 38 Atl. 507.

71. *Terry v. Ragsdale*, 33 Gratt. (Va.) 342; *Wiley v. Morse*, 30 Mo. App. 266 (action on firm note made by deceased partner); *Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577; *Stanton v. Ryan*, 41 Mo. 510; *Adams v. Earthly Hdw. Co.*, 78 Ga. 485, 3 S. E. 430; *Southwestern R. v. Papot*, 67 Ga. 675; *Ford v. Kennedy*, 64 Ga. 537; *Long v. McDonald*, 39 Ga. 186; *Crow v. Crow*, 124 Mo. App. 120, 100 S. W. 1123.

72. *McGehee v. Jones*, 41 Ga. 123; *Leaptrot v. Robertson*, 37 Ga. 586.

The statute does not apply where the contract was made with the living partner or with the living and the dead concurrently. *Simmons v. Haas*, 56 Md. 153.

It must appear that the transaction about which he testifies was had with the deceased, and with no other living member of the firm. *Moore v. Harlon & Hollingsworth*, 37 Ga. 623.

73. *Assignment to Decedent*. When the question is whether a married woman executed an assignment of a life insurance policy to a person since deceased, she is not a competent witness in an action between herself and the administrator of such decedent. *Wienecke v. Arbin*, 88 Md. 182, 40 Atl. 709.

74. *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289.

75. *Walling v. Newton*, 59 Vt. 684, 10 Atl. 827.

thereto;⁷⁶ hence the maker of a note is incompetent for himself in an action thereon, the payee being dead.⁷⁷ So also he is incompetent against his deceased co-maker's representative although they are co-parties.⁷⁸

The death of the endorsee of a note renders the maker incompetent in his own behalf in an action by the representative of such endorsee,⁷⁹ unless the interest of the witness has been destroyed, as by a discharge in bankruptcy.⁸⁰ Where the only matter in issue is the contract between the payee and the endorser, the maker not being a party thereto is not disqualified by the death of either of such persons.⁸¹

The Payee is incompetent to prove his transactions with the deceased maker,⁸² or holder⁸³ relating to the note in issue.

Indorsee.—In an action on a note, unless some issue is raised as to his not being a *bona fide* holder⁸⁴ or his having discharged the indorser by granting indulgence to the maker,⁸⁵ the indorsee is not

76. *Dixon v. Edwards*, 48 Ga. 142.
New Promise To Bar Statute of Limitations.—The plaintiff in an action upon a negotiable instrument barred on its face by the statute of limitations, is not a competent witness to prove acts or admissions of the maker which came to the plaintiff's knowledge whilst he was disinterested, tending, with the aid of written evidence, to establish a new promise alleged to have been made to the payee, the maker being now dead, and the action being against his administrator. *Dobson v. Dickson*, 62 Ga. 639. See also *Wright v. Gilbert*, 51 Md. 146.

77. *Hubbard v. Chapin*, 2 Allen (Mass.) 328; *Byrne v. McDonald*, 1 Allen (Mass.) 293; *Angell v. Hester*, 64 Mo. 142. See *Rice v. McFarland*, 41 Mo. App. 489; *Farmers' Mut. F. Ins. Co. v. Wells*, 53 Vt. 14.

The maker of a promissory note is not a competent witness in a suit thereon against him by an endorsee, if at the time the payee of the note, who was also an endorser, is dead; and this is true although such payee was merely an accommodation endorser and was subsequently released from liability through the failure of the holder to make due presentment of the note for payment. *Ashbrook v. Letcher*, 41 Mo. App. 369.

78. *Alcorn's Exr. v. Cook*, 101 Pa. St. 209.

79. The maker of a note is not a competent witness, in an action thereon by the deceased indorsee's executor, to prove the decedent's admission that he had purchased the note after maturity, where purchase for value before maturity is an essential element of the cause of action, notwithstanding the fact that the payee is still alive. *Jones v. Burden*, 56 Mo. App. 199.

80. *Hayden v. McKnight*, 45 Ga. 147.

81. Therefore in a contest between the indorser and payee, which cannot in any way affect the liability of the maker, he is not rendered an incompetent witness by the death of the payee. *Freeman v. Bigham*, 65 Ga. 580.

82. *Foster v. King*, 73 Vt. 278, 50 Atl. 1061 (incompetent on behalf of the endorsee); *Goddard v. Williamson's Admr.*, 72 Mo. 131.

The payee or holder of a note is incompetent to testify that he put the credit on it which kept it alive, by the authority and as agent of the maker, the latter being dead. *Wright v. Bessnon*, 55 Ga. 187.

83. *Dick v. Williams*, 130 Pa. St. 41, 18 Atl. 615.

84. *Jones v. Burden*, 56 Mo. App. 199.

85. *Hayden v. McKnight*, 45 Ga. 147.

regarded as a party to the contract or cause of action and is therefore not disqualified by the death of the payee.⁸⁶

The Indorser is not competent as to matters governing his liability to his indorsee, since deceased.⁸⁷

c. *Parties to Bond*. — Where one party to a bond is dead the statute applies to an action thereon and disqualifies the survivor.⁸⁸

The death of the assignee of a bond disqualifies the obligor, in an action thereon, where the question in issue is whether the decedent was a *bona fide* holder, even though the obligee is still living and competent to testify.⁸⁹

f. *Principal and Surety*. — A surety on a contract or obligation is an original party thereto within the meaning of the statute,⁹⁰ and he is therefore incompetent against the representative of his deceased principal,⁹¹ of the deceased obligee,⁹² or of a deceased surety.⁹³

In an action against the surety, the fact that the principal obligor is dead does not serve to disqualify the adverse party,⁹⁴ unless the judgment would be binding upon the decedent's representatives.⁹⁵

g. *Trustee and Beneficiary*. — **The Beneficiary** under a trust is not competent as to matters in issue which occurred between himself and the deceased grantor;⁹⁶ nor in a suit by the trustee for his benefit is he competent to prove the cause of action, the other party to which is dead.⁹⁷ He is, however, competent as to transactions between himself and the trustee relating to the trust although the

86. *Hubbard v. Chapin*, 2 Allen (Mass.) 328. See also *Byrne v. McDonald*, 1 Allen (Mass.) 293.

87. He is incompetent to prove lack of notice of protest against the indorsee's administrator substituted as a party after the commencement of the action. *Lewis v. Weisenham*, 1 Mo. App. 222.

88. *Morris v. Grubb*, 30 Gratt. (Va.) 286; *Carter v. Hale*, 32 Gratt. (Va.) 115.

The obligors on a bond are incompetent witnesses to testify on their own behalf in an action on the bond by the assignee of a deceased obligee. *Grigsby v. Simpson*, 28 Gratt. (Va.) 348.

89. *Gamble v. Hepburn*, 90 Pa. St. 439.

90. *Parent's Admr. v. Spitler*, 30 Gratt. (Va.) 819.

In an action against the maker of a note and the executor of his deceased surety, the fact that the decedent is only a surety and that his co-defendant is therefore liable to reimburse him does not render the

maker competent against such representative. *Alcorn's Exr. v. Cook*, 101 Pa. St. 209.

91. *Nesbitt v. Parrott*, 84 Ga. 142, 10 S. E. 589.

92. *Leeper v. McGuire*, 57 Mo. 360.

93. *Harper's Admr. v. McVeigh's Admr.*, 82 Va. 751, 1 S. E. 193.

94. *Rawson v. Cherry*, 44 Ga. 73.

95. Where pending an action against a principal and surety, the former dies and his name is, on motion of the adverse party, stricken from the record without substitution of his personal representative, the adverse party (or survivor) is not competent against the surety because the adjudication would be conclusive in an action by the latter against the administrator for indemnity, since the principal had notice of and was a party to the action. *Lacock v. Com.*, 99 Pa. St. 207.

96. *Baker v. Reed*, 162 Mo. 341, 62 S. W. 1001.

97. *Gabbett v. Sparks*, 60 Ga. 582.

grantor therein is dead;⁹⁸ but in an action by him against the trustee's representative he is incompetent as to such matters.⁹⁹

The Trustee is not competent against the representatives of the deceased grantor in the trust¹ or of the purchaser of property sold under the trust,² to prove his transactions with such persons which are in issue and on trial; nor is he competent as to his transactions with the deceased beneficiary against the latter's representative.³

h. Grantor and Grantee. — (1.) **Generally.** — A deed, one party to which is dead, is a contract within the meaning of the statute disqualifying the survivor.⁴

(2.) **Grantor.** — Where the grantee is dead and the deed is in issue, the grantor is incompetent to testify in his own behalf as to matters connected with the deed.⁵ He cannot testify for the purpose of invalidating the deed,⁶ as by showing it to be a forgery⁷ or a mere trust,⁸ that it was not delivered,⁹ or that the consideration has not been paid.¹⁰

Grantor Disinterested. — Where the grantor is not interested in the controversy he is competent against the representatives of his deceased grantee to show the non-delivery of the deed.¹¹ So also he is competent when his interests are conflicting and equally balanced.¹²

98. *Orr v. Rode*, 101 Mo. 387, 13 S. W. 1066.

99. *Farrelly v. Ladd*, 10 Allen (Mass.) 127.

1. *McKaig v. Piatt*, 34 Md. 249. But see *Kraft v. Neuffer*, 202 Pa. St. 558, 52 Atl. 100.

2. Where, upon a bill filed by the children of *cestui que trust* against the administrator of the purchaser of property sold by the trustee, to recover the same, the defense is title by prescription, the trustee is an incompetent witness to prove what passed between him and the purchaser at the time of the execution of the deed relied on as color of title, in order to show that such instrument originated in fraud. *Virgin v. Wingfield*, 56 Ga. 474.

3. *Appeal of Taylor* (Pa. St.), 11 Atl. 307. See also *In re Meeley's Estate*, 4 Pa. Co. Ct. 644.

4. *Davis v. Wood*, 161 Mo. 17, 61 S. W. 695; *Chapman v. Daugherty*, 87 Mo. 617; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

5. *New York & O. Land Co. v. Weidner*, 169 Pa. St. 359, 32 Atl. 557.

6. *Martin v. Jones*, 59 Mo. 181; *Hughes v. Israel*, 73 Mo. 538.

7. *Patton v. Fox*, 169 Mo. 97, 69

S. W. 287; *Sutherland v. Ross*, 160 Pa. St. 29, 28 Atl. 437; *s. c.* on previous appeal, 140 Pa. St. 379, 21 Atl. 354.

8. *Mulock v. Mulock*, 156 Mo. 431, 57 S. W. 122.

The surviving grantor is not a competent witness against his deceased grantee's devisee to impeach the grantee's title by showing that the deed though absolute on its face was intended as a conveyance in trust for the grantor. *Murray v. New York, L. & W. Co.*, 103 Pa. St. 37.

The grantor cannot testify after the grantee's death that the deed was a trust for the benefit of the grantee's wife. *Smith v. Smith*, 201 Mo. 533, 100 S. W. 579; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990.

9. *Niles v. Groover*, 73 Ga. 808; *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469.

10. *Hays v. Callaway*, 58 Ga. 288.

11. *Harrison v. Perry*, 86 Ga. 813, 13 S. E. 88.

12. Where two deeds were made by the same grantor conveying the same property to different persons, and the question at issue in an action for ejectment was which chain

(3.) *Grantee.* — The grantee is incompetent in his own behalf against the representative of the deceased grantor in an action in which the deed is in issue, as to matters connected with the deed.¹³ He is not competent to prove the performance of the condition on which the deed was given,¹⁴ nor the action taken under it,¹⁵ nor to explain a mutilation of the deed,¹⁶ or his redelivery of it to the deceased grantor.¹⁷

i. *Vendor and Vendee.* — The surviving parties to a contract of sale are incompetent in their own behalf.¹⁸ The vendee cannot testify to the terms of contract to convey and his compliance therewith.¹⁹

j. *Donor and Donee.* — Where the contract or transaction in question is a gift, one party to which is dead, the survivor, whether donor²⁰ or donee,²¹ is incompetent in his own behalf to the extent

of title should prevail, the grantor is a competent witness, notwithstanding the death of the first grantee, to show that the first deed was based upon no consideration, and was executed simply to avoid the land being made subject to the payment of his debts. Such testimony was certainly not in his own favor, and whilst he was the plaintiff's lessor who held under the first deed, he was also the warrantor of the title under which the defendant held, and his interest was therefore equally balanced. *Allen v. Davis*, 65 Ga. 179.

13. *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. 566; *Griggs v. Vermilya*, 151 Pa. St. 429, 25 Atl. 61; *Miller v. Slupsky*, 158 Mo. 643, 59 S. W. 990; *Frizzell v. Reed*, 77 Ga. 724.

14. *Trapton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

15. Where an easement is conveyed in certain land, and the land afterwards transferred without reference thereto, the grantee of the easement cannot controvert a claim of abandonment by testifying to a continuous user, in an action brought after the death of the grantor; the witness being incompetent as to what occurred during the life of the grantor. *Paschall v. Fels*, 207 Pa. St. 71, 56 Atl. 320.

16. *Barclay v. Waring*, 58 Ga. 86.

17. *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111.

18. *Tunstall's Admrs. v. Whittier*, 86 Va. 892, 11 S. E. 565; *Saunders v. Greever*, 85 Va. 252, 7 S. E. 391; *Gray's Exrs. v. Whitney*, 81 Pa. St. 332.

19. *Hughes v. Israel*, 73 Mo. 538. See also *Wood v. Shurtleff*, 46 Vt. 325.

In an action of ejectment where both the plaintiff and defendant claim to have derived their interest in the premises in question from the same party (now deceased), the one as heir, and the other by contract, the defendant is not a competent witness in his own behalf to prove that such party agreed by parol to deed the premises to him on his paying \$150, and that he had paid it, as this was the contract "in issue and on trial"; the contract in issue as used in the statute, means the same as contract in dispute, or in question, and relates as well to the substantial issue made by the evidence, as to the merely formal issue made by the pleadings. *Pember v. Condon*, 55 Vt. 58.

20. In an action by a mother against the estate of a daughter to rescind a gift made by the plaintiff to her daughter, the plaintiff is not a competent witness. *Yeakel v. McAtee*, 156 Pa. St. 600, 27 Atl. 277.

21. *Patterson v. Dushane*, 115 Pa. St. 334, 8 Atl. 440; *Diehl v. Emig*, 65 Pa. St. 320; *La Mountain v. Miller*, 56 Vt. 432; *Elsinger v. Beytage*, 74 Ga. 399.

One claiming property as donee of the decedent is incompetent against the representative of decedent claiming the property as part of the estate. *Flanagan v. Nash*, 184 Pa. St. 41, 39 Atl. 818.

Upon a bill to enforce specific performance of an alleged gift by one

provided by the statute.²² The fact that the donee was not present when the facts constituting the alleged gift occurred does not render him competent.²³ It has been held, however, that a gift is not a contract and that the surviving donee is therefore not incompetent as the surviving party to a contract.²⁴

k. *Lessor and Lessee*. — Where the question in issue is whether the relation of lessor and lessee existed between the deceased and witness, he is not competent in his own behalf as to such matter.²⁵ Nor is the surviving party to a lease in issue and on trial competent to impeach the terms of the writing.²⁶

l. *Mortgagor and Mortgagee*. — A party to a mortgage is not competent as to the mortgage contract, in issue and on trial, when the other party thereto is dead.²⁷

m. *Heirs, Devisees and Next of Kin*. — An heir, devisee, or next of kin is subject to the statutory disqualification whenever he is the surviving party to the contract or cause of action in issue.²⁸ Otherwise he is competent.²⁹

since deceased, the plaintiff is not a competent witness to prove the gift. *Polk v. Clark*, 92 Md. 372, 48 Atl. 67.

The Donee Under Alleged Verbal Gift by decedent is incompetent to prove the gift or the improvements made on land. *Huggins v. Huggins*, 71 Ga. 66; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209. See also *Bothwell v. Dobbs*, 59 Ga. 787.

Gift Causa Mortis. — One claiming property as a gift *causa mortis* is not competent to establish his claim against the distributees of the deceased donor's estate. *Scott v. Riley*, 49 Mo. App. 251.

22. See *Diehl v. Emig*, 65 Pa. St. 320, and *supra*, IX, 2, E, *et seq.*

23. *Bieber's Admr. v. Boeckmann*, 70 Mo. App. 503.

24. **Gift Not a Contract**. — Where the question in issue was whether property given to the witness by the testator was a gift or an advancement, the witness was held competent in his own behalf to prove declarations of the testator accompanying the gift. The transaction in question was not a contract with the decedent, nor was it a cause of action upon which either he or his personal representatives could be sued. *Graves v. Spedden*, 46 Md. 527.

25. *Tomlinson v. Driver*, 53 Ga. 9; *Veal v. Veal*, 45 Ga. 511.

26. *Duffield v. Hue*, 129 Pa. St.

94, 18 Atl. 566. See *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113.

27. *Straw v. Greene*, 14 Allen (Mass.) 206; *Carey v. Fairchild* (Pa.), 9 Atl. 328.

A mortgagee is not competent in his own behalf as to matters concerning a mortgage or its contents after the death of the mortgagor in an action for conversion of the mortgaged property; and the fact that he was named in the mortgage as one of the persons to identify the property did not remove his disqualification. *Ladd v. Williams*, 104 Mo. App. 390, 79 S. W. 511.

In an action by the administrator of a mortgagee to foreclose a mortgage, the mortgagor is incompetent to sustain a charge of usury as against the deceased mortgagee. *Stanford v. Horwitz*, 49 Md. 525.

28. *Bothwell v. Dobbs*, 59 Ga. 787; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17.

An heir suing for partition of the decedent's real estate cannot testify in his own behalf that money received from the intestate was a gift and not an advancement. *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654.

The heirs of a decedent are incompetent against his devisees as to transactions with such decedent forming the basis of the heirs' claims to the property involved. *Rice v. Shipley*, 159 Mo. 399, 60 S. W. 740.

29. See *Jones v. Jones*, 36 Md.

n. *Executor and Administrator*.—The executor or administrator of the decedent is a competent witness notwithstanding the incompetency of the surviving party,³⁰ except where he himself is the surviving party to the contract or transaction in question.³¹ But his incompetency in the latter case is limited to matters occurring in the decedent's lifetime.³²

o. *Spouse of Survivor*.—(1.) **Generally**.—The surviving party's spouse, not a party to the contract or cause of action in issue, is not incompetent for such survivor.³³

(2.) **Widow of Decedent**.—Although the widow of the decedent may not be incompetent, merely because of the relation between them,³⁴ to prove a contract or transaction with him, she is incompetent as the surviving party thereto³⁵ in a proper case for the ap-

447; *Garvin's Admr. v. Williams*, 50 Mo. 206; *Tarr v. Robinson*, 158 Pa. St. 60, 27 Atl. 859; *Williams v. Davis*, 69 Pa. St. 21.

30. *Crenshaw v. Robinson*, 37 Ga. 118; *Kenyon v. Peirce*, 17 R. I. 794, 24 Atl. 825; *McIntyre v. Meldrim*, 40 Ga. 490.

On Proceeding To Probate Will. See *Harris v. Harris*, 53 Ga. 678, and *supra*, IX, 2, C, b, (3.), (B.).

31. *Bowie v. Bowie*, 77 Md. 311, 26 Atl. 405; *Leach v. McFadden*, 110 Mo. 584, 19 S. W. 947.

An executor or administrator is incompetent to prove his own claim against the estate. *Tygard v. Falor*, 163 Mo. 234, 63 S. W. 672; *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562. See more fully *supra*, IV, 16, D, c.

32. An administrator, though a creditor of intestate, is a competent witness to show by debts of the estate other than his own the necessity to sell land, and to show his acts and the state of his account since the administration, but not to prove any debt due to him from the intestate arising from a partnership agreement between them, or otherwise. *Finch v. Creech*, 55 Ga. 124.

Where, upon an accounting between an executor and the legatees, a note made by the former was found in his inventory of the property of the testator and embraced in the appraisement thereof, which he claimed to represent an advancement made to him by such testator, he was a competent witness to show how he came to return said note in the inventory, but incompetent as to any matters which passed between

the testator and him as to the same. *Williams v. McDowell*, 54 Ga. 222.

33. See *supra*, IV, 27. But see *Tomlinson v. Driver*, 53 Ga. 9.

Where, in ejectment against husband and wife by execution creditors claiming under sheriff's deed, plaintiff dies, the husband defendant is a competent witness in favor of the wife to show that she purchased the property in question with her own money, for the reason that he is not a party to the thing or contract in action. *Craig v. Brendel*, 69 Pa. St. 153.

34. *Hach v. Rollins*, 158 Mo. 182, 59 S. W. 232. See *Robinson v. Talmadge*, 97 Mass. 171; *Litchfield v. Merritt*, 102 Mass. 520. But see *Tomlinson v. Driver*, 53 Ga. 9.

As to competency of a widow or wife as such, see *supra*, IV, 27, and articles "HUSBAND AND WIFE," Vol. VI; "PRIVILEGED COMMUNICATIONS," Vol. X.

35. *Hach v. Rollins*, 158 Mo. 182, 59 S. W. 232; *Gardner v. McClelland*, 79 Pa. St. 398; *In re Irwin's Estate*, 160 Pa. St. 82, 28 Atl. 505; *Gross v. Iler*, 103 Md. 592, 64 Atl. 33.

In an action based on an antenuptial contract, a widow who was a party thereto as well as a party to and interested in the event of the action, is incompetent in her own behalf to prove such contract, her husband being dead. *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489.

A widow suing the husband's estate for services rendered during his lifetime is not a competent witness in her own behalf to prove that a note shown to have been given there-

plication of this rule.³⁶ A wife who joins in a conveyance by her husband, since deceased, merely for the purpose of relinquishing her dower does not become a party to the contract within the meaning of the statute.³⁷ The statute has no application where either the widow³⁸ or the decedent³⁹ was not a party to the contract or cause of action in issue.

(3.) **Surviving Husband.** — A surviving husband is incompetent to prove contracts or transactions with his deceased wife which are in issue and on trial.⁴⁰

(4.) **Marriage to Decedent.** — Where the witness' alleged marriage to decedent is in issue he is not competent to prove it.⁴¹ Where, however, the marriage is only incidentally involved in the case, the statute does not apply.⁴² A woman suing to annul her marriage for fraud of the deceased husband is not competent to prove the alleged fraud.⁴³

p. *Principal and Agent.* — (1.) **Generally.** — While the living⁴⁴ agent is not generally regarded as a party to the contract which he

for was lost and had not been in her possession since the date of the appointment of the administrator. *Dawdy v. Dawdy's Estate*, 118 Mo. App. 336, 94 S. W. 767. *distinguishing* *Shanklin v. McCracken*, 140 Mo. 348, 41 S. W. 898, where the witness was permitted to testify to the fact that she saw certain deeds delivered to her husband, on the ground that the evidence was there held competent because the wife derived her knowledge wholly by the exercise of the sense of sight.

36. *Magee v. Burch*, 108 Mo. 336, 18 S. W. 1078.

37. *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17 (*holding* that the grantee is therefore not competent against her as a surviving co-contractor). Compare *Clawson v. Wallace*, 16 Utah 300, 52 Pac. 9.

38. *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225.

A widow suing to set aside a conveyance by her husband, since deceased, is not incompetent, since she is not a party to the contract or cause of action. *Sanborn v. Lang*, 41 Md. 107.

39. *First Nat. Bank v. Eccleston*, 48 Md. 145.

40. The surviving husband claiming against his deceased wife's heirs under a conveyance from her to him, is incompetent on rebuttal of a claim that the property was purchased

with the decedent's money, to prove that he himself paid for it. *Miller v. Slupsky*, 158 Mo. 643, 59 S. W. 990.

Establishing Resulting Trust. A husband is incompetent to establish a resulting trust in property conveyed to his wife, since deceased. *Curd v. Brown*, 148 Mo. 95, 49 S. W. 990. So in an action by heirs of the dead wife to establish a resulting trust in property bought by the husband with the wife's money, he is incompetent. *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202.

41. A woman claiming the right as the widow of a deceased person to administer upon his estate is not competent to testify as to the fact of her marriage with the intestate. *Redgrave v. Redgrave*, 38 Md. 93. But see *Greenawalt v. McEvetlay*, 85 Pa. St. 352.

In a controversy between the alleged wife of an intestate and his administrator involving her right to a distributive share of the intestate's estate, her testimony is inadmissible. *Denison v. Denison*, 35 Md. 361.

42. *Stevens v. Joyal*, 48 Vt. 291; *Green v. Green*, 126 Mo. 17, 28 S. W. 752, 1008.

43. *Davis v. Plymouth*, 45 Vt. 492.

44. As to contracts or transactions with an agent since deceased, see *supra*, IX, 2, C, c. (4.).

negotiates,⁴⁵ he is a party to the contract of agency; and when this is the matter in issue and the agent is a party to or interested in the action he is incompetent to testify thereto in his own behalf if the principal is dead;⁴⁶ and an analogous rule applies likewise to the principal.⁴⁷

The principal sought to be charged with the agent's act is a competent witness to prove the character and extent of the agent's authority and instructions, although the other party to the transaction with the agent is dead.⁴⁸

(2.) **Agent of Party to Contract.** — (A.) **GENERALLY.** — The agent who acted for his principal in the execution of a contract with one since deceased or incompetent is not for that reason interested in or a party to the contract,⁴⁹ and is therefore competent for his principal in an action on the contract notwithstanding the death of the other

45. See *supra*, IX, 2, C, c, (3.), and *Sargeant v. National Life Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351.

46. *National Bank v. Bones*, 75 Ga. 246.

47. *Smith v. Smith*, 1 Allen (Mass.) 231. But see *Davis v. McLuter*, 65 Ga. 132.

48. Where it is sought to make one liable by reason of the acceptance of a draft by his agent, he is not rendered incompetent to testify to the want of authority in the agent to make such acceptance on account of the death of the drawer, the accepting agent and payee being both in life. *Lemon v. Arnaby*, 63 Ga. 271.

49. *Georgia*. — *Scurry v. Cotton States Life Ins. Co.*, 51 Ga. 624; *Flournoy v. Wooten*, 71 Ga. 168.

Maryland. — *Flach v. Gottschalk*, 88 Md. 368, 41 Atl. 908.

Pennsylvania. — *Sargeant v. National Life Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351.

Vermont. — *Lyttle v. Bond's Estate*, 40 Vt. 618; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092; *Gifford v. Thomas' Estate*, 62 Vt. 34, 19 Atl. 1088; *Poquet v. Town of North Hero*, 44 Vt. 91.

Virginia. — *Hall v. Rixey*, 84 Va. 790, 6 S. E. 215.

In an Action on an Insurance Policy, the agent of the company was introduced in its behalf, and after testifying that he, as its soliciting agent, took the application of deceased for the contract of insurance, for the benefit of plaintiff, he was asked the following question:

"At the time of taking the said application, did Mr. Oliver pay you any money, or did you furnish him with a binding receipt?"

Objection was made to this question and to his furnishing any more testimony upon any matter relating to his dealings with Mr. Oliver, or of any of Mr. Oliver's statements to him, which concern said application, or the contract of insurance alleged to have been made by defendant in accordance therewith. The court held that the witness was competent to testify, and said: "The contract for insurance made by Oliver with the defendant company was the foundation of the suit and the subject of the investigation. The original parties to the contract were Oliver and the company. They were the contracting parties, and not Oliver and the witness Stringfellow, who was simply the agent of the company, and in no legal sense one of the 'original parties' to the contract, which constituted the cause of action and was the subject of the investigation, he was not incompetent to testify. The test of competency of a party under the statute is not the fact to which such party is called to testify, but the contract or other transaction which is the subject of investigation. . . . It has been repeatedly said by this court that the statute relating to the competency of persons as witnesses was enacted to remove incompetency in most cases, and not to create it in any case. . . . And we have seen that there

party,⁵⁰ to prove both his agency and the contract,⁵¹ though in some jurisdictions an exception has been made to this rule in the case of a contract with a corporation's agent because a corporation can act only through an agent.⁵² In an action by the surviving party against the agent of the decedent for a breach of his authority the agent is competent in his own behalf, the transaction being regarded as one between living persons in which the decedent's estate is not interested.⁵³

(B.) **STATUTE.** — The statute sometimes disqualifies the agent as a witness for his principal against the other party's representatives.⁵⁴

is nothing to disqualify an agent in the few qualifications imposed by the statute upon its general removal of the incompetency of persons as witnesses; so that, both by the common law and under the statute, Stringfellow was competent to testify in behalf of his principal, the defendant company."

Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. 594. To the same effect, *Sargeant v. National L. Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351; *Scurry v. Cotton States Life Ins. Co.*, 51 Ga. 624.

50. *Georgia.* — *Flournoy v. Wooten*, 71 Ga. 168; *Planters & Miners Bank v. Neel*, 74 Ga. 576; *Scurry v. Cotton States Life Ins. Co.*, 51 Ga. 624. See *Odum v. Gill*, 59 Ga. 180.

Missouri. — *Clark v. Thais*, 173 Mo. 628, 73 S. W. 616; *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823; *Stanton v. Ryan*, 41 Mo. 510; *Leahy v. Simpson's Admr.*, 60 Mo. App. 83; *Baer v. Pfaff*, 44 Mo. App. 35; *Leeper v. McGuire*, 57 Mo. 360. *Contra.* — *Waltemar v. Schnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053; *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Green v. Ditsch*, 143 Mo. 1, 44 S. W. 799; *Edwards v. Warner*, 84 Mo. App. 200; *Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577.

Pennsylvania. — *Sargeant v. National Life Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351.

Vermont. — See *Atkins v. Atkins*, 69 Vt. 270, 37 Atl. 746.

Virginia. — *Richmond Union Pass. R. Co. v. New York, S. B. R. Co.*, 95 Va. 386, 28 S. E. 573; *Goodell's Exrs. v. Gibbons*, 91 Va. 608, 22 S. E. 504.

Agent of Corporation. — Where the contract is made between the

agent of a corporation and the person subsequently adjudged to be insane, such agent is competent to testify in an action on the contract, because the other party to the contract is the corporation, not the agent. *Flach v. Gottschalk*, 88 Md. 368, 377, 41 Atl. 908.

51. *Gifford v. Thomas's Estate*, 62 Vt. 34, 19 Atl. 1088.

52. *Flournoy v. Wooten*, 71 Ga. 168 (but see *Scurry v. Cotton States Ins. Co.*, 51 Ga. 624); *The South-western R. v. Papot*, 67 Ga. 675.

The president of a railroad company was held not a competent witness to prove certain negotiations and agreements concerning the stock, between himself and a member of the firm since dead, in an action brought by the surviving members of the firm against the railroad company, although he testified that his railroad had been previously leased by another company, to which he applied as friend of the deceased partner, and not officially, for an issuing of the stock. Nor was it competent to prove by a director in the railroad company, representations made by the deceased partner in the course of such negotiations, although the witness stated that he acted in such negotiations as attorney of the two companies, and not as a director of the one leased. *Central Railroad & Bkg. Co. v. Papot*, 59 Ga. 342.

53. *Davis v. Hawkins*, 163 Pa. St. 228, 29 Atl. 746, which was an action of deceit against the agent personally for conveying his principal's property to the plaintiff and taking the money therefor without authority.

54. Where a statute provides that no person who shall have acted in the making or continuing of a con-

(C.) PERSON ACTING IN MERELY CLERICAL CAPACITY. — One who acts in a merely clerical capacity under the immediate direction and supervision of his principal is not a "party" to the transaction, nor a contracting agent.⁵⁵

(D.) AGENT FOR BOTH PARTIES. — Where the agent through whom the contract was executed or the transaction negotiated was the agent of both parties, he is not rendered incompetent as a witness for one of the original parties by the death of the other.⁵⁶

(E.) DECEDENT'S AGENT. — (a.) *For His Principal's Representative.* The decedent's agent with whom the contract was made is a competent witness thereto on behalf of his principal's representative.⁵⁷

(b.) *Against Representative of Principal.* — The agent who acted for his principal in the contract or transaction is not competent in his own behalf in an action by or against the principal's representative.⁵⁸ He is, however, competent for the other party to the contract.⁵⁹

(c.) *Agency Not Disclosed.* — Although the agency was not disclosed at the time the contract was made in the name of the agent, it has been held that the latter is not a party thereto and is therefore competent in an action against his deceased principal's representative to prove his agency in the matter.⁶⁰ Where, however, the agent

tract with a person subsequently deceased shall be a competent witness in any suit involving such contract, as to matters occurring prior to the death of the decedent, on behalf of his principal and against the decedent's representatives, an agent of the payee of a note executed by the decedent cannot testify in an action thereon as to a part payment made to the witness and endorsed by him on the back of the note. *Locklund v. Burman's Estate*, 146 Mich. 233, 109 N. W. 255.

55. One who indorses upon a note payments made to the payee by the maker, since deceased, and acts in the presence and at the instance of such payee, is not an agent, but acts merely in a clerical capacity and is therefore competent to prove the transaction. *Waltmar v. Schnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053.

A cashier of a bank who is present merely in a clerical capacity when the discount committee of the bank makes a contract with one since deceased, is not a party to such contract nor a contracting agent, and is therefore competent to testify thereto. *Southern Com. Sav. Bank v.*

Slattery's Admr., 166 Mo. 620, 66 S. W. 1066.

56. See *Planters & Miners Bank v. Neel*, 74 Ga. 576; *citing Scurry v. Cotton States Life Ins. Co.*, 51 Ga. 624.

57. *Gifford v. Thomas's Estate*, 62 Vt. 34, 19 Atl. 1088.

An agent is not a party to a contract made by him in the name and behalf of his principal, hence where a note was signed Richard Bond, by Stillman Clark, it was held, that Clark was a competent witness in an action on said note against Bond's estate, after Bond's decease, Clark being an agent is not in legal sense a party to the note. *Lyttle v. Bond's Estate*, 40 Vt. 618.

58. *Brown v. Brightman*, 11 Allen (Mass.) 226; *Harper v. Dillon*, 60 Ga. 498. See also *Wright v. Bessman*, 55 Ga. 187. Compare *National Bank v. Bones*, 75 Ga. 246.

59. *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092. See *Lowrys v. Candler*, 64 Ga. 236. But see *National Bank v. Bones*, 75 Ga. 246.

60. An agent not a party to a suit is a competent witness to show his agency, not disclosed at the time of the transaction in controversy, al-

is himself a party to the action and the question in issue is whether he acted in his individual capacity or as agent, he is not competent.⁶¹

q. *Surviving Partner*. — The surviving partner is incompetent to testify in his own behalf in an action against the representatives of his deceased partner involving partnership transactions,⁶² except as to independent matters.⁶³ This rule applies, although such surviving partner is not a party to the action,⁶⁴ but in Pennsylvania the deceased partner's estate must be a party to or interested in the action.⁶⁵ In a proceeding by⁶⁶ or against⁶⁷ a deceased partner's representative for a partnership accounting, the surviving partner is incompetent.

r. *Corporation Stockholders, Directors and Officers*. — A stockholder in a corporation is not a party to any contract made by the corporation unless he acts as the latter's agent in the transaction,⁶⁸ nor are the directors,⁶⁹ or officers.⁷⁰ And even when such persons acted as the corporation's agent in the transaction in question they are not disqualified, since a mere agent is not regarded as the "other party" to the contract or transaction within the meaning of the statute.⁷¹

s. *Creditor of Decedent*. — A creditor of the decedent is not com-

though his principal may be dead, and although the effect of establishing the agency may be to make the estate liable instead of the agent individually. Before the passage of the act of 1866 the agent was a competent witness for or against his principal, and this has not been changed by the statute in question. In this case the agent is not one of the original parties to the contract or cause of action in issue or on trial, and he is not *the other party* to the contract or cause of action in issue or on trial. *Lowrys v. Candler*, 64 Ga. 236.

61. *National Bank v. Bones*, 75 Ga. 246. See also *Standford v. Horwitz*, 49 Md. 525.

62. *Graham v. Howell*, 50 Ga. 203. See *Stanbridge v. Catamach*, 83 Pa. St. 368; *Hanna v. Wray*, 77 Pa. St. 27.

63. *Graham v. Howell*, 50 Ga. 203.

64. *Hogeboom v. Gibbs*, 88 Pa. St. 235; *McKaig v. Hebb*, 42 Md. 227.

65. *Lancaster County Nat. Bank v. Henning*, 171 Pa. St. 399, 33 Atl. 335.

66. *Sangston v. Hack*, 52 Md. 173; *McKaig v. Hebb*, 42 Md. 227.

67. *Graham v. Howell*, 50 Ga. 203.

68. *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Southern Commercial Sav. Bank v. Slattery's Admr.*, 166 Mo. 620, 66 S. W. 1066; *Downes, Exr. v. Maryland & D. R. Co.*, 37 Md. 100; *Kuhn v. Germania Ins. Co.*, 71 Mo. App. 305. But see *Arrott Steam-Power Mills Co. v. Way Mfg. Co.*, 143 Pa. St. 435, 22 Atl. 699.

69. *First Nat. Bank v. Terry*, 99 Va. 194, 37 S. E. 843.

70. *Kuhn v. Germania Ins. Co.*, 71 Mo. App. 305; *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120.

A secretary and treasurer of a corporation party is not incompetent as to conversations between the president of the corporation and the other party to the cause of action, since deceased, the witness taking no part therein. *Wolff Shirt Co. v. Frankenthal*, 96 Mo. App. 307, 70 S. W. 378.

71. See fully *supra*, IX, 2, G, p. (2.), (A.).

Contra. — *Flournoy v. Wooten*, 71 Ga. 168. But see *Scurry v. Cotton States Ins. Co.*, 51 Ga. 624.

petent to prove his claim against the estate, or to show character of the contract for the purpose of establishing a priority.⁷²

X. LIMITATIONS AND EXCEPTIONS.

1. Generally. — The disability created by the statutes hereunder discussion is subject to certain limitations and exceptions which prevail quite generally without regard to the form of the statute.⁷³

2. Exceptions at Common Law. — A. **GENERALLY.** — At common law certain exceptions were made to the competency of parties and interested witnesses. These exceptions still prevail under the statutes.⁷⁴

B. **PROVING BOOKS OF ACCOUNT.** — a. *Generally.* — Statutes disqualifying parties and interested persons as to transactions with a decedent do not operate to make incompetent such party's account books showing his accounts with the decedent,⁷⁵ or his testimony in support of such books and accounts.⁷⁶ And this is the rule whether such books and the party's testimony in support thereof were competent at common law, or only by virtue of a statute;⁷⁷ the reason being that the disqualifying statutes are mere exceptions to general enabling acts and do not create any incompetency which did not theretofore exist. It has been held that the witness may also

⁷². *Latimer v. Sayre*, 45 Ga. 468.

⁷³. See succeeding discussion, and also *supra*, II.

⁷⁴. See *supra*, II, 2, D.

⁷⁵. *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875; *Dysart v. Furrow*, 90 Iowa 59, 57 N. W. 644; *Silver v. Worcester*, 72 Me. 322. *Contra*, *Dismukes v. Tolson*, 67 Ala. 386. See *Davis v. Seaman*, 64 Hun 572, 19 N. Y. Supp. 260; *Schwartz v. Stock*, 26 Nev. 128, 65 Pac. 351.

⁷⁶. *California.* — *Roche v. Ware*, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539.

Colorado. — *Haines v. Christie*, 28 Colo. 502, 66 Pac. 883.

Florida. — *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875; *Robinson v. Dibble's Admr.*, 17 Fla. 457; *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19.

Georgia. — *Strickland v. Wynn*, 51 Ga. 600.

Kansas. — *Anthony v. Stinson*, 4 Kan. 180.

Maine. — *Silver v. Worcester*, 72 Me. 322.

Missouri. — *Tierney v. Hannon's Exr.*, 81 Mo. App. 488.

New Hampshire. — *Snell v. Parsons*, 59 N. H. 521.

North Carolina. — *Leggett v. Glover*, 71 N. C. 211.

Pennsylvania. — *Keener v. Zartman*, 144 Pa. St. 179, 22 Atl. 889.

Rhode Island. — *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214.

But see *Boyd v. Cauthen*, 28 S. C. 72, 5 S. E. 170.

See article "BOOKS OF ACCOUNT," Vol. II.

⁷⁷. Thus, in Florida where a party's account books were not competent in his own behalf at common law, but were made so by an early statute, it is held that § 1095 Rev. Stat. 1892, disqualifying parties and interested persons from testifying as to transactions with deceased or incompetent persons, does not render incompetent the account books of such a witness, nor his testimony in support thereof, to the effect that the articles charged therein were delivered, or the labor and services therein charged were actually performed, and that the entries thereof were made at or about the time of the transaction and are the original entries, and that the charges have not been paid. Such books to be admissible in such cases, however, must

testify to the facts necessary to render the decedent's books admissible where they were kept by the witness himself.⁷⁸

Statutes in several states contain provisions making witnesses competent for this purpose.⁷⁹

b. *Character of Books and Entries.* — Under these statutes and decisions, the books and entries which may be supported by the incompetent witness' testimony are the same as are admissible under the rules governing the use of account books generally.⁸⁰

c. *Character of Testimony.* — The witness may testify to such

appear to be fairly kept and free from erasures and interlineations. *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875, following *Robinson v. Dibble's Admr.*, 17 Fla. 457, and holding that *Deans v. King's Exrx.*, 20 Fla. 533, is based upon the same theory, and that the testimony therein held to be admissible was held competent only because of the statute relating to the admission in evidence of account books. "What was decided in *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19, in reference to the supplementary oath in connection with the account book is not in conflict with the decision in *Deans v. King's Exrx.*" The court also distinguishes *Belote v. O'Brian's Admr.*, 20 Fla. 126, and refers to *Leggett v. Glover*, 71 N. C. 211 and *Strickland v. Wynn*, 51 Ga. 600 as holding the same as the principal case.

78. *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221. See *Keener v. Zartman*, 144 Pa. St. 179, 22 Atl. 889.

79. See *supra*, statutes of Colorado, Illinois, Missouri, Ohio, Tennessee, Vermont and Wyoming.

80. *Chapin v. Mitchell*, 44 Fla. 225, 32 So. 875; *Wyman v. Wilcox's Estate*, 66 Vt. 26, 28 Atl. 321.

In an action on a note secured by a mortgage, against the estate of the deceased maker, plaintiff contended that he was a competent witness to prove an alleged account book kept by himself showing an account of money loaned to the decedent and the taking of a note. Subsec. 7, § 606, Civ. Code Prac. provides that a person may testify for himself as to the correctness of original entries made by him against persons who are under no disability, other than infancy, in an accounting, according to the usual course of business,

though the person against whom they were made may have died or become of unsound mind; but that he must be ready to produce such book or writing if required. The account in question purported to be an account with the decedent showing money loaned on certain dates, followed by a statement: "This account settled October 11th, 1900, by note." Plaintiff contended that the book was kept by him in the regular course of business and that the items were correct. The court held that this section was not intended to enlarge the common law as to the admissibility of account books, and that only those books and entries which were competent at common law can be established by a person in his own behalf against the estate of a decedent under this section. The court quotes extensively from the case of *Proctor v. Proctor's Admr.*, 26 Ky. L. Rep. 348, 81 S. W. 272, construing this section and reviewing the previous cases of *Galbraith v. Starks*, 25 Ky. L. Rep. 2090, 79 S. W. 1191; *Brannin v. Foree's Admr.*, 12 B. Mon. (Ky.) 506. In all of these cases the section was held to refer merely to those books and entries which were competent at common law. The court says the purpose of the statute "is to allow the debtor himself to testify to the correctness of entries made by him in his books kept according to the usual course of business in those cases where the books themselves at common law were evidence of the facts set out in them. It was not designed to change the rule as to what books were evidence." *Clark v. Clark*, 28 Ky. L. Rep. 1069, 91 S. W. 284. To the same effect, *Estes v. Jackson*, 21 Ky. L. Rep. 859, 53 S. W. 271.

facts as must be proved to render the books admissible;⁸¹ he is not competent to explain entries therein;⁸² the statutes usually provide to what extent the witness shall be competent.⁸³

3. Calling or Examination by Court. — A. **GENERALLY.** — Statutes in some states provide that an incompetent witness may be compelled or allowed to testify by the court.⁸⁴ And it has been held that when the court can see that justice demands that the witness should be sworn it is within its discretion to permit his testimony to be given.⁸⁵

A statute providing that a claimant against the estate may be required to testify, does not give him the right to testify,⁸⁶ though it has been held that where the statute requires an examination by the court, the party is competent in his own behalf.⁸⁷

B. **DISCRETION OF COURT.** — The calling of the witness under such a statute is a matter resting in the sound discretion of the court.⁸⁸

It has been held that under a statute disqualifying parties from testifying against each other, unless called by the opposite party or required to testify by the court, the overruling of an objection to

81. Chapin v. Mitchell, 44 Fla. 225, 32 So. 875. See Cummins v. Hull's Admr., 35 Iowa 253. Deans v. King's Exrs., 20 Fla. 533.

82. Silver v. Worcester, 72 Me. 322.

83. Wyman v. Wilcox's Estate, 66 Vt. 26, 28 Atl. 321; Swafford's Admr. v. White, 28 Ky. L. Rep. 119, 89 S. W. 129.

84. See *supra*, statutes of Arizona, District of Columbia, Indiana and United States, and Robinson v. Mandell, 3 Cliff. 169, 20 Fed. Cas. No. 11, 959; Eslava v. Mazange's Admr., 1 Woods 623, 8 Fed. Cas. No. 4,527; Smith v. Burnet, 34 N. J. Eq. 219; Meyer v. Morris, 78 Ind. 558.

85. The Poland, 19 Fed. Cas. No. 11, 242. See *infra*, X, 4.

86. White v. Brown, 67 Me. 196; Gould v. Carlton, 55 Me. 511; Smith v. Burnet, 34 N. J. Eq. 219. Compare Moore v. Taylor, 44 N. H. 370.

87. *In re Hodges' Estate*, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820. Compare Hoehn v. Struttman, 71 Mo. App. 399.

88. Goldman v. Sotelo, 7 Ariz. 23, 60 Pac. 696; Willetts v. Schuyler, 3 Ind. App. 118, 29 N. E. 273; Forgeron v. Smith, 104 Ind. 246, 3 N. E. 866.

Under § 510, Burn's Rev. Stat.

1901, the court may in its discretion require any party to testify in an action against the representative of a decedent even though he would be otherwise incompetent in his own behalf, any abuse of discretion being reviewable on appeal. Hence in a proceeding by an heir of a deceased grantor against the grantee to have the conveyance declared a trust in favor of the plaintiff, the action of the court in calling the plaintiff to testify as to an alleged subsequent written trust agreement on the part of the grantor varying the terms of the written conveyance was held an abuse of discretion, being against the spirit and letter of § 507 disqualifying the plaintiff as to such matter. It appeared that there was no other evidence of the alleged trust agreement. *Jonas v. Hirshburg* (Ind. App.), 79 N. E. 1058.

In an action against a devisee based on a transaction with the testator, it is not an abuse of discretion to call plaintiff to testify thereto after he has made out a *prima facie* case. *Talbott v. Barber*, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 487. To same effect, *Thornburg v. Buck*, 13 Ind. App. 446, 41 N. E. 85.

In an action against the representative of a deceased maker and a sur-

the competency of the witness is in effect requiring the witness to testify.⁸⁹ But the contrary has also been held.⁹⁰

C. EFFECT AS WAIVER. — Where pursuant to statute the court calls and examines one of the parties to the proceeding as to matters concerning which the other party is incompetent, the latter's incompetency is not thereby waived by the person so examined.⁹¹ The fact, however, that in a particular proceeding the statute requires the court to examine a party does not prevent the examination of such party by the adverse party, in such a proceeding, from being a waiver of the incompetency of the witness.⁹²

4. When Injustice May Be Done. — **A. GENERALLY.** — In New Hampshire the statute disqualifies parties adverse to an executor or administrator as to matters occurring in the decedent's lifetime, except when it clearly appears that injustice may be done without such testimony.⁹³ The injustice which will authorize the court to permit the witness to testify must clearly⁹⁴ appear otherwise than from the testimony of the witness himself.⁹⁵

B. LIMITS OF COURT'S DISCRETION. — The statute provides that the ruling of the trial court admitting or rejecting the testimony of a party in such a case may be reviewed. The decisions have established the rule that the witness is properly allowed to testify only as to those matters concerning which the decedent, if alive, could not have testified.⁹⁶ Under a former statute the incompetency was

viving maker of a note, where each sets up a separate defense, it is discretionary with the court to permit the surviving maker to testify. *Meyer v. Morris*, 78 Ind. 558.

89. *Goldman v. Sotelo*, 7 Ariz. 23, 60 Pac. 696, holding that the evident purpose of the statute was to leave the matter in the discretion of the court, and that there was no abuse of discretion where other witnesses had testified to the same transaction.

90. *Cupp v. Ayers*, 89 Ind. 60, overruling *Smith v. Smith*, 76 Ind. 236.

91. *Merchants Loan & Trust Co. v. Egan*, 222 Ill. 494 78 N. E. 800.

92. Although in a proceeding charging the concealment and embezzling of property belonging to an estate the statute requires the accused to be examined under oath by the court, the plaintiff cannot call and examine such person without waiving his incompetency. *Hoehn v. Struttman*, 71 Mo. App. 399.

93. *Giles v. Smith* (N. H.), 66 Atl. 1049; *Simpson v. Gaffney*, 66 N. H. 261, 20 Atl. 931; *Welch v. Adams*, 63 N. H. 344, 1 Atl. 1, 56 Am.

Rep. 521; *Tuck v. Nelson*, 62 N. H. 469.

In the case of *Moore v. Taylor*, 44 N. H. 370, the court held that upon appeals from commissioners on insolvent estates, it is within the discretion of the court to allow the creditor to testify in his own favor, as well as to compel him to testify in favor of the estate, upon a proper case made, whether the administrator elects to testify or not, but the creditor is not entitled, as a matter of right, to be thus admitted as a witness in his own favor.

The Exclusion of the Testimony is equivalent to a finding by the court that justice does not require its admission. *Berry v. McArdle*, 62 N. H. 354.

94. *Berry v. McArdle*, 62 N. H. 354; *Simpson v. Gaffney*, 66 N. H. 261, 20 Atl. 931.

95. *Weston v. Elliott*, 72 N. H. 433, 57 Atl. 336; *Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652; *Harvey v. Hilliard*, 47 N. H. 551; *Cochran v. Langmaid*, 60 N. H. 571; *Fosgate v. Thompson*, 54 N. H. 455.

96. *Parsons v. Wentworth*, 73 N.

not limited to matters occurring in the decedent's lifetime; it was nevertheless held that the witness was properly allowed to testify to matters occurring subsequent to the death.⁹⁷ Where the executor or administrator has elected to become a witness, the court has no discretionary right to exclude the adverse party.⁹⁸

5. Corroboration Does Not Remove Incompetency. — The fact that the testimony of an incompetent witness is corroborated does not entitle it to admission or consideration.⁹⁹

6. Inapplicability of Statute on Ground of Necessity. — In some cases necessity has apparently been considered a sufficient ground for making an exception to the disqualifying statute, as where the testimony of the disqualified witness is in the nature of the case the only evidence of the fact.¹ This is in harmony with the rule

H. 122, 59 Atl. 623; *Chandler v. Davis*, 47 N. H. 462; *Hoit v. Russell*, 56 N. H. 559; *Burns v. Madigan*, 60 N. H. 197; *Page v. Whidden*, 59 N. H. 507; *Giles v. Smith* (N. H.), 66 Atl. 1049.

97. *Brown v. Brown*, 48 N. H. 90.

98. *Ballou v. Tilton*, 52 N. H. 605.

99. *Gaar, Scott & Co. v. Reesor*, 28 Ky. L. Rep. 1308, 91 S. W. 717; *Englehart v. Richter*, 136 Ala. 562, 33 So. 939; *Kendall's Exr. v. Collier*, 97 Ky. 446, 30 S. W. 1002. See *Downey v. Andrus*, 43 Mich. 65, 4 N. W. 628; *Killen v. Lide*, 65 Ala. 565.

1. *Sykes v. Bates*, 26 Iowa 521. This was an action by the vendee in an oral contract of sale, against the deceased vendor's administrator to recover money alleged to have been paid under the contract. It appeared that plaintiff had paid a small sum down and agreed to send to the vendor the balance, \$1000, by express, to the care of one K. The evidence showed that an express package purporting to contain money had arrived at the destination, directed to the vendor in the care of K.; that the vendor was advised of the arrival of the package, and before his death said that the plaintiff had performed his contract; but the deed drawn by the vendor was never delivered. K. instead of delivering the package to the vendor delivered it to one Fowler, who immediately absconded and had not been since heard from. Plaintiff was offered not as a general witness, but merely to prove that the package when sent contained \$1000. Over objection he was permitted to

testify that he placed the money, in bills of certain denomination, in the package and called the attention of the express agent to the enclosure, who refused to look at it because of the rules of the company, and that no other person was present at the office at the time the money was sent. This ruling was held no error, although it was contended that the evidence was incompetent because the fact testified to transpired before the decedent's death, the statute disqualifying the witness as to such facts. The court says: "From the necessity of the case, we think it was competent for the plaintiff to testify to the amount or sum that it contained when he deposited it in the express office. This is analogous to the well known rule which allowed a party, although disqualified to testify generally, to give evidence of the contents of his lost baggage or trunks in an action against a carrier or innkeeper. The reception of the plaintiff's testimony, under these circumstances, as to the amount of money which the package contained, is not in contravention of the meaning and intention of the statute (§ 3982), although it is apparently against the strict letter of it. The section of the statute just named did not intend, with respect to cases in which an executor was an adverse party, to make the rule as to the competency of evidence more strict than it was at common law, and at common law the evidence, for the specific purpose for which it was offered and used, was, from the necessity of the case, regarded as competent."

at common law which admitted the testimony of an incompetent witness in certain cases "*ex necessitate rei*."²

7. Calling or Examination by Adverse Party. — A. RIGHT TO CALL ADVERSE PARTY OR WITNESS. — a. *Generally.* — Either party to an action has the right to call and examine the adverse party or witness, notwithstanding the fact that such witness may be incompetent against the person so calling him.³ Although statutes fre-

2. Testimony Admissible Ex Necessitate Rei. — At common law the testimony of the party was sometimes held competent on the ground of necessity (see *United States v. Clark*, 96 U. S. 37; *Lampley v. Scott*, 2 Cushm. (Miss.) 528; *Lancum v. Lovell*, 9 Bingh. 465, 23 E. C. L. 335; *Buller's N. P.* 289; *Evans v. Hardgrove*, 11 Tex. 210), as where his property had been destroyed through the wilful wrongdoing of the other party, in which case he was competent to prove his damage where no other evidence was obtainable. *Herman v. Drinkwater*, 1 Me. 27; *Queenier v. Morrow*, 1 Coldw. (Tenn.) 123; *Childrens v. Saxby*, 1 Vern. (Eng.) 207. Thus in an action against a carrier or innkeeper for the loss of baggage, where no other evidence was obtainable the plaintiff was held competent to prove the nature and value of the lost goods. See the following cases:

United States. — *United States v. Clark*, 96 U. S. 37.

Alabama. — *Douglass v. Montgomery & W. P. R. Co.*, 37 Ala. 638, 79 Am. Dec. 76.

Georgia. — *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Kitchen v. Robbins*, 29 Ga. 713.

Illinois. — *Parmelee v. McNulty*, 19 Ill. 556; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Illinois Cent. R. Co. v. Taylor*, 24 Ill. 323; *Davis v. Michigan So. & N. I. R. Co.*, 22 Ill. 278; *Illinois Cent. R. Co. v. Cope-land*, 24 Ill. 332, 76 Am. Dec. 749.

Indiana. — *Indiana Cent. R. Co. v. Gulick*, 19 Ind. 83.

Louisiana. — *Pope v. Hall*, 14 La. Ann. 324.

Maryland. — *Pettigrew v. Barnum*, 11 Md. 445, 69 Am. Dec. 212.

Michigan. — *Wright v. Caldwell*, 3 Mich. 51.

Missouri. — *Nolan v. Ohio & M. R.*

Co., 39 Mo. 114; *Williams v. Frost*, 39 Mo. 516.

New York. — *Taylor v. Monnot*, 4 Duer 116.

Pennsylvania. — *Clark v. Spence*, 10 Watts 335; *David v. Moore*, 2 Watts & S. 230.

Tennessee. — *Johnson v. Stone*, 11 Humph. 419.

Though in some jurisdictions the rule was limited to those cases in which there had been some wilful wrongdoing other than mere negligence. *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44; *Smith v. North Carolina R. Co.*, 60 N. C. 202; *Packard v. Northcraft's Admr.*, 2 Metc. (Ky.) 439; *Garvey v. Camden, etc. R. Co.*, 1 Hilt. (N. Y.) 280; *Block v. Steamboat Trent*, 18 La. Ann. 664; *Christian v. United States*, 7 Ct. Cl. 431.

3. United States. — *Treadwell v. Lennig*, 50 Fed. 872.

Alabama. — *Thomas v. Thomas*, 42 Ala. 120; *Dudley v. Steele*, 71 Ala. 423.

California. — *Chase v. Evoy*, 51 Cal. 618.

Illinois. — *Sconce v. Henderson*, 102 Ill. 376; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Thompson v. Wilson*, 56 Ill. App. 159.

Indiana. — *Howard v. Howard*, 69 Ind. 592; *Bartlett v. Burden*, 11 Ind. App. 419, 39 N. E. 175.

Iowa. — *Leasman v. Nicholson*, 59 Iowa 259, 12 N. W. 270, 13 N. W. 289.

Maryland. — *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645.

New Jersey. — *Joss v. Mohn*, 55 N. J. L. 407, 26 Atl. 987; *Personette v. Pryme*, 34 N. J. Eq. 26; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156; *Daw v. Vreeland*, 30 N. J. Eq. 542.

New York. — *Cunningham v.*

quently provide for this right it exists independent of such statutory recognition.⁴ The right to call such a witness of course carries with it the right to compel him to testify.⁵

b. *Who Is Opposite or Adverse Party.* — In determining who is an opposite party and entitled as such to call the adverse party as a witness the court will ordinarily look at the real interests of the parties and not their position on the record.⁶ But where a person

Whitford, 73 Hun 273, 26 N. Y. Supp. 575.

Ohio. — Neil v. Cherry, 2 Ohio Dec. 417; Roberts v. Briscoe, 44 Ohio St. 596, 10 N. E. 61.

Pennsylvania. — Ash v. Guie, 97 Pa. St. 493, 39 Am. Rep. 818.

Texas. — Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030.

The Statutes of Alabama, Arizona, Arkansas, Delaware, District of Columbia, Illinois, Maryland, North and South Dakota, Tennessee, Texas, Utah, Virginia, and the United States provide that the witness shall be competent when called by the opposite party. See *supra*, statutes.

Under a statute disqualifying both parties, unless called by the opposite party, either party is competent when called by the other. Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Clark v. Clark, 21 Tex. Civ. App. 371, 51 S. W. 337; United States Fidelity & Guaranty Co. v. Fossati (Tex. Civ. App.), 81 S. W. 1038.

Although one of the original parties to the contract or transaction which is the subject of investigation, be dead, the survivor may be called as a witness by the adverse party. Cottrell v. Watkins, 96 Va. 783, 32 S. E. 470; Whitridge v. Whitridge, 76 Md. 54, 24 Atl. 645; Ainsworth v. Stone, 73 Vt. 101, 50 Atl. 805.

Although a witness has a pecuniary interest in the result of the suit, if he is called by a party to whom his interest is opposed, he is competent. Harper v. Hays Co. (Ala.), 43 So. 360.

When the representative calls the other party he thereby waives any possible objection he might make to such party's calling him. Palmer v. Bass, 69 N. H. 300, 41 Atl. 447.

A protected party has the right to

call an incompetent witness to testify to transactions between the witness and decedent. Gray v. Cooper, 65 N. C. 183.

An incompetent party may call the executor. Terhune v. Henry, 13 Iowa 99.

The deposition of a party incompetent in his own behalf may be used by the adverse party. McDonald v. Woodbury, 65 How. Pr. (N. Y.) 226.

4. Chase v. Evoy, 51 Cal. 618.

The words "unless called to testify by the opposite party" were incorporated into the statute out of abundant legislative caution, in recognition of a right which would have otherwise existed; and hence the omission of these words from the statute by subsequent amendment, cannot be construed as a legislative amendment to abrogate the right. Dudley v. Steele, 71 Ala. 423.

5. Roberts v. Briscoe, 44 Ohio St. 596, 10 N. E. 61.

6. *United States.* — Eslava v. Mazange's Admr., 1 Woods 623, 8 Fed. Cas. No. 4,527.

Alabama. — Dolan v. Dolan, 89 Ala. 256, 7 So. 425.

Illinois. — Corderey v. Hughes, 6 Ill. App. 401; Bardell v. Brady, 172 Ill. 420, 50 N. E. 124; Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999; Apperson v. Gogin, 3 Ill. App. 48; Bragg v. Geddes, 93 Ill. 39; Wagenseller v. Prettyman, 12 Ill. App. 341.

Indiana. — Martin v. Asher's Admr., 25 Ind. 237; Ketcham v. Hill, 42 Ind. 64; Cupp v. Ayers, 89 Ind. 60.

Iowa. — Culbertson v. Salinger, 131 Iowa 307, 108 N. W. 454.

Kansas. — Shorten v. Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

Missouri. — Scott v. Burfiend, 116 Mo. App. 71, 92 S. W. 175.

has been made a party defendant because of his refusal to join as a plaintiff and has interposed an answer opposing the plaintiff's contentions, he is an opposite party within the meaning of the statute, notwithstanding the fact that he may really desire the plaintiff to succeed.⁷ And it has been held that one who is a necessary party defendant and has been joined as such is competent on behalf

New Jersey.—*McCartin v. Trap-
hagen*, 43 N. J. Eq. 323, 11 Atl. 156.

North Carolina.—*Weinstein v.
Patrick*, 75 N. C. 344; *Mason v. Mc-
Cormick*, 75 N. C. 263, 80 N. C. 244.
Ohio.—*Hubbell v. Hubbell*, 22
Ohio St. 208.

Pennsylvania.—*Guldin's Admr's v.
Guldin's Admr.*, 97 Pa. St. 411.

Tennessee.—*Aymett v. Butler*, 8
Lea 453.

West Virginia.—*Seabright v. Sea-
bright*, 28 W. Va. 412.

Compare *supra*, IV, 2, C.

The opposite party within the meaning of the phrase, "unless called by the opposite party," is the opposite party in interest, and his position on the record is immaterial. Hence one party cannot call the adverse party on the record if their interests are in reality the same. *Trabue v. Turner*, 10 Heisk. (Tenn.) 447.

A Surviving Partner or Joint Debtor, in an action against himself and the representative of the decedent, is not competent on behalf of the plaintiff to prove that the deceased was his partner or a joint party to the obligation. *Rascoe v. Walker-Smith Co.*, 98 Tex. 565, 86 S. W. 728; *Lyon v. Pender*, 118 N. C. 147, 24 S. E. 744; *Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884; *Hurlbut v. Meeker*, 104 Ill. 541; *Alcorn's Exr. v. Cook*, 101 Pa. St. 209.

Where a bill seeks relief against the estate of a deceased defendant, and also as against another as a co-contractor with the deceased, and seeks to hold them jointly responsible, and that other is offered as a witness by the complainants, the representatives of the estate not consenting, the witness is not competent to testify, since his interest would seem to be directly in conflict with the interest of the estate in the matter of shifting a burden from himself to the estate, and the fact of the po-

sition of the witness on the record, and the further fact that his interest in some respects was opposed also to the complainants, does not enable them to avoid his incompetency as to the estate by waiving it as to themselves. *Browning v. Kelly*, 124 Ala. 645, 27 So. 391. But see *Cunningham v. Whitford*, 73 Hun 273, 26 N. Y. Supp. 575.

7. Thus in a suit by an heir against the executor and devisees to set aside a will where the latter have been made defendants because of their refusal to join with the plaintiff, and have interposed a general denial, they are competent witnesses for the plaintiff although they have testified that they really desire the will to be set aside and the plaintiff allowed to share in the estate. It appeared that one of the witnesses thought he would receive a little less, while the other was uncertain whether he would receive more or less if the plaintiff were successful. The witnesses were also aiding the plaintiff on the trial by prompting her attorneys and otherwise. The court after citing *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Lewis v. Aylott*, 45 Tex. 190, says: "We are of the opinion that the witnesses were opposite parties to the plaintiff. They were beneficiaries under the will, and were therefore necessary parties to the proceeding to invalidate it. They refused to attack it, and were therefore necessary defendants. Their attitude in the issue formed, . . . made it necessary for the appellant to establish the facts upon which she relied to set aside the will. Whatever may have been their feelings, their relation to this issue was that of parties opposed to appellant. We do not speak of cases of collusion in which a party really a plaintiff in interest is made a defendant, or *vice versa*, in order

of the plaintiff, although his real interest lies with the latter.⁸ The opposite party is *prima facie* adverse and therefore competent for the other party to the record.⁹

B. EFFECT OF SUCH CALLING OR EXAMINATION. — a. *Generally.*

to evade the statute." *Sanders v. Kirbie*, 94 Tex. 564, 63 S. W. 626. But see *Wagenseller v. Prettyman*, 12 Ill. App. 341.

8. See *Packer v. Noble*, 103 Pa. St. 188.

In an action by an administrator, the purpose of which was to compel a defendant corporation to issue a certificate of stock to the intestate's son and to require the latter to assign the same to the plaintiff, the son, who had been made a party defendant, was held competent to testify to transactions with the intestate on behalf of the plaintiff. The answer of the witness admitted all of the allegations of the bill. It was contended that the witness was not an opposite party to the plaintiff within the meaning of the statute. The court says: "It is insisted that his adverse position as a defendant on the docket does not make him competent as a witness at the call of the plaintiff, because of accord between him and the plaintiff as to the object to be accomplished by the suit. The exception to the competency of this witness, however, cannot be sustained. That he is, as a witness, not hostile to the plaintiff (appellant), and may be supposed, under the circumstances of the case, to have a bias in favor of the appellant, who called him, as respects the result of the suit, may be properly suggested as reason why the court should be cautious in weighing his evidence, and in the effect to be given to it; but his competency to testify is to be determined by his legal relation to the cause. Under the statute he was competent as a witness upon the call of the 'opposite party,' and his position in the case brings him within this provision of the statute. As respects the object of the suit, appearing from the allegations of the bill of complaint of the appellant and its prayer for relief, the defendant Baldwin had no

such identity of interest with the appellant that he could have been properly joined as a plaintiff in the proceeding. On the contrary, his position is shown to be adversary, in legal contemplation, and he was a necessary party defendant. Relief was sought by the bill as against him; and to establish such right of relief as against him was the very foundation for the relief sought by the suit as against the other parties thereto. In the circumstances of the case the court would not have made a decree for the relief prayed in the bill of the appellant in the absence of George S. Baldwin as a defendant. As to the defendant corporation, no decree could have been safely or justly passed against it to issue a new certificate of stock, as asked by the bill, unless by such decree the title to the stock was settled as against Baldwin, as well as in favor of the appellant. If the appellant was to have a decree according to the relief asked, it was manifestly proper that Baldwin should be concluded by the decree as to his title to the stock which was the subject of the suit. Baldwin, being a proper and necessary party defendant in the cause, was, as to the appellant, an 'opposite party,' within the meaning and purview of the statute to which reference has been made. As respects the question now being considered, this case would seem to fall clearly within the ruling made in the case of *Whitridge v. Whitridge*, et al., 76 Md. 54 (see pages 75, 76), 24 Atl. 645, as to the competency of Mrs. Whitridge as a witness in that case." *Duval v. Hambleton & Co.*, 98 Md. 12, 55 Atl. 431. Compare *Cross v. Iler*, 103 Md. 592, 64 Atl. 33.

9. In an action to set aside the will, a defendant devisee was *prima facie* competent on behalf of the contestants. *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

Where one party calls or examines a witness, incompetent against him, as to prohibited matters, the incompetency of the witness for the other party, as to the same matters, is thereby waived.¹⁰ But the calling or examination of such a witness, by the protected party, as to matters not within the inhibition of the statute, is not a waiver of his incompetency for the adverse party as to other matters, either on direct or cross-examination.¹¹ Nor does the calling of one party

10. *Colorado*.—Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604.

Georgia.—Shipp *v.* Davis, 78 Ga. 201, 2 S. E. 549.

Illinois.—Butz *v.* Schwartz, 135 Ill. 180, 25 N. E. 1007; Becker *v.* Foster, 64 Ill. App. 192.

Indiana.—Gilbert *v.* Swain's Estate, 9 Ind. App. 88, 36 N. E. 374; Bartlett *v.* Burden, 11 Ind. App. 419, 39 N. E. 175.

Kansas.—Niccolls *v.* Esterly, 16 Kan. 32.

Minnesota.—*In re* Hess' Estate, 57 Minn. 282, 59 N. W. 193.

Michigan.—Beardslee *v.* Reeves, 76 Mich. 661, 43 N. W. 677; Lilley *v.* Mutual Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631; Smith's Appeal, 52 Mich. 415, 18 N. W. 195; *In re* Dunlap's Estate, 94 Mich. 11, 53 N. W. 788; Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788.

Missouri.—Tucker *v.* Gentry, 93 Mo. App. 655, 67 S. W. 723; Strode *v.* Frommeyer, 115 Mo. App. 220, 91 S. W. 167; Saettele *v.* Metropolitan Life Ins. Co., 86 Mo. App. 156.

New Jersey.—Wilson *v.* Terry, 70 N. J. Eq. 231, 62 Atl. 310.

New York.—Hackstaff *v.* Hackstaff, 82 Hun 16, 31 N. Y. Supp. 11; Cole *v.* Sweet, 187 N. Y. 488, 80 N. E. 355.

Ohio.—Roberts *v.* Briscoe, 44 Ohio St. 596, 10 N. E. 61.

Pennsylvania.—Bair *v.* Frischhorn, 151 Pa. St. 466, 25 Atl. 123.

Texas.—Jackson *v.* Munford's Exr., 74 Tex. 104, 11 S. W. 1061.

Vermont.—Dee *v.* King, 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860; Paine *v.* McDowell, 71 Vt. 28, 41 Atl. 1042; Ainsworth *v.* Stone, 73 Vt. 101, 50 Atl. 805.

West Virginia.—Metz *v.* Snodgrass, 9 W. Va. 190.

Wisconsin.—Drinkwine *v.* Gruelle, 120 Wis. 628, 98 N. W. 534.

On the trial of an action to recover an alleged loan, plaintiffs gave in evidence a check signed by their intestate, payable to defendant, and proved that it was delivered to, indorsed by and paid to him; they then called him as a witness and proved by him that at the time of the delivery of the check said intestate did not owe him anything. As a witness in his own behalf he was asked to state what took place between decedent and himself, which was objected to and excluded as incompetent under the statute. This ruling was held error, on the ground that the statute does not abrogate the rule of evidence, that where a party calls a witness and examines him as to a part of a communication or transaction, the other party may call out the whole, so far as it bears upon or tends to explain the part called out; that, as the testimony of the defendant called out by the plaintiff tended to rebut the presumption that the transaction, i.e., the giving of the check, was the payment of a debt, and to raise the presumption that it was a loan, this opened the whole transaction and entitled defendant to testify in his own behalf in regard thereto. *Nay v. Curley*, 113 N. Y. 575, 21 N. E. 698.

11. *Georgia*.—Perry *v.* Mulligan, 58 Ga. 479.

Illinois.—Merchants' Loan & Tr. Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800.

Massachusetts.—Green *v.* Gould, 3 Allen 465.

Minnesota.—Tretheway *v.* Carey, 60 Minn. 457, 62 N. W. 815.

New York.—Miller *v.* Montgomery, 78 N. Y. 282.

North Carolina.—Summer *v.* Candler, 92 N. C. 634; Armfield *v.* Colvert, 103 N. C. 147, 9 S. E. 461;

by another render the latter a competent witness in his own behalf.¹²

b. *Examination to Determine Competency.*—An examination, however, which is made merely to disclose the incompetency of the witness is not a waiver of such incompetency.¹³

c. *Nature of Calling or Examination.*—(1.) **Cross-Examination.** (A.) **GENERALLY.**—The waiver of a witness' incompetency as to a transaction with a decedent may be made not only by a direct, but also by a cross-examination of him as to such matters.¹⁴ A protected party cannot complain of testimony of an incompetent witness as to prohibited matters where such testimony is responsive to his own cross-examination.¹⁵

(B.) **CROSS-EXAMINATION AFTER OBJECTION.**—A protected party does not waive the incompetency of an adverse witness by cross-examining him after a proper objection has been overruled and exception taken, if he confines such cross-examination to the matters brought out in chief.¹⁶

(C.) **CROSS-EXAMINATION AS TO NEW MATTER.**—Where a protected party, on cross-examination, goes into new matter not touched upon in the direct examination and as to which the witness is incompetent under the statute, he thereby waives the incompetency as to such new matter.¹⁷

Hopkins v. Bowers, 108 N. C. 298, 12 S. E. 984.

Pennsylvania.—*Lahey v. Heenan*, 81 Pa. St. 185; *Bierly's Estate*, 81* Pa. St. 402; *Bair v. Frischkorn*, 151 Pa. St. 466, 25 Atl. 123.

West Virginia.—*French v. French*, 14 W. Va. 458.

12. *Daw v. Vreeland*, 30 N. J. Eq. 542, and see fully, *infra*, X, 8, A, e.

13. *Tretheway v. Carey*, 60 Minn. 457, 62 N. W. 815. See also *Davis v. Davis*, 86 Hun 400, 33 N. Y. Supp. 477.

14. *Georgia.*—*Moore v. Dutson*, 79 Ga. 456, 4 S. E. 169; *Shipp v. Davis*, 78 Ga. 201, 2 S. E. 549; *Carlton v. Western & A. R. Co.*, 81 Ga. 531, 7 S. E. 623.

Kentucky.—*Schonbachler's Admr. v. Mitchell*, 28 Ky. L. Rep. 460, 89 S. W. 525.

Michigan.—*Michigan Sav. Bank v. Butler's Estate*, 98 Mich. 381, 57 N. W. 253.

Minnesota.—*In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193.

Missouri.—*Ables v. Ackley*, 126 Mo. App. 84, 103 S. W. 974.

New Hampshire.—*Eastman v. Moulton*, 3 N. H. 156.

New York.—*Hackstaff v. Hackstaff*, 82 Hun 16, 31 N. Y. Supp. 11.

15. *Treadwell v. Lennig*, 50 Fed. 872; *Harper v. Parks*, 63 Ga. 705; *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158.

The plaintiff's deposition having been taken, and the defendants having cross-examined him, they can not have the questions and answers on cross-examination stricken out, though these may refer to the acts and declarations of a deceased person, under whom the defendants claim. *Field v. Brown*, 24 Gratt. (Va.) 74.

16. *Goodlett v. Kelly*, 74 Ala. 213; *Achilles v. Achilles*, 137 Ill. 589, 28 N. E. 45; *Calwell v. Prindle*, 11 W. Va. 307. See also articles "COMPETENCY," Vol. III, and "OBJECTIONS," Vol. IX.

17. *Douglass v. Fullerton*, 7 Ill. App. 102; *Stuyvaert v. Arnold*, 122 Mo. App. 421, 99 S. W. 529; *Edwards v. Latimer*, 183 Mo. 610, 82 S. W. 109; *Tierney v. Hannon's Exr.*, 81 Mo. App. 488; *Corson's Estate*, 137 Pa. St. 160, 20 Atl. 588; *Boyd*

(D.) CROSS-EXAMINATION AS TO ADMISSION RELATING TO A TRANSACTION. Cross-examination by the adverse party as to a previous admission by the witness which relates to a transaction or communication between himself and the decedent is not a waiver of the incompetency of the witness as to such transaction or communication.¹⁸

(2.) **Taking Deposition.** — A party who takes and files the adverse party's deposition thereby waives the latter's incompetency on his own behalf, even though he does not introduce such deposition in evidence;¹⁹ and the same rule applies though the deposition is never filed with the clerk.²⁰ Such waiver must, however, be shown to the court.²¹ A party whose deposition has been taken and filed by the adverse party may introduce such deposition in his own behalf although it relates to prohibited matters.²²

v. Conshohocken Worsted Mills, 149 Pa. St. 363, 24 Atl. 287; *In re Clad's Estate*, 214 Pa. St. 141, 63 Atl. 542.

The incompetency of the witness as to such new matter is waived even though the rule enforced in some states, that when a cross-examiner examines a witness on new matter he makes such witness thenceforward his own, does not prevail in Missouri. "A sequence of that rule has been adopted and applied by this court as a sensible rule in the administration of justice. If a witness be incompetent and the party interested in his incompetency nevertheless examines him on new matter not touched or brought out in chief, then as to such new matter his incompetency is waived." *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997.

But in *Donnell v. Braden*, 70 Iowa 551, 30 N. W. 777, the court said: "The plaintiff cross-examined the witness, and it may be that the facts were more fully brought out on such examination than they had been in chief; and it is now insisted, if the evidence elicited on the examination in chief is excluded, that on cross-examination cannot be, because it was introduced by the plaintiff. But, as the witness was incompetent to testify, and such objection was made at the proper time, we do not think the plaintiff waived such objection by the cross-examination."

18. In an action to determine adverse claims to the contents of a safety deposit box, which were claimed by the defendant K. as a gift

causa mortis from the deceased, and, also, by the defendant D. as administrator of the estate of the deceased, the defendant K. was cross-examined by the administrator in reference to an affidavit she had made as to a conversation between herself and the deceased, which was alleged to have taken place about the time of the alleged gift, the purpose of such question being to show an admission by the witness in the affidavit contrary to the theory of a gift *causa mortis*, and not seeking to prove by her what transpired at the time of the alleged gift. It was held that § 829 of the Code of Civil Procedure, permitting the plaintiff to testify to any transaction with the deceased where the administrator has offered evidence concerning the same transaction, did not apply, as the affidavit was not offered by the administrator to show a personal transaction with the deceased, but that the question was, whether she had in that affidavit made an admission which was fatal to her claim. *Mercantile Safe-Deposit Co. v. Dimon*, 55 App. Div. 538, 67 N. Y. Supp. 430. Compare *infra*, X, 8, A, d.

19. *Ess v. Griffith*, 139 Mo. 322, 40 S. W. 930; *In re Souldard's Estate*, 141 Mo. 642, 43 S. W. 617; *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567.

20. *Rice v. Waddill*, 168 Mo. 99, 67 S. W. 605.

21. *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201.

22. *Thomas v. Irvin*, 90 Tenn. 512, 16 S. W. 1045.

(3.) **Effect of Interrogatories in Bill.** — (A.) **GENERALLY.** — Where the complainant in an equity suit propounds interrogatories in his bill he thereby makes the adverse party competent for the purpose of answering such interrogatories.²³ And the introduction of such answers in evidence by the complainant renders the adverse party competent on the trial as to any transaction with the decedent covered thereby.²⁴

(B.) **INTERROGATORIES REQUIRED BY LAW.** — Where, however, interrogatories to the adverse party are part of the pleading required by law, the propounding of such interrogatories is not a waiver of the adverse party's incompetency to testify at the trial.²⁵

(4.) **Suit for Accounting.** — It has been held that one who sues for an accounting calls the adverse party to testify within the meaning of the statute,²⁶ but the weight of authority is to the contrary,²⁷ and in a suit for an accounting *inter vivos*, the fact that the defendant has been ordered to appear for examination regarding the account does not make him competent for such purpose where the plaintiff dies before the examination takes place.²⁸

(5.) **Introduction of Witness' Extrajudicial Admissions.** — The mere introduction of the witness' extrajudicial admissions, by the protected party, is not calling him as a witness within the meaning of the statute.²⁹

23. *Campbell v. Brown*, 183 Pa. St. 112, 38 Atl. 516.

24. *German v. Brown*, 145 Atl. 364, 39 So. 742.

25. *Tygar v. Falor*, 163 Mo. 234, 63 S. W. 672, which was a proceeding under the statute against an executor to compel him to inventory certain property as assets of the estate. The statute required interrogatories to be filed and answered in such case to make up the issues to be tried. The filing of such interrogatories was no waiver of the incompetency of the executor as to transactions with the decedent. "Waiver can alone arise as the result of a voluntary act and not as the result of one which the law commands to be done as a means of procedure in court."

26. *Bowen v. Bowen*, 17 R. I. 738, 24 Atl. 714, where the court said: "In an accounting, the first step is for the master to require the accounting party to present an account under oath. This may properly be regarded as done at the instance of the party whose suit renders the taking of an account necessary, and the party presenting the account may

therefore in so doing properly be regarded as testifying upon the call of his opponent, and hence not within the prohibition" of the statute. See also *Flynn v. Seale*, 2 Cal. App. 665, 84 Pac. 263.

27. Upon a bill for an accounting by the representatives of a deceased partner against the surviving partners, the latter are not competent witnesses in their own behalf *Sangston v. Hack*, 52 Md. 173; *Besson v. Cox*, 35 N. J. Eq. 87.

28. *Halsted v. Tyng*, 29 N. J. Eq. 86.

29. *Wilbur v. Grover*, 140 Mich. 187, 103 N. W. 583; *Cole v. Sweet*, 187 N. Y. 488, 80 N. E. 355. But see X, 8, A, d, and X, 9, B, d, (1.); also *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195.

Although an admission of the witness, consisting of his statement as to a transaction between himself and the decedent, has been testified to by the adverse party, this does not render the witness competent in rebuttal to testify as to the transaction with decedent referred to in the admission. *Brown v. Burgett*, 55 App. Div. 538, 15 N. Y. Supp. 942.

(6.) **Introduction of Testimony Given in Another Proceeding.**—The introduction, by the protected party, of the testimony given by the witness on behalf of the same party in another proceeding, is calling him as a witness within the meaning of the statute, and is therefore a waiver of his incompetency as to the matter testified to.³⁰ It has been held, however, that under the Illinois statute such action is not a waiver.³¹ But independent of the question of waiver it has

The witness is not competent to prove that his written admissions, introduced in evidence, are forgeries. *Ford v. Holmes*, 61 Ga. 419.

30. *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Cady v. Burgess*, 144 Mich. 523, 108 N. W. 414, following *Fox v. Barrett's Estate*, 117 Mich. 162, 74 N. W. 440; *Lange v. Klatt*, 135 Mich. 262, 97 N. W. 708. See also *Beardslee v. Reeves*, 76 Mich. 661, 43 N. W. 677.

The New York statute provides that the incompetency is waived where the personal representative calls the survivor as a witness to the transaction with the decedent. Under this statute it is held that merely introducing the extra-judicial admissions of the survivor as to the transaction with the decedent does not constitute a waiver of his incompetency. But the introduction of the testimony of such survivor given in another proceeding on behalf of the representative amounts to the same thing as calling him as a witness. Thus in an action by an executor on behalf of a residuary legatee to recover money claimed to be due the estate, it appeared that in a previous proceeding by such residuary legatee contesting the executor's accounts and claiming a failure on the part of the executor to recover the sum in question from the defendant, the residuary legatee had called the defendant as a witness and examined him as to the transaction with the decedent. A transcript of this testimony was introduced in evidence by the executor. This was held to constitute a waiver of the defendant's incompetency to testify fully as to such transaction, there being no substantial difference between this and actually calling the defendant as a witness. The residuary legatee and not the executor being the real party in interest. *Cole v. Sweet*, 187 N. Y. 488, 80 N. E. 355; citing

as upholding this construction of the statute, *Lilley v. Mutual Ben. Life Ins. Co.*, 92 Mich. 153, 52 N. W. 631; *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Martien v. Barr*, 5 Mo. 102.

31. The statute in this state provides that a party shall be disqualified as a witness in his own behalf against one suing or defending as the representative of a deceased or incompetent person "unless when called as a witness by such adverse party so suing or defending." The latter expression is construed as though the word "therein" followed the word "called." "The statute does not mean that if the party has been called by the 'adverse party so suing or defending' in a previous suit or proceeding between the same parties and in respect to the same matters, he may testify in the pending suit." *Merchants Loan & Trust Co. v. Egan*, 222 Ill. 494, 78 N. E. 800. This was a proceeding by an executor to recover property belonging to the estate. It appeared that in a previous proceeding an examination of the defendant had been held pursuant to a statute providing that the probate court may require to appear before it and examine a person charged by the oath of the executor with retaining possession of property belonging to the estate. It was held that the introduction by the executor of a transcript of the examination of the defendant in such prior proceeding was not a waiver of the latter's incompetency since the statute contemplates only an examination in the pending action, and further because the previous examination was by the court and not the executor. Cases from other states tending to uphold a contrary ruling, including *Forrester v. Torrence*, 64 Pa. St. 29; *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Lilley v. Mutual Ben. L. Ins. Co.*,

been held that where part of such testimony has been introduced by the protected party the adverse party is entitled to introduce the remainder thereof or any portion of it.³²

(7.) **Examination in Another Proceeding.**—(A.) **GENERALLY.**—The fact that the protected party has in another action or proceeding, in which neither the parties nor the issues were the same, examined an incompetent witness as to prohibited matters, is not a waiver of his incompetency.³³

(B.) **EXAMINATION AT PREVIOUS TRIAL OF SAME CAUSE.**—(a.) *Generally.*—Where the incompetency of the witness has been waived by calling and examining him as to matters within the inhibition of the statute, the waiver applies to all subsequent trials of the same cause.³⁴ The fact of a waiver must be made to appear when the witness is offered in subsequent trials.³⁵

(b.) *Trial De Novo on Appeal.*—Where on appeal the case is tried *de novo*, any waiver of incompetency by calling and examining the witness as to prohibited matters on the trial below extends likewise to the trial in the appellate court.³⁶

(8.) **Examination Subsequent to Calling of Incompetent Witness.** Where the testimony of an incompetent witness has been improperly admitted over objection, the error is not cured or waived by the action of the objecting party in calling other incompetent witnesses to the same matter, although such action would have constituted a waiver had it occurred prior to the offer of the testimony objected to.³⁷

d. *Nature of Testimony.*—(1.) **Generally.**—Whether the testimony called forth by the adverse or protected party is such as to constitute a waiver, that is, whether it is testimony as to a transaction with the decedent or otherwise covers prohibited matters, will

92 Mich. 153, 52 N. W. 631, are *disapproved* and *distinguished* on the ground that the statutes in those states are different. See also *Millard v. Millard*, 221 Ill. 86, 77 N. E. 595.

32. *Beardslee v. Reeves*, 76 Mich. 661, 43 N. W. 677.

33. In an action of ejectment by the assignee of a deceased grantee against the latter's grantor, the defendant's incompetency cannot be considered waived because in another proceeding growing out of the same controversy to which such grantee's executor was plaintiff, and the assignee and the grantor were co-defendants, the plaintiff therein had called the grantor as a witness. Neither the issues nor the parties were the same. The assignee was not bound by the executor's waiver, and he could not have objected.

New York & O. Land Co. v. Weidner, 169 Pa. St. 359, 32 Atl. 557.

34. *Bair v. Frischkorn*, 151 Pa. St. 466, 25 Atl. 123.

35. *Bair v. Frischkorn*, 151 Pa. St. 466, 25 Atl. 123.

36. *Tierney v. Hannon's Exr.*, 81 Mo. App. 488, so *holding* in the case of an appeal from the probate to the circuit court, although the testimony in such courts is not preserved by bill of exceptions. Compare *Imboden v. St. Louis Union Tr. Co.*, 111 Mo. App. 220, 86 S. W. 263.

37. *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685, *holding* that error in the admission of the testimony of an incompetent witness is not waived by the action of the representative in introducing the testimony of living witnesses to the same transaction with the decedent, although such action prior to the offer of the incom-

be governed by the general rules according to which the competency of testimony under the statute is determined.³⁸

(2.) **Testimony as to Signature.** — While examining a witness as to the genuineness of his signature on an instrument does not make him competent as to the delivery thereof,³⁹ it does qualify him sufficiently to explain the circumstances under which the signing was made.⁴⁰

(3.) **As to Indebtedness.** — Where the decedent's representative has called the adverse party to establish the witness' alleged indebtedness to the estate, the latter is competent in his own behalf to show the satisfaction of the indebtedness, the whole matter being regarded as a single transaction.⁴¹

e. **Extent of Waiver.** — (1.) **Generally.** — Where one party has examined the incompetent witness with reference to a prohibited matter, the adverse party is entitled to examine the witness fully as to the transaction or communication inquired into, even though his examination calls forth facts in relation thereto not previously testified to by the witness.⁴² The general rule, however, is that

petent witness would have been a waiver of the latter's incompetency.

38. See *supra*, VI.

Fact of Employment. — A question by an executrix propounded to the opposite party as to when and by whom the latter was employed to conduct a certain cause, the answer to which is that the witness was employed by the testator, involves a transaction with such testator and constitutes a waiver of the witness' incompetency as to such transaction. *German v. Brown*, 145 Ala. 364, 39 So. 742, in which it was contended that the interrogatory called for no part of the transaction, contract or conversation.

39. In *Hoes v. Nagele*, 28 App. Div. 374, 51 N. Y. Supp. 233, citing *De Verry v. Schuyler*, 54 Hun 639, 8 N. Y. Supp. 221, the court said: "that examining a witness as to the genuineness of his signature did not involve a personal transaction between himself and the testator so as to open the door to an inquiry as to the circumstances under which the paper was delivered." Compare *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659.

40. Where the plaintiff in a personal injury action was asked by defendant whether he had signed a certain paper exhibited to him and claimed to be a receipt in full for all

damages, it was held error to refuse to permit him to explain the circumstances under which he signed, and whether the paper was the same as the one signed by him, although the defendant's agent with whom the transaction occurred was dead. *Carlton v. Western A. R. Co.*, 81 Ga. 531, 7 S. E. 623.

41. *Mahoney v. Jones*, 35 App. Div. 84, 54 N. Y. Supp. 488; *In re Woodbury's Estate*, 40 Misc. 143, 81 N. Y. Supp. 503.

In an action by an executor to recover money alleged to have been delivered by decedent to defendant to be loaned, plaintiff required defendant to identify certain of the latter's letters and to testify that he had received the money in question from the decedent; it was held that the transaction between the deceased and the witness was an entirety, and that he was therefore entitled to state how much, if anything, remained unpaid. *Taylor v. Ainsworth*, 49 Neb. 696, 68 N. W. 1045.

42. *Georgia.* — *Shipp v. Davis*, 78 Ga. 201, 2 S. E. 549.

Kansas. — *Niccolls v. Esterly*, 16 Kan. 32.

Michigan. — *Fox v. Barrett's Estate*, 117 Mich. 162, 75 N. W. 440.

Minnesota. — *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193.

New York. — *Nay v. Curley*, 113

the examination must be confined to the same transactions, communications, or other prohibited matters called forth by the other party.⁴³ In some jurisdictions, however, such action is held to completely remove the disability of the witness examined.⁴⁴

Other Conversations Relating to Same Transaction.—While the waiver does not extend beyond the transaction inquired into, it does cover other conversations between the witness and the decedent relating to the same transaction.⁴⁵

(2.) Nature of Examination Permissible.—(A.) **GENERALLY.**—Where the waiver is made by a direct examination of the witness, the adverse party may also make the witness his own by an examination in chief as to the same matters.⁴⁶ The witness may in his answer

N. Y. 575, 21 N. E. 698; *Merritt v. Campbell*, 79 N. Y. 625; *Hopkins v. Clark*, 90 Hun 4, 35 N. Y. Supp. 360, 69 N. Y. St. 849; *Rogers v. Rogers*, 153 N. Y. 343, 47 N. E. 452.

Wisconsin.—*Moore v. May*, 117 Wis. 192, 94 N. W. 45.

Where the witness has been questioned as to a particular transaction he becomes competent as to all that was said and done on that occasion, and can therefore testify as to conversations not called out by the protected party. *Hoehn v. Struttman*, 71 Mo. App. 399.

Where for the purpose of defeating an action on an implied contract with the decedent the defendant administrator called the plaintiff to prove that there was a special contract for the services in question, the witness was held competent in his own behalf to testify to "all the particulars going to make up or qualify such facts and put it in its proper light." *Gray v. Cooper*, 65 N. C. 183.

⁴³ *Hopkins v. Bowers*, 108 N. C. 298, 12 S. E. 984; *Smith v. Smith*, 101 N. C. 461, 8 S. E. 128, 131, 133; *Butz v. Schwartz*, 135 Ill. 180, 25 N. E. 1007; *Perry v. Mulligan*, 58 Ga. 479; *Causler v. Wharton*, 62 Ala. 358; *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461; *Rogers v. Rogers*, 153 N. Y. 343, 47 N. E. 452.

The cross-examination of the adverse party as to the meaning of statements in a letter from him to the decedent does not qualify him to testify as to a conversation with the decedent which was prior to and the cause of the writing of the letter. *Weston v. Reich*, 55 Hun 605, 7 N.

Y. Supp. 784, judgment affirmed in 130 N. Y. 659, 29 N. E. 1034.

⁴⁴ *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604; *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570; *In re Young's Estate*, 148 Pa. St. 573, 24 Atl. 124. See also *Granger v. Bassett*, 98 Mass. 462; *Young v. Montgomery*, 161 Ind. 68, 67 N. E. 684.

Under § 7 of the act of 1887, P. L. 160, where a witness incompetent as to matters occurring during the lifetime of the decedent has been cross-examined as to any such matters by one entitled to the protection of the statute, the witness is thereby rendered competent for the adverse party "as to all relevant matters, whether or not these matters were touched upon in his cross-examination." *Corson's Estate*, 137 Pa. St. 160, 20 Atl. 588; *Boyd v. Conshohocken Worsted Mills*, 149 Pa. St. 363, 24 Atl. 287.

⁴⁵ Where the representative of the estate calls the claimant as a witness and examines him as to a transaction between the witness and the deceased, the claimant is then a competent witness as to other conversations between himself and the decedent relating to the same transaction. § 4069, Rev. Stat. 1898. *Currie v. Michie*, 123 Wis. 120, 101 N. W. 370.

⁴⁶ Where an administrator took the adverse party's deposition as to certain transactions with the decedent, and the witness asked for permission to secure his books so that he might testify fully in regard to such transactions but was refused permission to do so, it was held that on the trial after his deposition had been taken he was competent in his

to the question by the adverse party explain the transaction with decedent disclosed by such question.⁴⁷

(B.) CROSS-EXAMINATION. — Where the representative of the decedent or protected party has called and examined a witness otherwise incompetent, the latter on cross-examination may testify fully as to the same conversations or transactions in regard to which he was questioned on direct examination,⁴⁸ but is incompetent as to any others.⁴⁹

(C.) REDIRECT EXAMINATION. — An incompetent witness who has been cross-examined as to prohibited matters may on redirect examination fully explain the transaction or matter inquired into.⁵⁰

own behalf to make the explanations which he had been unable to make when his testimony was taken. The court said: "Unless made a witness by plaintiff he had no right to testify at all about his transactions with Munford. But when plaintiff elected to make him a witness on the point it was his right to explain the whole transaction and tell as well what was in his favor as what was against him. It was proper for him to do so when being examined under the commission, but having offered a satisfactory reason why he could not then go into all of the details he should have been permitted to do so at the trial, his evidence being then confined to the issues upon which he had been already examined." *Jackson v. Munford's Exr.*, 74 Tex. 104, 11 S. W. 1061.

47. In explanation of the obtaining possession of decedent's property, to which he has been compelled to testify, the witness may state that the property was given to him by decedent. *Bradley's Admr. v. Bradley*, 13 Tex. 263.

48. *Harnish v. Miles*, 111 Ill. App. 105; *Perry v. Mulligan*, 58 Ga. 479.

Strode v. Frommeyer, 115 Mo. App. 220, 91 S. W. 167, in which the plaintiff called the defendant as a witness to transactions with the deceased to which he would have been incompetent to testify in his own behalf, the refusal of the trial court to allow defendant's attorney to go more fully into such transactions on cross-examination on the ground that the witness was incompetent as to such matters in his own behalf, was held error.

In an action by an executor to re-

cover possession of certain notes claimed to belong to the estate, the plaintiff examined the defendant as his own witness, and the latter stated that the notes were given to her by the deceased just prior to his death. On cross-examination the witness was permitted to testify to the conversation between herself and the deceased at the time of the alleged gift, to which testimony the plaintiff objected, but it was held that by making the witness his own he had waived her incompetency under the statute, and having interrogated her as to the circumstances under which she obtained possession of the notes it was competent for the opposing counsel to ask for a full disclosure of all that was said and done on that occasion. *Hoehn v. Struttman*, 71 Mo. App. 399.

49. *Grothaus v. Witte*, 72 Tex. 124, 11 S. W. 1032; *Hopkins v. Bowlers*, 108 N. C. 298, 12 S. E. 984.

50. *Michigan Sav. Bank v. Butler's Estate*, 98 Mich. 381, 57 N. W. 253; *Hackstaff v. Hackstaff*, 82 Hun 16, 31 N. Y. Supp. 11; *Moore v. May*, 117 Wis. 192, 94 N. W. 45; *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193 (witness may qualify the conversation inquired into by testimony as to other conversations relating to the same transaction).

In an action on a promissory note made by a partnership, brought by the payee against the representatives of one of the partners, both of whom were dead, the plaintiff having testified in his own behalf to the loss of the note, and then, on cross-examination, having testified to his execution and delivery of a similar note to the partnership, which note was pleaded

(3.) **Effect on Competency of Other Witnesses.** — Where the protected party has examined an incompetent witness as to prohibited matters, his action is a waiver of the incompetency not only of the witness examined, but of all other witnesses as to the same matters.⁵¹

(4.) **Calling of Adverse Party by Co-Party.** — It seems that the calling of an incompetent witness by one of several adverse co-parties is a waiver of such witness' incompetency as to all of such co-parties who acquiesced therein.⁵²

8. Testimony by Adverse Party or Witnesses. — A. As to PROHIBITED MATTERS. — a. *Generally.* — Since the purpose of the statute is to secure equality, where the representative or successor of the decedent or interested persons have testified as to prohibited matters the incompetency of the adverse party or witness is thereby waived *pro tanto* at least.⁵³ The witness, however, must be adverse

as a set-off, he was competent to explain (to the same extent as a disinterested witness might do) the circumstances under which the latter note was executed and delivered; and as these circumstances connected it with the former, and also connected both notes with a book account between the contracting parties, his competency extended to a full explanation of the consideration of the notes, their relation to each other and to the account, of the object and purpose of interchanging them and of the entire transaction of which the matters brought out in the cross-examination constituted a part. The plaintiff also having testified on cross-examination that he delayed bringing suit till just before the bar of the statute would have attached, was competent to explain the whole cause of that delay, including the fact that he was urging the surviving partner, then alive, but since deceased, to settle the demand. *Shipp v. Davis*, 78 Ga. 201, 2 S. E. 549.

51. *Gray v. Cooper*, 65 N. C. 183. But see *Wood v. Hunt*, 38 Barb. (N. Y.) 302.

Competency of Spouse. — The removal of the incompetency of a witness in this manner removes the incompetency of his spouse. *In re White's Estate*, 2 Pa. Dist. 808. *Contra*, *Gilbert v. Swain's Estate*, 9 Ind. App. 88, 36 N. E. 374.

52. In *Hollmann v. Lange*, 143 Mo. 100, 44 S. W. 752, plaintiff who was incompetent as to transactions with defendant L's. deceased agent was called by a co-defendant who

was making a separate defense. L. failed to interpose any objection until plaintiff had testified to his signature to the contract with the deceased agent, but did object to any further questions as to the subject-matter of the transaction between them. This was held no waiver. "Mrs. Lange could not control the action of her co-defendants, and was not vested with power to direct their course. She did not call plaintiff as a witness, nor was it done in her interest, but it was after she had expressly declined to offer any evidence in her behalf. We do not think that she should be estopped to raise the objection that plaintiff was incompetent, as against her, to testify to a transaction with her deceased agent, simply because a co-defendant, represented by other counsel, and acting independently of her, introduced him for the purpose of formally proving the plaintiff's signature, and that she made no objection until he was asked to detail what took place between him and her said agent. If she had placed plaintiff upon the stand, or if he had been introduced with her consent or connivance or for her benefit, a different rule might apply."

53. *Copeland v. Copeland's Admrs.* (Va.), 24 S. E. 218; *Walters v. Davis*, 8 Ky. L. Rep. 688, 2 S. W. 695; *Blaesi v. Blaesi*, 14 N. Y. Civ. Proc. 216, 15 N. Y. St. 672; *Farrington v. Jennison*, 67 Vt. 509, 32 Atl. 641; *Gorham v. Price*, 25 Hun (N. Y.) 11; *Rudolph v. Rudolph*, 207 Pa.

to the person whose competency is to be affected by the testimony.⁵⁴

b. *Testimony of Protected Party.* — (1.) *Generally.* — Where the protected party elects to testify as to the prohibited matters, he thereby waives the incompetency of the adverse party or witness.⁵⁵

(2.) *Testimony by One of Several Joint Parties.* — It is sufficient that any one or more of the protected parties testify to the transaction where several of them are joined as parties.⁵⁶

(3.) *Testimony of Adverse Co-Party.* — Although the party testifying to transactions with the decedent is a co-party with the incompetent witness, if his interest is really on the other side of the case his testimony amounts to a waiver of the incompetency of his adverse co-party as to the same matters.⁵⁷

(4.) *Testimony Improperly Admitted.* — If the testimony of the protected party as to transactions between an adverse witness and the decedent has been improperly admitted, it does not waive the incompetency of such adverse witness.⁵⁸

St. 339, 56 Atl. 933; *Kelton v. Hill*, 59 Me. 259.

54. *Wells' Admr. v. Ayers*, 84 Va. 341, 5 S. E. 21. See *infra*, X, 8, A, c.

55. *Georgia.* — *Tarpley v. McWhorter*, 56 Ga. 410; *Hammond v. Drew*, 61 Ga. 189.

Kansas. — *Anthony v. Stinson*, 4 Kan. 180.

Kentucky. — *Dowis' Heirs v. Elliott*, 16 Ky. L. Rep. 520, 29 S. W. 142; *Walters v. Davis*, 8 Ky. L. Rep. 688, 3 S. W. 695.

Maine. — *Hall v. Otis*, 77 Me. 122.

Missouri. — *Wiley v. Morse*, 30 Mo. App. 266.

New Jersey. — *Shepherd's Exrx. v. McClain*, 18 N. J. Eq. 128. But see *Tichenor v. Tichenor*, 43 N. J. Eq. 163, 10 Atl. 867.

New York. — *Ward v. Plato*, 23 Hun 402; *Wilcox v. Corwin*, 117 N. Y. 500, 23 N. E. 165, *affirming* 50 Hun 425, 3 N. Y. Supp. 317; *Markell v. Benson*, 55 How. Pr. 360.

Ohio. — *Rankin v. Hannan*, 38 Ohio St. 438.

Pennsylvania. — *Huntley v. Goodyear*, 182 Pa. St. 613, 38 Atl. 507.

56. *Greenwood v. Henry*, 52 N. J. Eq. 447, 28 Atl. 1053. See *Booth v. Lenox*, 45 Fla. 191, 34 So. 566; *Johnson v. Heald*, 33 Md. 352.

The testimony of a co-party with the executor renders the adverse party competent as to the same matters. *Eaves' Exr. v. Harbin*, 12 Bush (Ky.) 445.

57. In an action by the plaintiffs, as next of kin of deceased, against the three administrators for an accounting, charging that certain money had not been accounted for, the charge was admitted by two of the defendants, but denied by the third, who claimed the same as his individual property. One of the two defendants testified as "to certain transactions with the deceased. Since such witness, while nominally a defendant, was in fact a plaintiff in interest, his testimony removed the third defendant's incompetency to the same matters. *Redman v. Redman*, 70 N. C. 257.

58. A testator bequeathed one-third of his personal estate to his widow, and the residue to three of his children, and what is claimed by the legatees to be a portion of the general estate consists of a specified sum of money and certain bonds, which the executor claims were transferred to him by the testator in his lifetime, and are therefore not part of the estate. After the death of the widow, a suit was brought by her administrator, against the executor and legatees of said testator to compel the executor to settle his accounts, to charge him with said money and the proceeds of said bonds, and for the distribution of said estate in this suit. The deposition of the widow, taken *de bene esse*, was read and portions of it re-

(5.) **Executor or Administrator.** — (A.) **GENERALLY.** — It is a general rule under the decisions and statutes that where an executor or administrator testifies in his own behalf as to matters concerning which the adverse party or witness is incompetent, the latter's incompetency is thereby and to that extent waived.⁵⁹

(B.) **IDENTIFYING ACCOUNT BOOKS OF DECEDENT.** — The testimony of the executor or administrator merely identifying the account books of the decedent does not amount to an election to testify which removes the incompetency of the adverse party under the statute.⁶⁰

lated to personal transactions and communications had in respect to said money and bonds between the executor and the testator. The deposition of the executor was also taken on his own behalf. It was held that the deposition of the widow was itself incompetent evidence and could not therefore lay the foundation for making the executor a competent witness to testify in his own behalf, as to personal transactions or communications had with the deceased, nor could he make his wife a competent witness as to such transactions and communications. The testimony of both the executor and his wife as to such matters, was therefore incompetent.

"Before the testimony of the executor or legatee can make that of a person claiming against the estate a competent witness, the executor or legatee must testify as to some matter about which he was legally competent to testify. The fact that illegal or incompetent testimony had been admitted on one side cannot lay the foundation for the introduction of incompetent testimony on the opposite side. In the cause before us, the deposition of Mrs. Rector (the deceased widow) was itself incompetent. She could not, under the statute, 'be examined as a witness in regard to any personal transaction or communication between' her and the decedent, her late husband," and therefore her testimony could not be the cause of making that of the defendant competent or admissible. *Kimmel v. Shroyer*, 28 W. Va. 505. And see *Dolson v. DeGanahl*, 70 Tex. 620, 8 S. W. 321. But see article "COMPETENCY," Vol. III, p. 183 *et seq.*

^{59.} *Colorado.* — *Hurd v. Fleck*, 34 Colo. 262, 82 Pac. 485.

Georgia. — *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270.

Illinois. — *Connelly v. Dunn*, 73 Ill. 218; *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. 782.

Iowa. — *Ivers v. Ivers*, 61 Iowa 721, 17 N. W. 149; *Bailey v. Keyes*, 52 Iowa 90, 2 N. W. 1025.

Maine. — *Kelton v. Hill*, 59 Me. 259; *Hall v. Otis*, 77 Me. 122.

New Jersey. — *McCartin v. Traphagen's Admr.*, 45 N. J. Eq. 265, 17 Atl. 809; *Christopher v. Wilkins*, 64 N. J. Eq. 354, 51 Atl. 728.

New York. — *Martin v. Hillen*, 142 N. Y. 140, 36 N. E. 803; *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081; *Sweet v. Low*, 28 Hun 432; *In re Woodward*, 69 App. Div. 286, 74 N. Y. Supp. 755; *Wilcox v. Corwin*, 50 Hun 425, 3 N. Y. Supp. 317.

North Carolina. — *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. 27; *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24; *Burnett v. Savage*, 92 N. C. 10.

Ohio. — *Rankin v. Hannan*, 38 Ohio St. 438.

The testimony of the administrator as to the kind of services claimant rendered the intestate and his wife, makes the testimony of the claimant as to the character of such services competent, under the statute. *Ridler v. Ridler*, 103 Iowa 470, 72 N. W. 671.

^{60.} *Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652.

In *Stevens v. Moulton*, 68 N. H. 254, 38 Atl. 732, it was held that the production in evidence of the account books of a person deceased, accompanied by the suppletory oath of the administrator, does not constitute an election to testify, under the statute, and will not give the opposite party the right to testify in

(6.) **Heir or Next of Kin.** — The general rule applies to testimony of an heir of or next of kin to the decedent.⁶¹

(7.) **Legatee, Devisee or Distributee.** — Unless the legatee, devisee or distributee is a party or interested in the action, his testimony as to transactions or communications with the decedent does not waive the incompetency of the adverse party to the same matters.⁶² And where he is not a party he is not interested if the result of the action will in no way diminish his distributive share of the estate.⁶³

c. *Testimony by Third Person.* — (1.) **Generally.** — Testimony as to prohibited matters given on behalf of the decedent's representative by third persons generally, does not constitute a waiver of the adverse party's incompetency as to such matters,⁶⁴ unless the statute so provides.⁶⁵ He may, however, contradict such testimony by testifying to any fact which does not come within the class of prohibited

respect to facts which occurred in the lifetime of the deceased.

61. *Florida.* — Booth v. Lenox, 45 Fla. 191, 34 So. 566.

Georgia. — Parkerson v. Burke, 59 Ga. 100; Tarpley v. McWhorter, 56 Ga. 410.

Illinois. — Blanchard v. Blanchard, 191 Ill. 450, 61 N. E. 481.

Iowa. — Wood v. Brolliar, 40 Iowa 591.

Kentucky. — Dowis' Heirs v. Elliott, 16 Ky. L. Rep. 520, 29 S. W. 142.

New Jersey. — McCartin v. McCartin, 45 N. J. Eq. 265, 17 Atl. 809; Greenwood v. Henry, 52 N. J. Eq. 447, 28 Atl. 1053.

North Carolina. — Wolfe v. Hampton, 131 N. C. 5, 42 S. E. 332.

Virginia. — Copeland v. Copeland's Admr., 24 S. E. 218.

West Virginia. — Metz's Admr. v. Snodgrass, 9 W. Va. 190.

62. *Niskern v. Haydock*, 23 App. Div. 175, 48 N. Y. Supp. 895 (the statute in this state disqualifies the witness as to transactions or communications with a decedent, "except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf").

63. *Niskern v. Haydock*, 23 App. Div. 175, 48 N. Y. Supp. 895.

64. *Alabama.* — Payne v. Long, 121 Ala. 385, 25 So. 780 (overruling Frank v. Thompson, 105 Ala. 211, 16 So. 634).

Indiana. — Allen v. Jones, 1 Ind.

App. 63, 27 N. E. 116; *Froman v. Rous*, 83 Ind. 94.

Iowa. — Canady v. Johnson, 40 Iowa 587.

Maryland. — Webster v. LeCompte, 74 Md. 249, 22 Atl. 232; *Hopper v. Beck*, 83 Md. 647, 34 Atl. 474.

New Jersey. — Fountain v. Linn, 57 N. J. L. 503, 31 Atl. 982.

New York. — Burdick v. Burdick, 180 N. Y. 261, 73 N. E. 23; *Dyer v. Dyer*, 48 Barb. 190; *Carney v. Wadhams*, 9 Civ. Proc. 204; *Rittenhouse v. Crevling*, 59 Hun 626, 14 N. Y. Supp. 85.

North Carolina. — Bushee v. Surles, 77 N. C. 62.

South Carolina. — Brice v. Hamilton, 12 S. C. 32.

Virginia. — Mason v. Wood, 27 Gratt. 783.

In an action by an administrator, testimony by her husband as to transactions with the deceased does not render the adverse party competent as to such transactions, under the statute making the introduction of testimony by the representative of the decedent a waiver of the incompetency. *Hall v. Holloman*, 136 N. C. 34, 48 S. E. 515; *citing* *McRae v. Malloy*, 90 N. C. 521, *holding* that testimony of third persons on behalf of the representative was not a waiver; *Sumner v. Candler*, 92 N. C. 634, *holding* that testimony of the administrator's son as to a conversation with the decedent was not a waiver of the adverse party's incompetency.

65. See *infra*, X, 8, A, c, (3.).

matters.⁶⁶ It has been held that the testimony of third persons to a conversation or transaction between the decedent and the incompetent witness does not remove the latter's incompetency as to such matter unless the third party was in a position to have a full knowledge not only of the immediate transaction, but all the facts and circumstances necessary to a full understanding of such transaction.⁶⁷

(2.) **Interested Witness.**—Statutes sometimes provide that the testimony of a witness interested in the estate, as to prohibited matters, waives the incompetency of an adverse party or witness,⁶⁸ and this is the rule in some states without statute,⁶⁹ though in others it is only the testimony of a party⁷⁰ or the representative himself⁷¹ which constitutes such a waiver.

(3.) **Disinterested Witness.**—Statutes sometimes provide that the testimony of any witness on behalf of the protected party, as to prohibited matters, is a waiver of the adverse witness or party's

66. As by denying the presence of the adverse witness at any transaction or conversation between himself and decedent. *Pinney v. Orth*, 88 N. Y. 447, 2 Civ. Proc. 1. But see *Carney v. Wadhams*, 9 Civ. Proc. (N. Y.) 204, holding that he cannot deny that such a conversation occurred.

67. *Downey v. Andrus*, 43 Mich. 65, 4 N. W. 628, followed in *Chadwick v. Chadwick*, 52 Mich. 545, 18 N. W. 350, which held that a claimant against the estate was not rendered competent by testimony of the decedent's widow to a conversation between decedent and the claimant.

68. See statutes of Kentucky, Ohio and Wyoming, and *Williams v. Longley*, 2 Ohio C. D. 292; *Kuhn's Admr. v. Kuhn*, 24 Ky. L. Rep. 787, 69 S. W. 1077; *Whitley v. Whitley's Admr.*, 26 Ky. L. Rep. 134, 80 S. W. 825; *Carpenter v. Rice's Admr.*, 25 Ky. L. Rep. 1704, 78 S. W. 458 (which was an action by an administrator; the defendant was held properly permitted to testify as to a transaction with the decedent where the administrator had previously introduced a daughter and heir of the decedent who testified to the same matter).

Where a statute removes the disqualification in case some one interested in the estate shall have testified against the witness with reference to the transaction with the de-

cedent, the widow of the decedent is not interested in the estate within the meaning of this statute in an action by decedent's daughter against the widow and the other children for a partition of the decedent's lands, where the defendants seek to charge plaintiffs with an alleged advancement, and consequently the widow's testimony as to the transaction claimed to be an advancement does not open the door for the plaintiff's testimony. The widow "is not interested in the estate except to the extent of the property given her under the statutes of descent and distribution and those relating to dower, and her rights in respect to this property cannot be diminished or enlarged by the claim asserted by" the plaintiff. "The language, 'some one interested in his estate,' has reference to a person whose property rights will be in some way affected by the declarations made by the decedent to the person asserting a claim against, or interest in, his estate." *Crafton v. Inge*, 30 Ky. L. Rep. 313, 98 S. W. 325.

69. *Parkerson v. Burke*, 59 Ga. 100; *Wood v. Isom*, 68 Ga. 417; *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111.

70. *Canady v. Johnson*, 40 Iowa 587. See *Burnham v. Mitchell*, 34 Wis. 117.

71. *Brice v. Hamilton*, 12 S. C. 32.

testimony;⁷² the general rule, however, is that the testimony of a disinterested witness does not constitute a waiver.⁷³

In Pennsylvania the statute removes the disability as to any matter occurring between the witness and some living person or in the latter's presence, provided that such person shall be competent to testify and shall have actually testified thereto against the incompetent witness.⁷⁴ The incompetent witness does not become competent until the witness who was present has testified,⁷⁵ and then only

72. See statutes of Illinois, Indiana, Nebraska and Wisconsin, and *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813; *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102; *Ruckman v. Alwood*, 71 Ill. 155; *Parish v. McNeal*, 36 Neb. 727, 55 N. W. 222; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731.

Under § 508, Stat. of 1894, providing that if a witness on behalf of the executor, administrator, etc., testify to any conversation or admission of a party to the suit, had or made in the absence of deceased, the opposite party may testify to the same matters, a claimant cannot testify to a conversation which he stated took place in the presence of the deceased, to rebut the testimony of a witness in behalf of the administrator. *Kibler v. Potter*, 11 Ind. App. 604, 39 N. E. 525.

73. *Alabama*. — *Miller v. Cannon*, 84 Ala. 59, 4 So. 204.

Georgia. — *Skelton v. Richardson*, 77 Ga. 546.

Illinois. — *Ruckman v. Alwood*, 71 Ill. 155.

Iowa. — *Canady v. Johnson*, 40 Iowa 587.

Maryland. — *Webster v. LeCompte*, 74 Md. 249, 22 Atl. 232.

Minnesota. — *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563.

Missouri. — *Ring v. Jamison*, 66 Mo. 424.

New Jersey. — *Fountain v. Linn*, 57 N. J. L. 503, 31 Atl. 982.

New York. — *McKenna v. Bolger*, 49 Hun 259, 1 N. Y. Supp. 651; *Hard v. Ashley*, 63 Hun 634, 18 N. Y. Supp. 413; *Healy v. Malcom*, 66 App. Div. 501, 73 N. Y. Supp. 259. See *Hobart v. Verrault*, 74 App. Div. 444, 77 N. Y. Supp. 483.

North Carolina. — *Bushee v. Surles*, 77 N. C. 62.

South Carolina. — *Brice v. Hamilton*, 12 S. C. 32 (but see *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291).

Wisconsin. — *Burnham v. Mitchell*, 34 Wis. 117.

See *supra*, X, 8, A, c, (1.).

The Surviving Party to the Contract or cause of action in issue and on trial, being incompetent in his own behalf, is not competent to rebut the testimony of disinterested witnesses as to transactions or conversations between such surviving party and the decedent. *McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111 (*distinguishing* *Wood v. Isom*, 68 Ga. 417; *Parkerson v. Burke*, 59 Ga. 100; *Stanford v. Murphy*, 63 Ga. 410; *Planters & Miners Bank v. Neel*, 74 Ga. 576; *White v. White*, 71 Ga. 670; *Scott v. Mathis*, 72 Ga. 119, and *approving* *Niles v. Groover*, 73 Ga. 808).

74. *Wright v. Hanna*, 210 Pa. St. 349, 59 Atl. 1097; *Montelius v. Montelius*, 209 Pa. St. 541, 58 Atl. 910 (*explaining* apparently contrary dicta in *Irwin v. Patchen*, 164 Pa. St. 51, 30 Atl. 436). See also *Rudolph v. Rudolph*, 207 Pa. St. 339, 56 Atl. 933; *Kauss v. Rohner*, 172 Pa. St. 481, 33 Atl. 1016, 51 Am. St. Rep. 762; *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685; *Shroyer v. Smith*, 204 Pa. St. 310, 54 Atl. 24; *Sutherland v. Ross*, 140 Pa. St. 379, 21 Atl. 354; *Hill v. Truby*, 117 Pa. St. 320, 11 Atl. 89, 300; *Brumbach v. McLean*, 187 Pa. St. 602, 41 Atl. 480; *Dumbach v. Bishop*, 183 Pa. St. 602, 39 Atl. 38.

To render the survivor a competent witness under this act the testimony of the other witness must be adverse to him. *Robbins v. Farwell*, 193 Pa. St. 37, 44 Atl. 260.

75. *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685; *Kauss v. Rohner*, 172 Pa. St. 481, 33 Atl. 1016. See *Krum-*

to such matters as to which the latter testifies.⁷⁶ The statute applies only to some matter occurring between the incompetent party and such other person, not to mere physical facts testified to by the latter.⁷⁷

(4.) **Agent of Decedent.**—It is sometimes provided that the introduction of the testimony of decedent's agent as to a transaction between himself and the adverse party renders the latter competent to the same matter;⁷⁸ in the absence of such a statutory provision it has been held that the witness is not thereby rendered competent,⁷⁹ though of course this rule would not apply where a party is not incompetent as to transactions with an agent of the deceased.⁸⁰ A

rife v. Grenoble, 165 Pa. St. 98, 30 Atl. 824.

76. *Kauss v. Rohner*, 172 Pa. St. 481, 33 Atl. 1016; *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685.

77. The act making the survivor competent as to any relevant matter occurring before the death of the opposite party "if such relevant matter occurred in the presence or hearing of such other living competent person," does not apply to mere physical facts, or to states of fact described by other witnesses in their testimony, but only to conversations or events transpiring between, or in the presence or hearing of the witness and other parties. "It will be observed that the subject-matter of the proposed contradicting evidence, must be something that occurred between the witness and another living competent person, or something that occurred in the presence or hearing of such other living competent person. Now the offers of contradictory proof by the plaintiff were not as to matters occurring between her and the other witnesses, but simply to the same matters of fact to which the others had testified, only that they were different from the description of them given by the other witnesses. The testimony was offered for the purpose of contradiction. We think the offers were not competent and that they were properly rejected by the court below. We think the act of 1891 was intended to apply to conversations, or to events transpiring between, or in the presence or hearing of the witness and the other parties, and not to mere physical facts or to states of fact described by the other

witnesses in their testimony. If it were not so there would be no practical limit to the general capacity of the surviving party to testify, and the act certainly was not intended to confer general capacity to testify to anything simply because it would be contradictory to the testimony of some other witness." *Thomas v. Miller*, 165 Pa. St. 216, 30 Atl. 928.

78. See statutes of District of Columbia, Illinois, Indiana, Nevada, Wyoming, and *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043; *Maher v. Title Guar. & Tr. Co.*, 95 Ill. App. 365; *Jacquin v. Davidson*, 49 Ill. 82; *Marshall v. Karl*, 60 Ill. 208; *McNab v. Stewart*, 12 Minn. 407; *Bigelow v. Ames*, 18 Minn. 527; *Kenney v. Phillipy*, 91 Ind. 511; *Blood v. Her-ring*, 22 Ky. L. Rep. 1725, 61 S. W. 273.

79. *Hill v. Postley*, 90 Va. 200, 17 S. E. 946. But see *Perry v. Mulligan*, 58 Ga. 479, and *supra*, VI, 7, B, b.

In an action by the heirs at law of a deceased person to reform a deed made by the defendants to the deceased, under § 1740, code 1892, providing, that "a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person," the court held that a person is incompetent to testify, by deposition or otherwise, to establish his own claim or defense against said estate, notwithstanding that the transaction out of which the claim arose was conducted by an agent of the decedent who is alive and has testified in the case. *McCaughan v. Hardy*, 78 Miss. 598, 29 So. 397.

80. See *supra*, VI, 2, O, d.

mere custodian of a document⁸¹ or a conveyancer⁸² is not an agent within the meaning of the statute. Some statutes render the adverse party competent when the agent who acted in the transaction for decedent is alive and competent to testify.⁸³ Under such a statute if the agent is incompetent to testify, the disability of the other party to the contract is not removed.⁸⁴ A statute removing the disability in case the testimony of the agent who conducted the transaction for the decedent "is received," does not require that such testimony be actually received, but that it be merely receivable under the rules of evidence.⁸⁵

d. *Rebutting or Supplementing Evidence of Statements or Admissions.* — In some jurisdictions⁸⁶ it is held that where the state-

81. *Comer v. Comer*, 24 Ill. App. 526.

82. Conveyancer Not an Agent. In a proceeding between the heirs for distribution of the estate, a notary public testified that at the request of deceased and wife, he drew a note and mortgage. He also gave evidence as to conversations with deceased occurring at that time. The widow contended that she was competent as to such conversations and transactions because this witness was deceased's agent. The court held, however, that he was not an agent within the statute. *Spencer v. Boardman*, 118 Ill. 553, 9 N. E. 330; *Galbraith v. McLain*, 84 Ill. 379; *Maher v. Title Guar. & Trust Co.*, 95 Ill. App. 365; *Kenney v. Phillipy*, 91 Ind. 511.

A scrivener employed to prepare a deed is not an agent. The scrivener is not employed to make a contract, but to prepare the evidence of it. An agent is one who acts in his principal's place or behalf, and it is to this class of agents that the statute applies. *Kenney v. Phillipy*, 91 Ind. 511.

83. See statutes of Ohio, Virginia and Wyoming.

84. Under a statute providing: "When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject," where the agent through whom it is claimed a contract was made by a person since deceased is himself a party, and therefore incompetent, the other party to the contract is also incompetent.

Roberts v. Remy, 56 Ohio St. 249, 46 N. E. 1066.

85. *Bigelow v. Ames*, 18 Minn. 527.

86. *Alabama.* — *Cousins v. Jackson*, 52 Ala. 262.

Georgia. — *Hardman v. Nowell*, 81 Ga. 748, 8 S. E. 188; *Planters' & Miners' Bank v. Neel*, 74 Ga. 576 (*distinguished in McBride v. McBride*, 82 Ga. 714, 9 S. E. 1111).

Illinois. — *Powell v. Powell*, 114 Ill. 329, 2 N. E. 162; *Butz v. Schwartz*, 135 Ill. 180, 25 N. E. 1007; *Stonecipher v. Hall*, 64 Ill. 121; *Straubher v. Mohler*, 80 Ill. 21; *Freeman v. Freeman*, 62 Ill. 189; *Loucks v. Paden*, 63 Ill. App. 545; *Penn v. Oglesby*, 89 Ill. 110; *Stewart v. Kirk*, 69 Ill. 509; *Duffy v. Leavitt*, 81 Ill. App. 470.

Kentucky. — See *Justice v. Phillips*, 23 Ky. L. Rep. 1441, 64 S. W. 963.

Michigan. — See *Cady v. Burgess*, 144 Mich. 523, 108 N. W. 414. But see *Wilbur v. Grover*, 140 Mich. 187, 103 N. W. 583.

Vermont. — *Merrill v. Pinney*, 43 Vt. 605.

Wisconsin. — *Burnham v. Mitchell*, 34 Wis. 117.

In a suit by the heirs of the decedent against his widow to recover real estate claimed to have been conveyed to the widow under a parol trust for the plaintiffs, the widow's testimony in explanation and contradiction of testimony on the part of the plaintiffs in respect to acts and statements attributed to the widow was held competent, notwithstanding that plaintiffs were infant

ments or admissions of an incompetent party or witness have been introduced or proved by the adverse party the former is thereby rendered competent to rebut or supplement such evidence by testifying to all that was said and done in that connection; and it is sometimes so provided by statute.⁸⁷ But in some states where such rebutting testimony falls within the prohibition of the statute, as where the fact occurred prior to the decedent's death, it is incompetent unless the statement or admission was proved by the testimony of one whose election to testify as to prohibited matters is a waiver of the adverse witness's incompetency.⁸⁸ Whether the introduction

heirs. *Nelson v. Nelson*, 29 Ky. L. Rep. 885, 96 S. W. 794.

Where an Administrator Introduced in Evidence a Letter From the Adverse Party giving a narrative of the transaction with the deceased upon which the action was based, this was held to amount to a waiver of the adverse party's incompetency to testify to the same transaction. The court says: "The letter . . . was evidently offered by the administrator upon the theory that its contents were an admission against the interest of the person writing it, and that it would aid the administrator in maintaining his theory of the case. It was offered for the purpose of showing what the transaction actually was, and, though it was not the oral testimony of the adverse party, it seems to us that, since it was his declarations and statements, and was offered as evidence for the purpose of showing the facts as to the transaction, the principle is the same as if he had been placed upon the witness stand by the administrator and had given his testimony for the same purpose. Having offered evidence of the original transaction, the administrator cannot now say that the adverse party should not also testify to it. He cannot take the benefit of the story of the transaction recited in the letter and at the same time refuse to give the adverse party the opportunity to testify in regard to the same matter." *Cline v. Dexter*, 72 Neb. 619, 101 N. W. 246.

In a suit on a deceased administrator's bond against his surety, the administrator of the administrator having testified to conversations and admissions had with the plaintiff tending to show a settlement, the

plaintiff is a competent witness to prove that the settlement did not relate to this particular matter. "The point of controversy is, was that admission made, or, if made, was it founded in fact, or in mistake. The admission certainly refers to a transaction with a deceased person, but that transaction is material only in determining whether the admission was made. . . . The admission is here the main fact proved, or to be disproved—the settlements with the deceased are only collateral to it. . . . It is only when admissions made by, or transactions with, the deceased, are offered as independent original evidence, to charge them, that the exception of the statute applies." *Cousins v. Jackson*, 52 Ala. 262.

⁸⁷. See statutes of Ohio and Wyoming.

In Indiana only testimony as to conversations which did not occur in the presence of the decedent may be rebutted by the incompetent witness. See *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Copeland v. Koontz*, 125 Ind. 126, 25 N. E. 174; *Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731; *Kibler v. Potter*, 11 Ind. App. 604, 39 N. E. 525; *Froman v. Rous*, 83 Ind. 94.

Conversations and admissions concerning which a party may testify under the provisions of the fourth exception to § 242, Rev. Stat., are those orally made by him. This exception does not authorize him to testify concerning a written statement in the nature of a settlement between the parties that may be adduced against him on trial. *Jackson v. Ely*, 57 Ohio St. 450, 49 N. E. 792.

⁸⁸. *Indiana*.—*Froman v. Rous*,

of the written admissions of the witness⁸⁹ or cross-examining him as to alleged admissions⁹⁰ is calling him as a witness and therefore a waiver of his incompetency is elsewhere treated in this article.

e. *At Whose Instance Given.* — (1.) **At Instance of Party Desiring To Testify.** — Where the testimony of the protected party or his witnesses has been given at the instance and on behalf of the party

83 Ind. 94; *Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731.

Maryland. — *Webster v. LeCompte*, 74 Md. 249, 22 Atl. 232.

Michigan. — *Pendill v. Neuberger*, 64 Mich. 220, 31 N. W. 177.

Minnesota. — *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563. See *Rhodes v. Pray*, 36 Minn. 392, 32 N. W. 86.

Missouri. — *Kersey v. O'Day*, 173 Mo. 560, 73 S. W. 481; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955 (but see *Martin v. Jones*, 59 Mo. 181; *Wade v. Hardy*, 75 Mo. 394).

New Jersey. — *Fountain v. Linn*, 57 N. J. L. 503, 31 Atl. 982.

New York. — *Rittenhouse v. Crevling*, 59 Hun 626, 14 N. Y. Supp. 85.

Virginia. — *Mason v. Wood*, 27 Gratt. 783.

See *supra*, VI, 6.

In an action for services rendered the defendant's intestate, the plaintiff being an incompetent witness herself to testify as to any fact occurring before the death of the intestate, she is likewise incompetent to contradict the testimony of a witness as to her admission made before intestate's death. *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142.

Testimony by the protected party or his witnesses as to admissions by the adverse party does not waive the latter's incompetency, although such admissions involved or related to a transaction between the party making them and the decedent.

Chadwick v. Fonner, 69 N. Y. 404. In this case the witness was claiming specific performance of an alleged parol agreement by the decedent to sell him land at a certain price. In rebuttal of testimony in support of such contention the adverse party offered evidence of admissions to the effect that the price was a much higher one. It was held that the latter testimony did not render the

party making the admission competent to testify that he never agreed to pay such a price.

Testimony by the plaintiff, an executor, of an admission by the defendant of a liability in favor of the estate does not waive the protection of the statute, so as to enable the defendant to testify as to conversations with, or admissions of, the decedent. *Rhodes v. Pray*, 36 Minn. 392, 32 N. W. 86.

In *Wilbur v. Grover*, 140 Mich. 187, 103 N. W. 583, evidence as to such admissions by the opposite party was held not to be a waiver of the latter's incompetency to testify to his statements accompanying the admissions but relating to matters equally within the knowledge of the decedent. "It is true, we have held (see *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Lilley v. Ins. Co.*, 92 Mich. 159, 52 N. W. 631) that when the personal representative or heir of a deceased person, being a party to a suit, proves certain admissions of the opposite party, he thereby waives the right to object to that party testifying to matters equally within the knowledge of the deceased. In these cases, however, the admission proved related to some matter equally within the knowledge of the deceased, and the decisions rest upon the proposition that the personal representatives or heir must accord to the opposite party the same right he himself asserts; that is, if he resorts to the evidence of the opposite party to prove a fact equally within the knowledge of the deceased, he must concede the same privilege to said opposite party. . . . Here the admission proved by the plaintiff did not relate to a matter equally within the knowledge of the deceased." See *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45. But see *Cady v. Burgess*, 144 Mich. 523, 108 N. W. 414.

⁸⁹. See *supra*, X, 7, B.

⁹⁰. See *supra*, X, 7, B.

desiring to testify, his incompetency as to the matters so brought out is not waived.⁹¹ Thus where the incompetent party compels the adverse party or his witnesses to testify on cross-examination for the first time as to transactions or communications with the deceased, this does not give him the right to introduce in rebuttal the testimony of himself or other incompetent witnesses as to the same matters.⁹²

(2.) **Introduced Pursuant to Stipulation.** — Although the testimony has been introduced pursuant to an agreement of all the parties it nevertheless operates as a waiver of the incompetency of the adverse witness.⁹³

f. *Availability of Testimony of Other Witnesses.* — In the absence of an express statutory provision the mere fact that the testimony of other witnesses is available to the adverse party does not remove the witness' disability.⁹⁴

g. *Nature of Testimony.* — (1.) **Generally.** — In determining whether the testimony of the protected party or his witnesses involves any of the prohibited matters, the court will apply the same rules as are applied in determining the competency of the adverse witness in the first instance.⁹⁵ Thus in those jurisdictions where

91. *Illinois.* — *Richerson v. Sternburg*, 65 Ill. 272.

New Hampshire. — *Harvey v. Hilliard*, 47 N. H. 551.

New Jersey. — *Joss v. Mohn*, 55 N. J. L. 407, 26 Atl. 987; *Daw v. Vreeland*, 30 N. J. Eq. 542; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156, affirmed in 45 N. J. Eq. 265, 17 Atl. 809.

New York. — *Corning v. Walker*, 100 N. Y. 547, 3 N. E. 290 (affirming 28 Hun 435); *Herrington v. Winn*, 60 Hun 235, 14 N. Y. Supp. 612.

North Carolina. — *Williams v. Cooper*, 113 N. C. 286, 18 S. E. 213.

Virginia. — *Terry v. Ragsdale*, 33 Gratt. 342; *Well's Admr. v. Ayers*, 84 Va. 341, 5 S. E. 21.

To make the survivor competent, under the statute, the living witness must be called in the interest of and by the party representing the right of the deceased. The calling of such a witness by the adversary is not within the contemplation of the statute. *Cake v. Cake*, 162 Pa. St. 584, 29 Atl. 797.

92. *Corning v. Walker*, 100 N. Y. 547, 3 N. E. 290; *Crafton v. Inge*, 30 Ky. L. Rep. 313, 98 S. W. 325; *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043; *Motz v. Motz*, 85 App. Div. 4, 82 N. Y. Supp. 926.

93. In an action on a note against the principal, one surety and the administrator of another surety, by agreement of all the parties an affidavit was read as the deposition of the principal. It was held that this testimony, being as to prohibited matters, was a waiver of the plaintiff's incompetency in his own behalf. *Eaves' Exr. v. Harbin*, 12 Bush. (Ky.) 445.

94. See preceding discussion and *supra*, VI, 7, and *Michels v. Western Underwriters' Assn.*, 129 Mich. 417, 89 N. W. 56; *Taylor v. Bunker*, 68 Mich. 258, 36 N. W. 66.

95. See *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; *Carpenter v. Rice's Admr.*, 25 Ky. L. Rep. 1704, 78 S. W. 458, and *supra*, VI.

Statement of Adverse Party Out of Hearing of Deceased. — In an action by a physician against the estate of a deceased patient for professional services rendered the latter, statements of the physician to witnesses as to the character of the deceased's ailment and the nature of the treatment tending to show that plaintiff was mistaken in his diagnosis, and made out of the presence of the deceased, do not involve any transaction with or statement by the testator within the meaning and

the terms transactions and communications are given a very broad meaning and held to include facts inferentially showing a transaction or communication with the decedent, the same broad interpretation of the terms is given in determining whether the testimony of the protected party constitutes a waiver.⁹⁶ But the adverse party is not rendered competent by testimony of the representative which raises a mere inference that a transaction did or did not take place between the deceased and the other party.⁹⁷

spirit of the statute. Such statements, however, if offered against the plaintiff for the purpose of proving a contract on his part to charge nothing unless a cure was effected did involve a transaction with the deceased. *McDonald v. Harris*, 131 Ala. 359, 31 So. 548.

96. In an action by an executor for the conversion of notes alleged to be the property of the estate, the defendant claimed that the testatrix had given him the notes. The plaintiff executor in his own behalf testified that the notes were kept by the testatrix in a tin trunk under her bed; that the witness saw them there shortly before testatrix's death, but that immediately thereafter they were missing and were afterward found in defendant's possession. The refusal to permit defendant to testify that he did not take the notes from any trunk or any person, and that he had possession of them several days before testatrix's death, was held error. The court said: "The excluded evidence did not purport to be admissible, nor was it offered, for the purpose of establishing an affirmative defense; but it is claimed to have been competent, as tending to overthrow a fact upon which plaintiff's cause of action solely rested, and which was testified to by the plaintiff alone. While, of course, it is not competent for a party, when called as a witness in his own behalf against one representing the deceased person, to testify affirmatively as to any transaction or communication had, personally, with such deceased person, or whether a particular interview between them took place or not, unless his adversary is first examined in reference thereto, or the evidence of the deceased person given on some former occasion is proved on the trial, yet this does not neces-

sarily and under all circumstances exclude the evidence of the surviving party when it tends to negate or affirm the existence of such transaction and communication. The object and intent of the restriction placed upon the survivor of those engaged in personal dealings and transactions from giving evidence in relation thereto, will be accomplished if it, is limited to cases which preclude him from giving such evidence when it is offered for the purpose of establishing an affirmative cause of action or defense. It is difficult to lay down any general rule which shall cover all possible transactions, but it is safe to say, when a party gives material evidence as to extraneous facts which may or may not involve the negation or affirmation of the existence of a personal transaction or communication with a deceased person, that the adverse party, although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of such personal communications or transactions." *Lewis v. Merritt*, 98 N. Y. 206. See also *s. c.* on subsequent appeal, 113 N. Y. 386, 21 N. E. 141.

97. See *Cochrane v. Breckenridge*, 75 Iowa 213, 39 N. W. 274.

Where the question in issue was whether the note in defendant's possession had been paid and delivered to him by decedent, testimony by the latter's administrator that defendant was in possession of a key to decedent's private safe and had access thereto on several occasions subsequent to decedent's death is not testimony as to a transaction or communication between defendant and the deceased intestate, which renders

Testimony on behalf of the protected party as to facts showing an implied contract by the disqualified witness necessarily involves transactions or communications with the decedent, and renders the disqualified witness competent in rebuttal as to the real nature of the transaction.⁹⁸

(2.) **Identification of Signature.** — The identification of the signatures of the parties to a written transaction does not constitute testimony as to the transaction itself and is therefore not a waiver of the incompetency of the adverse party.⁹⁹

(3.) **Testimony as to Admission of Transaction.** — Testimony as to an admission of an incompetent witness is not testimony as to the fact or transaction involved in such admission, and therefore does not render such witness competent as to such alleged fact.¹

(4.) **Denial of Transaction by Protected Party.** — The mere denial, by the protected party, of any knowledge of the occurrence or existence

defendant competent in his own behalf. Because there arises from a group of independent and separable facts an inference that a personal transaction did or did not take place between the survivor and the deceased, this is no reason for permitting the survivor to rebut such inference by his testimony that he had or did not have a personal transaction with the deceased, which was inconsistent with such inference. *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392, *distinguishing* *Pinney v. Orth*, 88 N. Y. 447, and *Lewis v. Merritt*, 98 N. Y. 206.

In an action against an administrator on an alleged debt of his intestate, the defendant testified in his own behalf that the decedent had shown him an acquittance, and that the body and signature of the same were in the handwriting of the plaintiff. This was held to be testimony as to the mere existence and custody of the paper and not as to its delivery, and the plaintiff was not thereby rendered competent to deny delivery, although he could testify that he never wrote such a paper. *Eagan v. Powers*, 51 Hun 642, 4 N. Y. Supp. 592.

98. In an action by administrators to recover rent for property used by defendant during the lifetime of their decedent, in which they testified to the occupation of the property under such circumstances as to raise an implied promise to pay rent, it was held that it was competent for the de-

fendant to testify as to the agreement between himself and the decedent under which he held the premises. *Bailey v. Keyes*, 52 Iowa 90, 2 N. W. 1025.

Contra. — Where a surviving partner has testified to facts to sustain his action of *quantum meruit*, the defendant may testify in opposition thereto, but cannot prove an express contract with the deceased partner covering the subject-matter of the suit. *Stanton v. Ryan*, 41 Mo. 510. *Compare* *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141.

99. See *Hobart v. Verrault*, 74 App. Div. 444, 77 N. Y. Supp. 483; *De Verry v. Schuyler*, 54 Hun 639, 8 N. Y. Supp. 221.

Where the administrator or representative offers in evidence a check given by the decedent reciting for what it is given and endorsed by the adverse party, his testimony identifying the handwriting of the decedent and the signature of the endorser is not testimony as to a transaction with the decedent, and does not therefore waive the incompetency of the adverse party. *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659; *Compare* *Hoes v. Nagele*, 28 App. Div. 374, 51 N. Y. Supp. 233; *DeVerry v. Schuyler*, 54 Hun 639, 8 N. Y. Supp. 221; *Eagan v. Powers*, 51 Hun 642, 4 N. Y. Supp. 592.

1. *Brown v. Burgett*, 61 Hun 623, 15 N. Y. Supp. 942, *holding* him incompetent to deny that the transac-

of a transaction between the decedent and the incompetent witness does not authorize the latter to testify to the fact and character of such a transaction.² But testimony which negatives an alleged transaction by showing a different state of facts may be rebutted.³

h. Extent of Waiver. — (1.) **Generally.** — Generally, testimony by the one party or his witnesses as to prohibited matters renders an adverse incompetent witness competent only as to the same matters

tion, claimed to have been admitted, occurred.

2. *In re Edward's Estate*, 58 Iowa 431, 10 N. W. 793. But see *Rudolph v. Underwood*, 88 Ga. 664, 16 S. E. 55.

Whether a denial of a transaction is testimony as to a transaction within the meaning of the statute, see *supra*, VI, 2, J, h, (2.).

3. In an action by an executor to recover damages for the alleged conversion of certain promissory notes, the issue was whether the testatrix gave the notes to defendant or whether the latter became possessed of them wrongfully. The plaintiff executor testified "that a few hours before the death of deceased, and when she was in an insensible state, which never improved, he saw these notes in her tin trunk; that just after her death he looked again, and they were gone; and that defendant was in the house that night and had opportunity to take them." Defendant in rebuttal was asked, "Did you take them (the notes) from any person without their consent?" It was held that the exclusion of his answer, if error, was not such as to justify a reversal in view of other testimony which he had been allowed to give. The court in discussing the right to rebut the executor's testimony, says: "The direct inference from this proof was that defendant wrongfully took the notes without the knowledge or consent of the owner, and it tended to establish that there had been no personal transaction between such owner and the defendant by force of which his possession could have been rightful and honest. The executor was, therefore, examined as to a personal transaction with the deceased by the defendant; that is, he negatived the existence of any such transaction. In answer, the defendant was permitted to affirm its possibility by the terms of the code.

This he could do, both directly and indirectly. He was permitted to swear that he had possession of the notes a week before the death of deceased, and that when the executor professed to have found them in the trunk, they were, in fact, not there, but in defendant's possession. If this evidence was true, it directly contradicted the executor as to his facts, and indirectly as to his inference of a wrongful taking. But was defendant confined to that indirect rebuttal of the inference? Had he not the right to meet it directly, and say that his possession, concededly derived from deceased if the notes were not stolen, was rightfully obtained because with her consent? If the executor, it is asked, could swear as he did, through the medium of the inference he established, that defendant took the notes without the consent of the deceased, and so, wrongfully, why may not the defendant rebut the inference by saying that he took the notes with her consent, and so, rightfully. The answer is that the executor swore to independent facts tending to show that the personal transaction in issue was impossible, and defendant was at liberty to contradict those facts and remove that impossibility. That he was fully permitted to do, but not allowed to go further and swear that such personal transaction was not only possible, but did, in truth, actually take place. In any event the excluded evidence would have added little to his contradiction of the executor, for, if he was believed, he had already thoroughly and perfectly rebutted the plaintiff's evidence, and the further proof was needless in rebuttal and only useful to establish an affirmative defense, for which purpose, as we held on the former appeal, it was not available. We ought not to reverse the judgment upon that ground." *Lewis v. Merritt*, 113

and no others,⁴ though in some jurisdictions, however, it is held that the witness is thereby rendered fully competent as to all matters.⁵ In one state the right of rebuttal in such case extends only to matters occurring after the decedent's death.⁶ Testimony by the representative or his witness as to conversations between himself and the adverse party⁷ or with the decedent⁸ does not waive the adverse party's incompetency as to transactions with the decedent, though they may waive his incompetency as to the conversations

N. Y. 386, 21 N. E. 141. *Compare* Boyd v. Boyd, 164 N. Y. 234, 58 N. E. 118.

4. *Colorado*. — Hurd v. Fleck, 34 Colo. 262, 82 Pac. 485.

Illinois. — Clark v. Harper, 215 Ill. 24, 74 N. E. 61; Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102; Consolidated Ice Mach. Co. v. Keifer, 26 Ill. App. 466, affirmed in 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

Indiana. — Martin v. Martin, 118 Ind. 227, 20 N. E. 763.

Iowa. — Luehrsmann v. Hoings, 60 Iowa 708, 15 N. W. 571; Clarity v. Sheridan, 91 Iowa 304, 59 N. W. 52. *Kentucky*. — Hardin's Admr. v. Taylor, 78 Ky. 593.

Maine. — Hall v. Otis, 77 Me. 122.

Maryland. — Johnson v. Heald, 33 Md. 352.

Mississippi. — Strickland v. Hudson, 55 Miss. 235.

Missouri. — Wiley v. Morse, 30 Mo. App. 266.

New York. — Ward v. Plato, 23 Hun 402; Rittenhouse v. Crevling, 59 Hun 626, 14 N. Y. Supp. 85; De Verry v. Schuyler, 54 Hun 639, 8 N. Y. Supp. 221.

North Carolina. — Sumner v. Candler, 92 N. C. 634; McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27.

Ohio. — Rankin v. Hannan, 38 Ohio St. 438.

Vermont. — Farrington v. Jennison, 67 Vt. 569, 32 Atl. 641.

When the decedent's agent testifies to a conversation or transaction had by him with the adverse party during deceased's life, the adverse party is rendered competent as to such conversation or transaction, but to no other. Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043; Maher v. Title Guar. & Tr. Co., 95 Ill. App. 365. *Compare* Jacquin v. Davidson,

49 Ill. 82, decided under a former statute.

5. *Christopher v. Wilkins*, 64 N. J. Eq. 354, 51 Atl. 728; *McCartin v. McCartin*, 45 N. J. Eq. 265, 17 Atl. 809; *Lam v. Brock*, 92 Va. 173, 23 S. E. 224; *Wilson v. Terry*, 70 N. J. Eq. 231, 62 Atl. 310; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054. See *Tucker v. Gentry*, 93 Mo. App. 655, 67 S. W. 723.

In an action against an executor, an objection by him to the testimony of the plaintiff as to a transaction with the testator is waived by the election of the executor to testify, even though his testimony is not concerned with transactions between plaintiff and the decedent, since the statute says in unambiguous language that if an executor or administrator, being a party, elects to testify, the adverse party may testify. "Therefore, the conclusion is that when the executor or administrator elects to testify for any purpose or to any extent whatever, the adverse party may then testify generally and without restriction." *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317.

6. Hence, in an action brought to recover on certain notes given by defendant to one Farrington, and by him endorsed to the plaintiff, the question being whether certain payments were made upon the note in suit to the original payee in his lifetime, it was held that the defendant could not testify to conversations with the plaintiff during decedent's lifetime touching such payments, although the plaintiff has been produced as a witness thereto. *Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641. See also *Robinson v. Talmadge*, 97 Mass. 171.

7. *Johnson v. Heald*, 33 Md. 352.

8. *Goodwin v. Hirsch*, 5 Jones & S. (N. Y. Super.) 503.

testified to.⁹ Testimony as to such a conversation does not justify rebuttal testimony as to all the facts in relation to the subject-matter of the conversation,¹⁰ or a denial of a transaction with decedent admitted therein.¹¹ A denial of a transaction in the presence of the witness does not render admissible testimony by the adverse party as to such a transaction when such witness was not present.¹²

Limits of Cross-Examination. — Where the protected party has testified to prohibited matters, the cross-examination as to such matters is limited to those testified to. The adverse party's right of cross-examination is no more extensive in regard to such prohibited matters than his right to testify thereto directly in his own behalf.¹³

Limited to Rebuttal Purposes. — It has been held that the rebuttal testimony of the adverse witness is limited strictly to rebuttal purposes and is not competent to establish an affirmative defense.¹⁴

(2.) Transactions and Communications With Decedent. — (A.) **GENERALLY.** — Where the incompetency is as to transactions or communications with the deceased the waiver extends to the whole transaction or communication as to which the protected party or his witnesses have testified,¹⁵ and the adverse witness may testify fully as to such

9. *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763 (by express provision of the statute the incompetent party is competent in rebuttal of such conversations if they were not in decedent's presence); *Stonecipher v. Hall*, 64 Ill. 121; *Stewart v. Kirk*, 69 Ill. 509.

As to the right to rebut such testimony, see fully *supra*, X, 8, A, d.

10. *Copeland v. Koontz*, 125 Ind. 126, 25 N. E. 174; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763.

11. *Brown v. Burgett*, 61 Hun 623, 15 N. Y. Supp. 942.

12. Where plaintiff testifies that no payment was made to the decedent in her presence, the defendant is not competent to prove a payment to the deceased unless he testifies that it was made in the presence of the plaintiff. *Rudolph v. Underwood*, 88 Ga. 664, 16 S. E. 55.

13. *Williams v. Cooper*, 113 N. C. 286, 18 S. E. 213.

14. *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141, *s. c.* on former appeal, 98 N. Y. 206. See *Stanton v. Ryan*, 41 Mo. 510. But see *Bailey v. Keyes*, 52 Iowa 90, 2 N. W. 1025.

15. *Bailey v. Keyes*, 52 Iowa 90, 2 N. W. 1025; *Hawkins v. Carpenter*, 85 N. C. 482; *Burnett v. Savage*, 92 N. C. 10; *Rankin v. Hannan*, 38 Ohio St. 438; *Clarity v. Sheridan*, 91 Iowa

304, 59 N. W. 52; *Markell v. Benson*, 55 How. Pr. (N. Y.) 360; *Wilcox v. Corwin*, 50 Hun 425, 3 N. Y. Supp. 317.

In *Cheatham v. Bobbitt*, 118 N. C. 343, 24 S. E. 13, which was an action by an administrator for the price of goods claimed to have been sold and delivered by his intestate to the defendant, the plaintiff's testimony that the defendant purchased goods and merchandise from the intestate and that the same were delivered, and that the bills offered in evidence were the original bills of the goods delivered, was held to be a waiver of the defendant's incompetency entitling the latter to testify that the delivery of the goods was in pursuance of a contract of bailment and not of sale. The court says: "The word 'transaction' is used in the statute in reference to the joinder of actions (Code, Sec. 267) in the sense of the conduct or finishing up of an affair, which constitutes as a whole the 'subject of action.' So the term 'personal transaction,' in its application to a case like the one at bar, was intended to describe the whole of the negotiation or treaty between the original parties to it, out of which the cause of action arose."

A note signed by a father and son was filed as a claim against the es-

transaction, not being confined to the particular portion thereof covered by the testimony of the adverse witness. Such testimony, however, is strictly confined to the limits of the transaction in ques-

tate of the father. On the trial the son testified that his father was merely a surety on the note and that he was the principal; that the note had been extended from time to time without the knowledge or assent of his father. He was then asked on cross-examination if it was not a part of the agreement between himself and his father on one side and the bank on the other that the note was not to be paid when due, but was to be extended from time to time for about one year. This question was held proper cross-examination, as, the estate having shown a part of the transaction, the plaintiff was entitled to show the whole. *American Savings Bank v. Harrington's Estate*, 34 Neb. 597, 52 N. W. 376.

In an action on a note executed by the decedent where the protected party has testified that an alteration therein is in plaintiff's handwriting, the latter is competent to testify that the alteration was made at the instance and in the presence of the deceased maker before delivery. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667.

Testimony of the representative's witnesses as to certain payments was held to render admissible the testimony of an interested party as to how these payments were applied, but not as to a prior agreement with the decedent. *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813.

Where the defendant claimed, in an action brought by the administratrix of a deceased payee on a note, certain credits evidenced by check but which were not indorsed upon the note, the daughter and heir of decedent was permitted to testify that at the time of the payment deceased held two notes of defendant, thus tending to create the impression that part of this payment went to the credit of the second note. It was held that the defendant was thereby rendered competent to testi-

fy as to this particular transaction and to deny that deceased held two notes against him at the time, but not as to cash payments on the note in question, nor as to an oral agreement with decedent to reduce the rate of interest on such note, there being no testimony for the plaintiff in reference thereto. *Carpenter v. Rice's Admr.*, 25 Ky. L. Rep. 1704, 78 S. W. 458.

In an action by a legatee on a note executed by the defendant, the latter's testimony as to the real consideration for the note is not rendered admissible merely because the plaintiff testified as to how she obtained the note and identified certain letters written by the defendant. *Chapman v. Chapman*, 132 Iowa 5, 109 N. W. 300.

In an action by the widow to declare a trust in her favor in a part of her deceased husband's estate, the testimony by an adverse party as to what property she brought with her upon her marriage to deceased, may be regarded as testimony to a "transaction" with the opposite party but such testimony does not render her competent to testify that the property in question was bought with her separate property. *Connelly v. Dunn*, 73 Ill. 218.

In an action by an executor to recover a debt due the decedent, the executor's testimony that at the time of the transaction in question no part of the debt was paid does not render the defendant competent to prove payments subsequent to that time. *Telford v. Howell*, 220 Ill. 52, 77 N. E. 82.

Where an executor sued for legal services performed by his testator for defendant, and the executor testified only that the services were rendered, and as to their reasonable value, it was held error to allow defendant to testify as to a conversation with the testator to the effect that no charges were to be made under certain circumstances. *Boardman v. Brown*, 114 Iowa 678, 87 N. W. 674.

tion.¹⁶ As to what are the limits of a transaction no rule can be laid down.

A question covering transactions with the decedent is too broad where the adverse witness has testified to but a single transaction.¹⁷ And testimony as to another transaction is not competent merely because it tends to disprove or contradict the transaction testified to by the protected party.¹⁸

(B.) EXECUTION AND PAYMENT DIFFERENT TRANSACTIONS. — The execution of an obligation and the payment thereof are two separate and distinct transactions, and testimony by the protected party as to one does not waive the adverse witness' incompetency to testify to the other.¹⁹

16. *Metz's Admr. v. Snodgrass*, 9 W. Va. 190; *Donlevy v. Montgomery*, 66 Ill. 227; *DeVerry v. Schuyler*, 54 Hun 639, 8 N. Y. Supp. 221; *Martin v. Hillen*, 142 N. Y. 140, 36 N. E. 803; *Rogers v. McGuire*, 90 Hun 455, 37 N. Y. Supp. 76, *affirmed* in 153 N. Y. 343, 47 N. E. 452; *Zane v. Frink*, 18 W. Va. 693; *Rogers v. McGuire*, 37 N. Y. Supp. 76.

Testimony by the representative that the adverse party went to the deceased's bedside does not render such party competent to prove the conversation that followed. *Bowers v. Smith*, 50 Hun 604, 3 N. Y. Supp. 105, judgment *affirmed* in 124 N. Y. 645, 27 N. E. 412.

17. *Motz v. Motz*, 85 App. Div. 4, 82 N. Y. Supp. 926.

18. *Rogers v. McGuire*, 90 Hun 455, 37 N. Y. Supp. 76, *affirmed* in 153 N. Y. 343, 47 N. E. 452.

In *Martin v. Hillen*, 142 N. Y. 140, 36 N. E. 803, the court in discussing the limits of the rebuttal testimony, says: "The adverse party may also testify against the executor or administrator, but the testimony, if it involves a personal transaction or communication with the deceased, must be confined strictly to the same transaction or communication to which the executor or administrator has already testified in his own behalf. It was competent for the defendant, if he could, to testify in regard to the same transaction referred to by the plaintiff in her testimony. *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081. Confining himself to that transaction, he could testify to any fact or circumstance that was a part of, or involved in it,

that tended to contradict or weaken the plaintiff's version of it. But he could not explain, impair, or contradict the plaintiff's version by means of another and independent personal transaction or communication between himself and the deceased. The contention of the defendant's counsel is that the defendant could testify to any fact or circumstance that concerned the transaction testified to by the plaintiff; and any new or independent personal transaction between the defendant and the deceased that tended to contradict it, or show that it could not have occurred, was evidence of that character, and admissible. We think that such a construction of section 829 is not permissible. The words 'concerning the same transaction or communication' were inserted in the section for the very purpose of rendering such a construction impossible. It would open the door for the admission of all the evils which the section was intended to prevent, and would go far towards repealing it entirely, since the testimony of the executor or administrator bringing the action in his own behalf to a single distinct personal transaction or communication would open the way for the adverse party to testify to any other personal transaction or communication, or to any number of them, upon the ground that they tended to explain or contradict the single transaction or communication given in evidence by the plaintiffs. This would practically defeat the purpose which the legislature had in view."

19. *Williams v. Cooper*, 113 N. C. 286, 18 S. E. 213. This was an ac-

(C.) *EFFECT OF DENIAL OF ADVERSE WITNESS' PRESENCE.* — It has been held that where the incompetent witness in rebuttal denies the presence of the adverse witness at the conversation or transaction testified to by the latter, he cannot testify further as to the nature of the transaction or communication because it cannot be regarded as the same transaction testified to by the adverse witness.²⁰

B. *AS TO MATTERS NOT PROHIBITED.* — The testimony of the protected party or his witnesses as to matters concerning which the testimony of the adverse party or witness is competent does not remove the latter's incompetency as to other matters,²¹ though the contrary has been held in New Hampshire under the law formerly in force in that state.²²

9. Availability or Introduction of Decedent's Testimony. — A. *AVAILABILITY.* — Generally the fact that the decedent's testimony on a former trial has been preserved and is available to the protected party,²³ or that his deposition has been taken in the case,²⁴ does not remove the incompetency of the witness, unless the statute so provides.²⁵

In one state, however, where the testimony of one of the parties to a suit has been taken in the form of a deposition or has been preserved by a bill of exceptions, upon his death the living party may testify in his own behalf regardless of whether the decedent's representative does or does not produce and introduce the testimony

tion by an administrator on a bond given to the decedent by the defendant. Plaintiff's testimony as to the execution of the bond was no waiver of the defendant's incompetency to prove payments made by him on the obligation, nor did it authorize cross-examination as to such alleged payments.

20. *Jones v. Perkins*, 29 App. Div. 37, 51 N. Y. Supp. 380; *Martin v. Hillen*, 142 N. Y. 140, 36 N. E. 803. Compare *Webster v. Sibley*, 72 Mich. 630, 40 N. W. 772.

21. See *supra*, X, 8, A, h, and *McCartin v. Traphagen's Admr.*, 45 N. J. Eq. 265, 17 Atl. 809.

22. *Ballou v. Tilton*, 52 N. H. 605.

Under the present New Hampshire law either party may testify as to matters occurring subsequent to the decedent's death without in anywise waiving the incompetency of the other as to matters occurring prior to that event. *Parsons v. Wentworth*, 73 N. H. 122, 59 Atl. 623.

23. *Hollis v. Calhoun*, 54 Ga. 115.

Trunkey v. Hedstrom, 131 Ill. 204, 23 N. E. 587, where the court says: "The fact that in this particular case

the testimony of the deceased agent was available to the defendants, cannot change the rule prescribed by the statute. It was necessary for plaintiffs to make out their case, in the first instance, by competent proof. Until they had done so, the defendants were not called upon to introduce any evidence. Plaintiffs could not avail themselves of proof made incompetent by the statute, simply because defendants had in their possession testimony which would tend to overcome such incompetent evidence." *Contra*, *Allen v. Morgan*, 61 Ga. 107.

24. *Keran v. Trice*, 75 Va. 690; *Levy v. Dwight*, 12 Colo. 101, 20 Pac. 12; *Hollis v. Calhoun*, 54 Ga. 115.

25. See *supra*, statutes of Indiana and Minnesota.

A statute providing that in case the deposition of the decedent has been taken and "can be used" the adverse witness shall be competent, removes his disability where the deposition is on file, though it has not been offered. *Coble v. McClintock*, 10 Ind. App. 562, 38 N. E. 74.

so preserved.²⁶ The living party's testimony, however, must be confined to the same matters covered by the testimony of the decedent so preserved.²⁷

B. INTRODUCTION. — a. *Generally*. — Where the testimony²⁸ or deposition²⁹ of the decedent has been introduced by the protected party, the incompetency of an adverse witness is removed. But the fact that at a former trial both parties testified does not render the survivor competent on a subsequent trial of the same case.³⁰

The introduction by the protected party of the record of his own cross-examination of the decedent at a former trial, although offered in rebuttal of the record of the direct testimony of such deceased introduced by the adverse party is a waiver of an adverse witness' incompetency to any transactions or communications referred to in such cross-examination.³¹

Under the Minnesota Statute where the testimony of the decedent on a former trial, as to the transaction between himself and the adverse party, has been preserved, the adverse party is a competent witness to such transaction at a subsequent trial against the representatives of such decedent. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995.

26. Stone v. Hunt, 114 Mo. 66, 21 S. W. 454; Coughlin v. Haessler, 50 Mo. 126; Leahy v. Rayburn, 33 Mo. App. 55; Hayden v. Grillo's Admr., 42 Mo. App. 1.

27. Stone v. Hunt, 114 Mo. 66, 21 S. W. 454, *approving* Coughlin v. Haessler, 50 Mo. 126 on this point, but *overruling* the latter case in so far as it holds that where the plaintiff has testified on the former trial his testimony after the other party's death must not contradict such former testimony.

28. Kroncke v. Madsen, 56 Neb. 609, 77 N. W. 202; Turpie v. Lowe (Ind.), 62 N. E. 484; Bangs v. Gray, 60 Neb. 457, 83 N. W. 680.

Testimony Taken at Former Trial. Strickland v. Hudson, 55 Miss. 235; Robbins v. Pultzs, 16 Jones & S. (N. Y. Super.) 510. See Shrader v. United States Glass Co., 179 Pa. St. 623, 36 Atl. 330.

Statutes. — For statutes governing the effect of the introduction of the testimony of the deceased or incompetent person, see *supra*, the statutes of Alabama, Florida, Iowa, Kansas, Maine, Maryland, Michigan, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma,

South Carolina, South Dakota, Vermont, Virginia, West Virginia and Wisconsin.

29. *United States*. — Mumm v. Owens, 2 Dill. 475, Fed. Cas. No. 9,919.

Georgia. — Monroe v. Napier, 52 Ga. 385; Hollis v. Calhoun, 54 Ga. 115.

Illinois. — Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820.

Indiana. — Hatton v. Jones, 78 Ind. 466.

Missouri. — Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869.

North Carolina. — Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154.

Tennessee. — Bingham v. Laverder, 2 Lea 48.

Texas. — Runnels v. Belden, 51 Tex. 48; Shuford v. Chinski (Tex. Civ. App.), 26 S. W. 141.

Statutes in some states govern this matter. See *supra*, statutes of Illinois, Michigan, Ohio and Wyoming.

30. Taylor v. Bunker, 68 Mich. 258, 36 N. W. 66.

31. Potts v. Mayer, 86 N. Y. 302. In this case it appeared that on a former trial the decedent had testified on behalf of the adverse party, but in one unresponsive answer referred to a transaction between himself and the party calling him; the other party on cross-examination went more fully into this transaction. On the subsequent trial the record of the direct examination of the decedent was introduced by the party in whose behalf it was taken. The other party in rebuttal then introduced the record of his former cross-examina-

b. *Absence of Statutory Provision.* — This general rule has been applied, even though not provided for in the statute.³²

c. *In Whose Benefit Taken.* — The testimony of decedent must have been on his own behalf or against the witness rendered incompetent by his death.³³

d. *Meaning of Testimony.* — (1.) *Generally.* — "Testimony" of the deceased in this connection means his statements under oath,³⁴ his deposition or testimony at a former trial.³⁵ It does not include his declarations,³⁶ or documents executed,³⁷ nor does it include the

tion. This was held to be the introduction of the testimony of the decedent within the meaning of the statute and consequently a waiver of the adverse party's incompetency to the transactions therein referred to, although it was contended that the testimony was called out by the adverse party.

32. *Strickland v. Hudson*, 55 Miss. 235 (*holding* the claimant's testimony competent in rebuttal of the decedent's testimony taken at a former trial); *Runnells v. Belden*, 51 Tex. 48.

O'Neil v. Brown, 61 Tex. 34, *holding* that the introduction of the testimony given by the decedent on a former trial of the case was a waiver of the adverse party's incompetency, since the statute would not be applied where the reason on which it is based ceases to operate.

In an action where the depositions of both parties to a suit were taken and thereafter one of the parties died before the trial of such suit, the court admitted the deposition of decedent, but excluded the deposition of the living party, and it was held by the court, that, while such ruling might be within the letter, it is not within the spirit of § 1740, Ann. Code, providing that "a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person," etc. *Drewry v. Hopper*, 77 Miss. 744, 27 So. 597.

33. The mere fact that one of the parties after he has been examined by the other, dies, does not render the other party a competent witness. The decedent's testimony to constitute a waiver must have been in his own behalf, or in the case of an agent, in behalf of his principal, to make the adverse party competent. *Puckett v. Mullins' Admr.*, 106 Va.

248, 55 S. E. 676, *holding* that *Keran v. Trice's Exrs.*, 75 Va. 690, is still the law except as modified by § 3349, Code 1904. But see *Potts v. Mayer*, 86 N. Y. 302, *supra*, X, 9, B, a, note.

34. *In re Callister*, 153 N. Y. 294, 47 N. E. 268.

35. *Hall v. Holloman*, 136 N. C. 34, 48 S. E. 515.

Deceased's Verified Complaint in Another Action. — Use of as Deposition, see *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820.

36. Declarations of the deceased relating to the transaction in question, but made upon another and distinct occasion, are not testimony of the deceased under the statute and do not open the door to the adverse party. *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189. Compare *Mercantile Safe Dep. Co. v. Dimon*, 55 App. Div. 538, 67 N. Y. Supp. 430. *Contra*, see *In re Scheuer*, 5 Dem. Sur. (N. Y.) 369.

Introducing the unsworn declaration of the decedent does not remove the incompetency of the other party to deny the facts stated in such declaration. The use of such declaration does not amount to the introduction of the testimony of the deceased person within the meaning of the statute. *Pepper v. Broughton*, 80 N. C. 251. See also *Doughty v. Doughty*, 5 N. Y. St. 95.

37. See *Owens v. Watts*, 24 S. C. 76; *Woodbury v. Woodbury's Estate*, 48 Vt. 94.

On an accounting by an administratrix she presented a claim for services against decedent, her husband, rendered during his lifetime. The deceased's heirs required her to produce a note given her by decedent, but not included in her claim. It was read in evidence by contestants. The administratrix offered

mere introduction of a document in the decedent's possession at his death.³⁸

(2.) **Book Entries and Other Writings of Decedent.** — (A.) **GENERALLY.** The introduction in evidence of the book entries or other writings of the decedent is not the introduction of his "testimony" as this term is used in the statute, providing that where the decedent's testimony in regard to the prohibited matters has been introduced, the disqualification of the adverse witness is removed thereby.³⁹ The statute, however, in one state, makes the adverse party competent where such books and memoranda have been used in evidence,⁴⁰ but they are not used in evidence when used merely for the purpose of refreshing the memory of a witness for the representative.⁴¹

herself as a witness as to all that was said and done at the time the note was given in order to rebut the presumption that it was a full settlement for all claims existing at that time. A ruling that she was incompetent was sustained on appeal on the ground that such note was not testimony of the deceased as to the transaction in question within the statute. *In re Callister*, 153 N. Y. 294, 47 N. E. 268, *affirming* 88 Hun 87, 34 N. Y. Supp. 628. See *Vanderveer v. Vanderveer*, 49 Hun 608, 1 N. Y. Supp. 897, 898.

38. Introduction of Note Held by Decedent To Prove Non-Payment. Not Testimony of Decedent. — In an action against the estate of decedent to foreclose a mortgage given by the intestate to secure payment of a note, the introduction of the note to show no payment, would not be making a witness of plaintiff's intestate as to transactions prior to his decease within the meaning of the code. *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

39. *Benjamin v. Dimmick*, 4 Redf. Sur. (N. Y.) 7; *Whisler v. Whisler*, 117 Iowa 712, 89 N. W. 1110, where the court says: "The admission of a receipt, or deed, or contract, or other writing of a deceased person has never, so far as we can ascertain, been held sufficient to admit the testimony of a living witness otherwise incompetent under the statute, and we can see no good reason for establishing such rule as against books and memoranda made by the deceased. The word 'testimony,' as used in the statute, has reference to the facts related by a witness under proper oath or affirmation, and,

where reference is made to 'the testimony of such deceased person,' we think the application of the language must be confined to his sworn testimony taken in his lifetime before some court or officer in due form of law. The case relied upon by appellants as announcing a contrary conclusion (*Marsh v. Brown*, 18 Hun 319) we do not think controlling, and, if it goes to the extent claimed for it by counsel, we must decline to follow it. The suggestion of counsel that we have already acknowledged the authority of this precedent is based upon a mistaken reading of the opinion. *In re Brown's Estate*, 113 Iowa 351. The extent of our reference to it in that case was to point out that the doctrine which it announced was not in point upon the question which we were then considering." *Contra*, *Marsh v. Brown*, 18 Hun 319.

40. *Kelton v. Hill*, 59 Me. 259; *Cary v. Herrin*, 59 Me. 361; *Burleigh v. White*, 64 Me. 23; *Berry v. Stevens*, 69 Me. 290.

The phrase "other memoranda," used in the statute, means memoranda made by the deceased only; it does not include receipts given by the adverse party to the deceased in his lifetime. Therefore, in a bill in equity brought by the heirs of a deceased mortgagor to redeem his mortgage, the defendant is not a competent witness to testify, before a master, for what, and under what circumstances, his receipt to the deceased, offered in evidence by the plaintiffs, was given. *Cary v. Herrin*, 59 Me. 361.

41. *Folsom v. Chapman*, 59 Me. 194.

(B.) DECEDENT'S CHECK. — The mere introduction of decedent's check,⁴² or the introduction of the decedent's check containing a statement of the purpose for which it is given, and endorsed by the adverse party as a receipt or admission by the latter of the facts recited thereon, is not the introduction of the testimony of the decedent within the meaning of the statute.⁴³

(C.) RECITAL IN WILL. — A recital in the decedent's will, not being evidence of the fact recited, is not his testimony within the meaning of the statute and does not warrant the testimony of otherwise incompetent witnesses in rebuttal thereof.⁴⁴

e. *Testimony or Deposition in Same Proceeding.* — Where the testimony or the deposition of the decedent has been taken in the same proceeding and is used after his death by his representatives, the adverse party is thereby rendered competent,⁴⁵ though the con-

42. *In re Callister's Estate*, 88 Hun 87, 34 N. Y. Supp. 628.

43. *In re Brown's Estate*, 92 Iowa 379, 60 N. W. 659, holding that the introduction of such a check did not authorize the plaintiff to testify in respect to the same matters. The court says: "Was the writing put in evidence the testimony of deceased? If so, Cole should have been permitted to explain it. The word 'testimony,' in its restricted legal sense, means a statement made under oath in a legal proceeding, and does not embrace a document or private writing. Webst. Dict.; Black, Law Dict. Viewed in this light, the check was not testimony of the deceased. But the word 'testimony,' as often and possibly generally used, embraces more than mere verbal statements made under oath in a legal proceeding." The court *distinguishes* *Marsh v. Brown*, 18 Hun (N. Y.) 319, holding under a similar statute that the introduction by the administrator of an entry in his books charging the adverse party with a certain sum as an advancement to be the testimony of the decedent. This case is distinguished on the ground that the writing there in question was a private writing or entry of the deceased alone which the plaintiff had never seen or heard of; while in the case at bar it is only the acceptance and endorsement of the check by the plaintiff which makes it evidence of the facts recited on it. "It is then, as between the parties, in the nature of a receipt—an

acknowledgment by the claimant that the money called for by the check is for the purpose stated therein. In legal effect, so far as these parties are concerned, it is as if the parties had entered into an agreement in writing, and both signed it. The check is, then, as much the testimony of the claimant as of deceased, except that it is offered on behalf of the defendants. If the check has not been changed, it is the written admission of the plaintiff that he received a certain sum therein named in payment for services as stated therein. In the cited case, the living witness is permitted to dispute or explain an *ex parte* entry made by deceased in his own books, and with which he had no personal connection. In the case at bar, plaintiff seeks to explain a writing to which he became a party. We do not think that the check can be said, under the circumstances, to be the testimony of the deceased in such a sense as to bring the case within the statutory exception." See reference to this opinion in *Whisler v. Whisler*, 117 Iowa 712, 89 N. W. 1110, *ante*, X, 9, B, d, (2.), (A.), first note.

44. A contestant of a will is not rendered competent to testify in his own behalf to contradict a recital in the will of testator as to advancements to the witness. *Davidson v. Davidson* (Neb.), 96 N. W. 409.

45. *Ellis v. Cribb*, 55 S. C. 328, 33 S. E. 484; *Monroe v. Napier*, 52 Ga. 385; *Bingham v. Lavender*, 2 Lea (Tenn.) 48.

trary has been held where the decedent's testimony was read in evidence.⁴⁶

f. *Qualified Introduction or Use of Testimony.* — Where the testimony of the deceased has been introduced and used not for the purpose of proving the facts stated therein, but merely to show the identity of the subject-matter of the action in which it was given and the pending action, the adverse party is not thereby rendered competent to testify as to prohibited matters therein referred to in support of the main issues in the case.⁴⁷

g. *Introduction at instance of Incompetent Party.* — (1.) **Generally.** Where the incompetent party has himself introduced the decedent's testimony, he is not thereby rendered competent as to the same matters,⁴⁸ nor can such incompetent party render himself a competent

Under the Ohio Statute if a party after testifying orally, dies, the evidence may be proved by *either* party on a further trial of the case, whereupon the opposite party may testify to the same matters. 2 Bates' Ann. St. (Everett's Ed.) § 5242, subd. 7.

46. Although the decedent has testified in the action before his death, this fact does not render the adverse party competent after the death and substitution of the executors even though decedent's testimony is read in evidence, especially where the adverse party had a sufficient opportunity to testify before the death. The time when the testimony is given determines its competency. Beckhaus v. Ladner, 48 N. J. Eq. 152, 21 Atl. 724. And see Evans v. Reed, 84 Pa. St. 524.

47. When one of the defenses pleaded in an equitable action was that the matters in controversy had previously been tried and determined adversely to plaintiff in an action brought by him against the decedent, of whom the defendants in the action pending were the heirs and personal representatives, and where the deposition of the deceased, taken in the case already determined, was introduced in evidence in the pending case merely to show the identity of the subject-matter of the two suits, the plaintiff in such suits claiming and testifying that they were not identical, the admission in evidence of said deposition, merely for the purpose aforesaid, did not justify the court in allowing in evidence in the pending action the testimony of plaintiff as to personal transactions or conversations between plaintiff

and said deceased person as decedent's admissions relative to material matters in the action pending. Furbush v. Barker, 38 Neb. 1, 56 N. W. 996.

48. Walker v. Taylor, 43 Vt. 612; McIndoe v. Clarke, 57 Wis. 165, 15 N. W. 17; Folsom v. Chapman, 59 Me. 194; Miller v. Adkins, 9 Hun (N. Y.) 9.

A party who is disqualified as to transactions with the decedent cannot remove the bar of the statute by introducing in his own behalf letters of the decedent, since a party cannot by his own act make himself competent. Ross v. Kirkwood, 123 Iowa 668, 99 N. W. 562.

A stipulation as to what the decedent's testimony would be, made before his death, does not qualify the party introducing such stipulation to testify to transactions with the decedent. Miller v. Adkins, 9 Hun (N. Y.) 9.

Testimony of Deceased Agent.

Under a statute disqualifying a party as to transactions with the deceased agent of the adverse party, unless the testimony of such agent be first read or given in evidence by the opposite party, the introduction of the decedent's testimony by the incompetent party does not render the latter competent; and the fact that a deposition of such deceased agent, which had been taken on the part of the plaintiff to be used on the trial, has been put in evidence by the defendant, does not render the latter competent to testify as to his transactions with such agent referred to in the deposition. McIndoe v. Clarke, 57 Wis. 165, 15 N. W. 17.

witness in the action by introducing the decedent's books and memoranda.⁴⁹

(2.) *Introduced Pursuant to Stipulation.* — Where the testimony of one since deceased has been taken previous to the trial pursuant to a stipulation by the parties that it might be read in evidence, a party cannot remove his own incompetency, caused by the death of the deponent, by introducing in evidence the testimony so taken.⁵⁰

C. *EXTENT OF WAIVER.* — The introduction of the decedent's testimony is a waiver of the adverse party's incompetency only as to transactions or matters contained therein,⁵¹ hence if it contain no reference to prohibited matters it constitutes no waiver at all.⁵²

XI. OBJECTIONS AND DETERMINATION.

1. *Objections.* — A. *NECESSITY OF OBJECTION.* — a. *Generally.* A party desiring the protection of the statute must make a proper and seasonable objection to the competency of the witness;⁵³ the failure to do so is ordinarily a waiver of the incompetency,⁵⁴ though it has been held that the court should exclude a manifestly incompetent witness without objection.⁵⁵

b. *By Infant.* — The failure of an infant's guardian to interpose a seasonable objection to an incompetent witness is not a waiver.⁵⁶

49. *Berry v. Stevens*, 69 Me. 290.

50. *Miller v. Adkins*, 9 Hun (N. Y.) 9. In this case the plaintiff's deposition had been taken under a stipulation by the parties that it might be read in evidence, and before the trial the plaintiff died; it was held that the defendant could not remove his incompetency as to transactions with the decedent by introducing in evidence the latter's deposition.

51. *United States.* — See *Mumm v. Owens*, 2 Dill. 475, 17 Fed. Cas. No. 9,919.

Indiana. — *Hatton v. Jones*, 78 Ind. 466.

Kentucky. — *Hardin's Admr. v. Taylor*, 78 Ky. 593.

Missouri. — *Leahy v. Rayburn*, 33 Mo. App. 55; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454.

Nebraska. — *Kroncke v. Madsen*, 56 Neb. 609, 77 N. W. 202; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949.

New York. — *Ward v. Plato*, 23 Hun 402.

Texas. — *Runnels v. Belden*, 51 Tex. 48.

52. *Newman's Admr. v. Blades*, 21 Ky. L. Rep. 1353, 54 S. W. 849.

53. *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Warren v. Warren*, 105 Ill. 568; *Becker v. Foster*, 64 Ill. App. 192; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Brague v. Lord*, 9 Jones & S. (N. Y. Super.) 193.

54. *Illinois.* — *Doty v. Doty*, 159 Ill. 46, 42 N. E. 174. But see *Kelsey v. Snyder*, 118 Ill. 544, 9 N. E. 195.

Indiana. — *Denbo v. Wright*, 53 Ind. 226; *Bartlett v. Burden*, 11 Ind. App. 419, 39 N. E. 175.

Michigan. — *Howatt v. Green*, 139 Mich. 289, 102 N. W. 734.

Minnesota. — *Levering v. Langley*, 8 Minn. 107.

Nebraska. — *Parrish v. McNeal*, 36 Neb. 727, 55 N. W. 222; *Bartlett v. Bartlett*, 15 Neb. 593, 19 N. W. 691.

New York. — *Cole v. Sweet*, 187 N. Y. 488, 80 N. E. 355.

55. *Sherman v. Lanier*, 39 N. J. Eq. 249; *McHugh v. Dowd's Estate*, 86 Mich. 412, 49 N. W. 216. See also *Kelsey v. Snyder*, 118 Ill. 544, 9 N. E. 195.

56. *Johnston v. Johnston* (Ill.), 27 N. E. 930. See also *Sherman v. Lanier*, 39 N. J. Eq. 249.

c. *Repetition of Objection.* — The failure to repeat an objection to the same sort of testimony by other incompetent witnesses is not a waiver of the objection already made.⁵⁷

B. WHO MAY MAKE OBJECTION. — a. *Generally.* — Any person directly interested in the estate represented in the action may object to the testimony of a witness who is incompetent against the estate,⁵⁸ but the right to object is not available to other persons who may be parties with the representative,⁵⁹ or opposed to him.⁶⁰

b. *Co-Party With Witness.* — Where the statute disqualifies the parties to an action from testifying against each other, only the adverse party and not a co-party with the witness can insist upon the enforcement of the statute,⁶¹ unless such co-parties are in reality adverse parties though occupying the same side of the record.⁶²

C. TIME FOR OBJECTION. — a. *Generally.* — Objection must be made before the witness has given the incompetent testimony;⁶³ an objection not made until after the objecting party has commenced a cross-examination is too late,⁶⁴ unless the incompetency then appears for the first time.⁶⁵

On Appeal. — The question of the competency of a witness in ref-

57. See article "OBJECTIONS," Vol. IX, p. 53, *et seq.*, and Schoonmaker v. Wolford, 20 Hun (N. Y.) 166.

58. Tate v. Tate's Exr., 75 Va. 522, holding that where for any reason the administrator fails to do so, "whether through ignorance, inadvertence, collusion or fraud, it is the privilege of any other person interested in the estate to make the objection." But see Ferguson v. State, 90 Ind. 38, holding that in an action on a bond given by decedent against his administrator and sureties, the latter could not object to the plaintiff's testimony, to the admission of which the administrator consented.

A Judgment Creditor, who has intervened in an action against an heir to establish a trust in the decedent's real estate, is entitled to object to the competency of the plaintiff. Vandevier v. Fetta, 20 Colo. 368, 38 Pac. 466, affirming 3 Colo. App. 419, 34 Pac. 168.

59. In the case of Marcy v. Amazeen, 61 N. H. 131, it was held that in a suit by an administrator the right to object to the testimony of the adverse party, under the statute, is the right of the administrator, and is not available to a third person who may be a party.

60. Austin v. Bean, 101 Ala. 133,

16 So. 41; Pattee v. Whitcomb, 72 N. H. 249, 56 Atl. 459, citing Marcy v. Amazeen, 61 N. H. 131, 60 Am. Rep. 320.

61. Hoxie, Exrx. v. Farmers' & M. Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637, holding that in an action upon a partnership debt against surviving partners and the executrix of a deceased partner, the former were competent to testify over the latter's objection, to transactions or statements by the decedent.

62. See *supra*, IV, 2, C, and X, 7, A, b.

63. Davis v. Hall, 128 Iowa 647, 105 N. W. 122; Levering v. Langley, 8 Minn. 107; Boone v. Ridgway's Exrs., 29 N. J. Eq. 543; Monfort's Admr. v. Rowland, 38 N. J. Eq. 181. But see Graham v. Berryman, 19 N. J. Eq. 29.

64. Dean v. Warnock, 98 Pa. St. 565; Ladd v. Williams, 104 Mo. App. 390, 79 S. W. 511; Meroney v. Avery, 64 N. C. 312; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328.

65. Branch v. Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050. The proper practice in such case, however, is a motion to strike out. See articles "OBJECTIONS," Vol. IX, and "STRIKING OUT AND WITHDRAWAL OF EVIDENCE," *ante*.

erence to transactions had with a person since deceased, cannot be raised for the first time in the appellate court,⁶⁶ except, it has been held, in equity cases.⁶⁷

b. *Partial Incompetency*. — Under most of the statutes the incompetency of the witness is only partial, being confined to certain prohibited matters. The objection therefore cannot properly be interposed until his testimony with respect to such matters has been called for.⁶⁸

c. *Total Incompetency*. — Where, however, the statute renders the witness totally incompetent in a particular class of actions, the objection must be interposed at the time his testimony is offered.⁶⁹

d. *Deposition*. — Where the testimony is given by deposition the objection may be made at the trial,⁷⁰ unless the objection be to the competency of the witness to testify at all.⁷¹ The proper time to object, where the witness is incompetent only as to certain prohibited matters, is when the objectionable portion of a deposition is offered in evidence.⁷²

D. NATURE AND SUFFICIENCY OF OBJECTION. — a. *Generally*. Under most of the statutes the incompetency of the witness is only partial, being limited to certain prohibited matters. Consequently a general objection to the witness as incompetent is not sufficient; the objection should specifically point out the ground of incompe-

66. *Georgia*. — *Clarke v. Alexander*, 71 Ga. 500.

Illinois. — *Bruner v. Nisbett*, 31 Ill. App. 517; *Hipple v. De Puie*, 51 Ill. 528.

Iowa. — *Bird v. Jacobus*, 113 Iowa 194, 84 N. W. 1062; *Moody v. Dryden*, 72 Iowa 461, 34 N. W. 210.

Missouri. — *Carney v. Carney*, 95 Mo. 353, 8 S. W. 729.

South Carolina. — *Wingo v. Caldwell*, 35 S. C. 609, 14 S. E. 827.

Virginia. — *Simmons v. Simmons' Admr.*, 33 Gratt. 451.

67. *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756.

68. *Chew v. Holt*, 111 Iowa 362, 82 N. W. 901; *Holloway v. Gallo-way*, 51 Ill. 159; *Norris v. Stewart's Heirs*, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917; *Murdock v. McNeely*, 1 Ohio C. D. 9.

Card v. Card, 39 N. Y. 317, holding that the refusal of the court to permit a witness to be sworn was error under a statute disqualifying him merely as to transactions or communications with a deceased person.

69. See article "OBJECTIONS," Vol. IX, p. 52.

70. *Kelsey v. Snyder*, 118 Ill. 544, 9 N. E. 195; *Albers Com. Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075; *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513; *Leavitt v. Baker*, 82 Me. 26, 19 Atl. 86; *Middleton's Exr. v. White*, 5 W. Va. 572.

71. *Greedy v. McGee*, 55 Iowa 759, 8 N. W. 651. See also *Watson v. Riskamire*, 45 Iowa 231, and article "DEPOSITIONS," Vol. IV.

72. *Burton v. Baldwin*, 61 Iowa 283, 16 N. W. 110, where it was contended that the objection should have been made when the witness was sworn, and the case of *Watson v. Riskamire*, 45 Iowa 231 was relied on. The court says: "That case is not in point. In it the objection was to the competency of the witness. Here the objection is not to the competency of the witness, but to the competency of his testimony. The witnesses were competent to testify as to all matters except personal transactions or communications between them and the deceased. The objections, we think, were taken in time." But see *Greedy v. McGee*, 55 Iowa 759, 8 N. W. 651.

tency.⁷³ It is too late to specify the ground of objection after the testimony is in, although a general objection has been previously made.⁷⁴

b. *Where Incompetency Is Total and Apparent.* — Where, however, the incompetency is total and dependent merely upon the fact that an executor or administrator is the adverse party, which is shown by the record, a general objection has been held sufficient.⁷⁵

c. *Testimony Competent for Certain Purposes.* — Where the testimony of the witness is competent for certain purposes though incompetent for others, a general objection is properly overruled.⁷⁶

d. *Grounds of Objection.* — (1.) *Generally.* — The objection must be made upon the proper ground, otherwise it is waived;⁷⁷ it is not, however, necessary to state the statute upon which the objection is based;⁷⁸ on the contrary, an objection which merely referred to the

73. *Alabama.* — Conoly v. Gayle, 61 Ala. 116.

Indiana. — Bingham v. Walk, 128 Ind. 164, 27 N. E. 483; Staser v. Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

Maryland. — Smith v. Humphreys, 104 Md. 285, 65 Atl. 57; Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060.

Minnesota. — Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193.

Missouri. — Mann v. Balfour, 187 Mo. 290, 86 S. W. 103; Hayden v. Grillo, Admr., 42 Mo. App. 1; Stone v. Hunt, 114 Mo. 66, 21 S. W. 454.

New York. — Cross v. Smith, 85 Hun 49, 32 N. Y. Supp. 671; Shiel v. Muir, 51 Hun 644, 4 N. Y. Supp. 272.

North Carolina. — Norris v. Stewart's Heirs, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917; Perkins v. Berry, 103 N. C. 131, 9 S. E. 621.

Ohio. — Meier v. Herancourt, 6 Ohio Dec. 1164.

A general objection to the competency of the witness is not sufficient where the witness has been rendered competent as to certain conversations with decedent by reason of the testimony of the other party to the same conversation. Colston v. Olroyd, 204 Ill. 435, 68 N. E. 373.

Incompetent Matter in Rebuttal must be specifically objected to when offered. Wiley v. Morse, 30 Mo. App. 266.

74. Mann v. Balfour, 187 Mo. 290, 86 S. W. 103.

75. St. Joseph v. Baker, 86 Mo. App. 310.

76. See article "OBJECTIONS," Vol. IX, p. 128 *et seq.*

Where a party to an action is asserting rights not only as the guardian of an insane person, but in his individual capacity, it is not error for the court to admit the testimony of a witness who is incompetent as against such person in his representative capacity but competent against him individually, where the objection is general and unqualified. Field v. Field (Tex. Civ. App.), 87 S. W. 726.

Since a party is a competent witness against himself, his co-parties desiring to restrict the use of such testimony must ask specific instructions that it be not considered as against themselves. Thistlewaite v. Thistlewaite, 132 Ind. 355, 31 N. E. 946.

77. See article "OBJECTIONS," Vol. IX, and Bell v. Bumstead, 60 Hun 580, 14 N. Y. Supp. 697; Cornell v. Barnes, 26 Wis. 473; McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303.

An objection to this class of evidence on the ground that it is a privileged communication is not sufficient and constitutes a waiver. Gerhardt v. Tucker, 187 Mo. 46, 85 S. W. 552.

78. An objection to a question to the effect that it relates to personal transactions or communications with the deceased by an interested witness is sufficient, and it is not necessary to refer to the section of the code or other authority by which the ob-

section of the statute has been held not insufficiently definite.⁷⁹

(2.) **Objection to Witness and Not Testimony.** — Inasmuch as it is the witness and not his testimony which is incompetent, the objection must be directed at the former and not the latter.⁸⁰ An objection to testimony raises no question as to the witness' competency.⁸¹ Where, however, the witness is incompetent only as to particular matters the objection must be made not to the witness generally, but merely to his testifying to the prohibited matters.⁸² A general objection will be regarded as applying to competency of the evidence rather than of the witness.⁸³

(3.) **Repetition of Grounds of Objection.** — Where a specific objection has been made, another objection immediately following and to the same class of testimony need not repeat the grounds of objection.⁸⁴

E. WAIVER BY FAILURE TO OBJECT. — a. *Generally.* — The failure to make a proper and seasonable objection to the witness is a waiver of his incompetency,⁸⁵ though it has been held that a personal representative cannot thus waive the protection of the statute, on the ground of possible fraud against the beneficiaries and in analogy with rule preventing him from waiving the defense of the statute of limitations.⁸⁶

b. *Failure To Object in Prior Proceeding.* — The failure to object to an incompetent witness in a prior proceeding between the same parties is generally not a waiver of his incompetency in a subsequent proceeding.⁸⁷ It is held, however, that where a trial *de novo* is had

jection could be sustained. *Sanford v. Ellithorp*, 95 N. Y. 48.

79. *Hoar v. Hoar*, 23 Hun (N. Y.) 33.

80. *McDonald v. Young*, 109 Iowa 704, 81 N. W. 155; *Sucke v. Hutchinson*, 97 Wis. 373, 72 N. W. 880; *Wells v. Chase*, 126 Wis. 202, 105 N. W. 799; *McCormick v. Herndon*, 67 Wis. 648, 31 N. W. 303; *Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. 531; *Hines v. Consolidated Coal & L. Co.*, 29 Ind. App. 563, 64 N. E. 886.

81. *McDonald v. Young*, 109 Iowa 704, 81 N. W. 155; *Sucke v. Hutchinson*, 97 Wis. 373, 72 N. W. 880; *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459. And see article "OBJECTIONS," Vol. IX, p. 99.

An objection that testimony is incompetent, irrelevant, immaterial, hearsay, and not the best evidence, is insufficient to raise the objection that the witness is disqualified under the statute. *Burdick v. Raymond*, 107 Iowa 228, 77 N. W. 833.

An objection to testimony as "incompetent" does not question the

competency of the witness under the statute. *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454.

82. An objection to testimony in this form: "Objected to as incompetent, irrelevant, and immaterial, being a communication with a deceased person," was held a sufficient objection to question the competency of the witness as to transactions with a decedent, although it was contended that the objection was merely to the testimony and not to the witness himself. *Conklin v. Yates*, 16 Okla. 266, 83 Pac. 910.

83. *Stevens v. Brennan*, 79 N. Y. 254.

84. *In re Eysaman's Will*, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599; and see article "OBJECTIONS," Vol. IX.

85. See *infra*, XI, I, F, also article "OBJECTIONS," and *Denbo v. Wright*, 53 Ind. 226.

86. *McHugh v. Dowd's Estate*, 86 Mich. 412, 49 N. W. 216.

87. See article "OBJECTIONS," Vol. IX, p. 45.

on appeal, any waiver made below must be held to be binding throughout the conduct of the case.⁸⁸

c. Failure To Object to Previous Similar Incompetent Testimony.

(1.) **By Same Witness.** — The mere failure to object to previous similar incompetent testimony by the same witness is not a waiver of his incompetency, though it may render the admission of such subsequent testimony harmless error.⁸⁹

(2.) **By Other Incompetent Witnesses.** — The failure of the decedent's representative to object to one or more incompetent witnesses is not a waiver of the incompetency of other witnesses.⁹⁰

F. CONSIDERATION OF TESTIMONY ADMITTED WITHOUT OBJECTION. — In accordance with the general rule in such cases the testimony of an incompetent witness admitted without objection becomes evidence in the case and must be so treated.⁹¹ It has, however, been held that in equity cases the court should disregard such evidence.⁹²

2. Determination of Admissibility. — **A. WHAT CONDITIONS GOVERN.** — *a. Generally.* — As a general rule in applying these statutes

88. Where the incompetency of a witness as to transactions with a deceased person has been waived by failure to object to his deposition when offered in the probate court, the deposition is thereby rendered competent in a trial *de novo* in the circuit court. The objection to the competency of the witness being once waived, his testimony is thereafter competent during the whole progress of the proceedings in which it was taken. *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220, 86 S. W. 263. Compare *Tierney v. Han-nan's Exr.*, 81 Mo. App. 488.

89. See article "OBJECTIONS," Vol. IX, p. 43.

In an action by a special administrator for money claimed to have been loaned defendant by plaintiff's intestate, defendant was asked "whether or not he had given his father any written obligation for any sum of money," to which he answered "No, sir." Held, that while this testimony should have been excluded as incompetent under § 4604 of the code, as relating to a personal transaction with the deceased, it was not prejudicial as defendant had been permitted to state theretofore, without objection, that he had not borrowed any money from his father. *Garret-*

son v. Kinkad, 118 Iowa 383, 92 N. W. 55.

90. See article "OBJECTIONS," Vol. IX, p. 43.

On a contested proceeding by an administrator to probate a will, the fact that he has without objection permitted witnesses to testify as to facts occurring before the death of the decedent does not entitle the contestant to testify, in rebuttal, to similar facts. By the express terms of the statute it is only when the 'administrator . . . elects so to testify' that the adverse party may testify as of legal right." *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459.

91. See article "OBJECTIONS," Vol. IX, and *Howatt v. Green*, 139 Mich. 289, 102 N. W. 734; *Chapman v. Peebles*, 84 Ala. 283, 4 So. 273; *Dille v. Love*, 61 Md. 603; *Hickok v. Bunting*, 67 App. Div. 560, 73 N. Y. Supp. 967.

92. *Stewart v. Stewart*, 19 Fla. 846. See also *Tunno v. Robert*, 16 Fla. 738; *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756. *Contra*, *Chapman v. Peebles*, 84 Ala. 283, 4 So. 273.

In *Foster v. Hill*, 55 Mich. 540, 22 N. W. 30, it is held that on a chancery appeal, all testimony appearing in the record which is inhibited by the statute, if objected to by either party on that ground, is excluded

the court must be governed by the conditions and facts existing at the time the testimony of the witness is offered.⁹³

b. *Effect of Subsequent Conditions Rendering Witness Competent.*— Since the ruling of the court must be based upon the conditions when it is made, the subsequent occurrence of facts amounting to a waiver⁹⁴ or a removal⁹⁵ of the incompetency does not affect a previous ruling excluding the testimony.

c. *Competency of Deposition.*— The courts are not in harmony as to what conditions govern in determining the competency of a deposition; some holding that the question must be determined by the conditions that exist at the time the deposition is sought to be used, because the statute is not based upon the common law rule, under which competency is determined by the conditions existing when the testimony is taken, but upon the principle that one party should not be given an advantage over another who by reason of death is unable to testify in his own behalf.⁹⁶ Others follow a contrary rule, namely, that the conditions existing at the time the deposition was taken govern its competency.⁹⁷

from the consideration of the court.

93. *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685; *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579; *Beckhaus v. Ladner*, 48 N. J. Eq. 152, 21 Atl. 724; *Beach v. Pennell*, 50 Me. 587. See *supra*, III, 2, D, b.

94. *Effect of Subsequent Testimony by Protected Party.*— The fact that the protected party subsequently testifies concerning matters as to which an adverse witness has been improperly permitted to testify does not cure the error. *Church v. Howard*, 79 N. Y. 415; *Brandes v. Brandes*, 129 Iowa 351, 105 N. W. 499. See also *German-American Bank v. Slade*, 15 Misc. 287, 36 N. Y. Supp. 983; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156. But see *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317.

The fact that the decedent's testimony, taken by deposition prior to his death, is offered in evidence subsequent to the rejection of the adverse party's testimony does not render the latter ruling error. *Lacock v. Com.*, 99 Pa. St. 207. *Contra*, *Trow v. Shannon*, 8 Daly (N. Y.) 239.

The erroneous admission of the testimony of an incompetent witness is not cured by the subsequent action of the objecting party in calling other witnesses to the same matters, although such action if it had been

taken previous to the admission of the incompetent testimony would have constituted a waiver of such incompetency. *Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685.

95. *Removal of Disability Subsequent to Trial.*— Where the testimony of a witness has been improperly admitted because of his incompetency under the existing law, the fact that subsequent to the trial and pending an appeal the incompetency is removed by statute does not defeat the exception or prevent a reversal. *Woodrow v. Mansfield*, 106 Mass. 112; *Carter v. Hale*, 32 Gratt. (Va.) 115; *Tremper v. Conklin*, 44 N. Y. 58.

96. *Smith v. Billings*, 76 Ill. App. 454, *affirmed* in 177 Ill. 446, 53 N. E. 81; *Campbell v. Mayes*, 38 Iowa 9 (*holding* that the dismissal of the action as to the decedent's representative rendered the deposition competent, and explaining the difference in this respect between the common law rule and the rule under the statute as due to the fact that under the former the interest of the witness disqualified him, while under the latter it is the character of the adverse party. But see *Burton v. Baldwin*, 61 Iowa 283, 16 N. W. 110, apparently to the contrary). See fully, *supra*, III, 5, D, b, and article "DEPOSITIONS," Vol. IV, p. 528.

97. See fully *supra*, III, 5, D, b,

B. QUESTION FOR COURT. — The determination of the competency of the witness and whether his proposed testimony relates to prohibited matters is a question for the court.⁹⁸

C. BURDEN OF PROOF. — a. *Generally.* — The testimony of a witness will not be excluded on objection unless it is made to appear that he comes within the provisions of the statute.⁹⁹ The burden of showing incompetency is on the objecting party.¹

Thus the interest claimed to disqualify a witness must be made to appear.² The representative character of the adverse party, if not apparent from the record, must also be shown where it constitutes the basis of the disqualification.³ One claiming the protection of the statute as an heir must establish the death of his ancestor,

and article "DEPOSITIONS," Vol. IV.

Where the deponent was incompetent on the ground of interest when his deposition was taken, the subsequent removal of the disqualification by his ceasing to be a party in interest, does not render the deposition competent since its competency when taken determines its admissibility. *Burton v. Baldwin*, 61 Iowa 283, 16 N. W. 110. Compare *Campbell v. Mayes* (preceding note).

98. *Lockhart v. Bell*, 90 N. C. 499; *Kimball v. Kimball*, 16 Mich. 211. See also *Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 225; *Barker v. Hebbard*, 81 Mich. 267, 45 N. W. 964; *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. 781. But see *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45.

The preliminary question of fact as to whether the question calls for a personal transaction between witness and the deceased, is one for the court to determine upon the facts as they appear when the question is propounded and objected to. On appeal its decision will not be reversed unless the facts in evidence at that time show it to be clearly wrong. *Sallade v. Gerlach*, 132 N. Y. 548, 30 N. E. 372.

99. *Card v. Card*, 39 N. Y. 317; *Thompson v. Olney*, 96 N. C. 9, 1 S. E. 620; *Woolverton v. Van Syckel*, 57 N. J. L. 393, 31 Atl. 603; *Lockhart v. Bell*, 86 N. C. 443, 90 N. C. 499; *Adams v. Allen*, 44 Wis. 93. See article "COMPETENCY," Vol. III, p. 198.

Shoemaker v. Smith, 80 Iowa 655, 45 N. W. 744, in which the testimony of a witness as to a transaction with

an insane party was held properly admitted over objection, there being nothing to show that he came within the provisions of the statute.

Where a witness in an action against an administrator is asked to examine an offered exhibit and state what it is, if the exhibit shows on its face what it is, and that such testimony would violate the rule excluding the testimony of an interested party, the testimony is properly excluded. *Campbell v. Collins*, 133 Iowa 152, 110 N. W. 435.

1. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Hendricks v. Kelly*, 64 Ala. 388; *Hill v. Helton*, 80 Ala. 528, 1 So. 340; *Englehart v. Richter*, 136 Ala. 562, 33 So. 939.

2. *Shober v. Jack*, 3 Mont. 351.

Interest. — Burden of Proof. — The burden rests upon the party objecting to a witness on this ground to show on which side of the controversy his interest lies. *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620. *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82, 50 N. W. 1022; *Sorensen v. Sorensen*, 56 Neb. 729, 77 N. W. 68.

Where it appears that the witness has interests on both sides of the controversy, the burden is upon the objecting party to show on which side the interest preponderates. *Farrar v. Farmers' Loan & Tr. Co.*, 85 App. Div. 367, 83 N. Y. Supp. 172.

3. *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684; *Beach v. Pennell*, 50 Me. 587; *Roney v. Buckland*, 4 Nev. 45. See *Douglass v. Snow*, 77 Me. 91; *Goulding v. Horbury*, 85 Me. 227, 27 Atl. 127.

unless it is apparent from the record.⁴ Where the witness is incompetent only as to certain prohibited matters unless the question or the testimony itself shows that it comes within the prohibited class, the complaining party must make this fact appear.⁵

b. *Witness Prima Facie Incompetent*. — Where a witness is *prima facie* incompetent to testify against the representative of a decedent it is incumbent upon the party seeking to introduce his testimony to offer to show facts, the effect of which would be to remove the disqualification.⁶ Thus where he is incompetent except as to certain special matters set out in the statute, his testimony is properly excluded unless the offer shows that his testimony will fall within one of the exceptions.⁷

D. EVIDENCE ADMISSIBLE ON QUESTION. — a. *Generally*. — The question of the competency of the witness and his testimony is only to be determined upon proper evidence like any other similar question.⁸ Thus a witness who would be incompetent but for an assignment may be cross-examined to show that it was not made in good faith.⁹ It has been held, however, that where the statute disqualifies any person who has an interest which may be affected by the event of the suit, the court will not as an incident to the determination of the witness' competency enter upon an inquiry as to

4. *Hodgson v. Jeffries*, 52 Ind. 334.

5. See the following cases:

Alabama. — *Stiff v. Cobb*, 126 Ala. 381, 28 So. 402.

Kansas. — *Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. 531.

Michigan. — *Webster v. Sibley*, 72 Mich. 630, 40 N. W. 772.

New York. — *Comins v. Hetfield*, 80 N. Y. 261; *Denise v. Denise*, 110 N. Y. 562, 18 N. E. 368.

South Carolina. — *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291.

Texas. — *Field v. Field* (Tex. Civ. App.), 87 S. W. 726.

Unless it appears from the question or answer that the testimony relates to a transaction with the decedent, the objecting party must make this fact appear otherwise. *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620.

A party may testify as to transactions had with a partnership of which one of the members has since died, although the personal representatives and heirs of such deceased partner are parties to the suit, where it does not appear that the transaction was with the deceased partner. *Alabama Gold Life Ins. Co. v. Sledge*, 62 Ala. 566.

6. Thus where it is claimed that the adverse party has waived the incompetency by calling the witness in his own behalf on a former trial to prove transactions with the decedent, the offer must be sufficient to show that the questions propounded by the adverse party related to matters occurring in the lifetime of the decedent. *Bair v. Frischkorn*, 151 Pa. St. 466, 25 Atl. 123.

7. *Harper v. Dillon*, 60 Ga. 498; *Reynolds v. Reynolds*, 45 Mo. App. 622; *McElvain v. Garrett*, 84 Mo. App. 300; *White v. Brown*, 67 Me. 196. See also *Bagnell v. Bank*, 76 Mo. App. 121. Thus where the witness is incompetent as to a conversation with a decedent, unless it was heard by some third person the burden of showing the latter fact is upon the party offering the witness. *Merchants' Nat. Bank v. Demere*, 92 Ga. 735, 19 S. E. 38.

8. *Lockhart v. Bell*, 90 N. C. 499, and see *supra*, IX, 2, C, a, and *Davis v. Davis*, 86 Hun 400, 33 N. Y. Supp. 477.

9. *Buck v. Haynes' Estate*, 75 Mich. 397, 42 N. W. 949.

whether certain alleged facts will destroy a legal interest which the witness is shown to possess.¹⁰ But where the witness is shown to have conflicting interests it has been held to be the court's duty to determine which interest is the stronger.¹¹ A preliminary examination of an adverse witness for the purpose of determining his competency is not a waiver of incompetency thus disclosed.¹²

b. *Competency of Witness Himself.* — The witness himself is not competent for the purpose of establishing facts which would remove his disqualification.¹³ It has been held, however, that for the purpose of determining his competency, the witness may testify to the court whether the transaction in question was with the decedent.¹⁴ And he may testify to facts showing his incompetency.¹⁵

E. WHEN DETERMINATION OF COMPETENCY INVOLVES A DETERMINATION OF ULTIMATE ISSUE. — It has been held that where ruling the witness to be incompetent necessarily involves a determination of the ultimate issues of the case adversely to his claim, he must be permitted to testify.¹⁶ The general rule, however, is to the con-

10. *Roe v. Harrison*, 9 S. C. 279, holding that where insolvency of the estate of which the witness was a distributee was claimed to destroy the witness' interest, the court would not determine the question of insolvency, but this fact must be made to appear from an independent judicial determination. Compare *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771.

11. In *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, a suit to set aside a will, one of the defendants, a devisee under the will, was offered as a witness by complainant in proof of deceased's testamentary incapacity. The offered witness was also an heir of deceased's. On objection by the other defendants, the witness was held incompetent without a determination as to whether his interest as heir was greater than as devisee. This ruling was held error on the ground that it was the court's duty to determine which interest of the witness was greater, and that from the facts it appeared that her interest as devisee was in fact the greater.

12. *Tretheway v. Carey*, 60 Minn. 457, 62 N. W. 815. See *supra*, X, 7, B, d, and *Davis v. Davis*, 86 Hun 400, 33 N. Y. Supp. 477.

13. *Harnish v. Herr*, 98 Pa. St. 6. And see *infra*, XI, 2, E.

Where letters of administration have been issued, the fact that the defendant claims that the plaintiff's

alleged intestate is alive, even conceding that he is not estopped to raise this question, does not render him competent as to conversations between himself and the intestate, although such conversations tend to show that the intestate is alive. *Parhan v. Moran*, 4 Hun (N. Y.) 717.

14. *Lockhart v. Bell*, 90 N. C. 499, holding that where the question was whether an endorsement of payment on a bond, which endorsement was made by the witness, was a transaction with the deceased obligee, the witness was properly allowed to testify whether the transaction was between himself and the decedent, and that he had no personal communication with the latter about the matter. "Evidence as to this went to the court, and this fact was independent of the main fact as to how the entries came to be made, and the application of the money. It did not prove or tend to prove the main facts."

15. *Buck v. Patterson*, 75 Mich. 397, 42 N. W. 949.

16. *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108. Compare *In re McCoy's Estate*, 64 Neb. 150, 89 N. W. 665; *McClintock's Appeal*, 58 Mich. 152, 24 N. W. 549.

In *Myers v. Reinsteint*, 67 Cal. 89, 7 Pac. 192, an action to establish a trust in land, the legal title to which was in defendant's testator, was held not to be a claim against the estate

trary;¹⁷ thus in a proceeding against the heirs of an estate by one claiming also to be an heir, the latter is not competent to prove his heirship although such fact if established would remove the incompetency.¹⁸

3. Striking Out. — A. GENERALLY. — Incompetent evidence called out by a proper question will be stricken out on motion, but such motion must be made immediately.¹⁹

B. STRIKING OUT TESTIMONY ADMITTED WITHOUT OBJECTION. The court may in its discretion, upon motion, strike out incompetent testimony admitted without objection, where the failure to object was due to lack of knowledge of the incompetency.²⁰ Where the facts showing the incompetency are disclosed only in cross-examination, the testimony should be stricken out on motion.²¹ The grounds for such a motion must be specifically stated,²² and it must be directed at the particular testimony which is incompetent.²³ The rules governing the striking out and withdrawal of testimony are elsewhere fully discussed.²⁴

C. INCOMPETENCY OCCURRING SUBSEQUENT TO TESTIMONY. — Although, after the witness has testified facts occur which render him incompetent, his testimony previously given cannot for that reason be stricken out.²⁵

under the statute. "The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not. If it was a part of his estate, then no trust existed; if the trust existed, he held it in trust in his lifetime, and the interest passed to his successors to the legal title, clothed with the trust. To hold that the claim or demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action."

17. See *supra*, III, 6, E, c, and III, 6, E, d, (2.).

A contestant in a will case cannot state what testator said to him about disposing of his property, on the theory that it cannot be known until after the contest is decided whether contestant is a legatee. *In re Goldthorp's Estate*, 94 Iowa 336, 62 N. W. 845.

18. *In re Maher's Estate*, 210 Ill. 160, 71 N. E. 438; *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424. See Im-

boden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263, and *supra*, III, 6, E, d, (2.). But see *Nolen v. Doss*, 133 Ala. 259, 31 So. 969.

19. *Hull v. Hull*, 117 Iowa 738, 89 N. W. 979.

20. *Miller v. Montgomery*, 78 N. Y. 282.

21. *Mayer v. Knapp* (Kan. App.), 59 Pac. 674; *Branch v. Makeig*, 9 Tex. Civ. App. 399, 28 S. W. 1050; *Morrisett v. Carr*, 118 Ala. 585, 23 So. 795.

22. *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283.

23. *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283.

24. See article "STRIKING OUT AND WITHDRAWAL OF EVIDENCE."

25. See *supra*, III, 5, D, a.

Where parties are incompetent, the testimony of one who was not made a party until after his testimony has been given, cannot be stricken out, though it appears that he is the real party in interest and was not made a party in the first instance for the express purpose of rendering him a competent witness. *Snyder v. Harris*, 61 N. J. Eq. 480, 48 Atl. 329.

